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Timothy Carey

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Comity, Coronavirus, and Interstate Travel Restrictions

Timothy Carey[†]

I. INTRODUCTION

Before the COVID-19 pandemic, the most common restriction on interstate travel within the United States was likely the tollbooth.¹ That interstate travel within the United States is largely so uncontroversial reflects a simple fact: the right to travel “occupies a position fundamental to the concept of our Federal Union.”² The Supreme Court has repeatedly emphasized the importance of the right to travel between states, placing the right on the same pedestal as free speech and assembly.³ Yet in the aftermath of the COVID-19 outbreak, multiple states have restricted interstate travel. Those states purported to act under their broad police powers to protect and promote public health, but their restrictions also impinged on constitutionally protected rights that the Supreme Court has recognized as fundamental.

Multiple lawsuits challenging state restrictions on interstate travel have been brought across the country. Though some challenges have been settled out of court, at least five cases have been decided in the district courts, with some travel restrictions upheld and others struck.⁴ The courts have struggled with questions about the proper level of scru-

[†] B.A., American University, 2017; J.D. Candidate, The University of Chicago Law School, 2022. Many thanks to the staff of *The University of Chicago Legal Forum*, and to Professor Alison LaCroix, for generous support throughout the Comment writing process.

¹ See, e.g., *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 87 (2d Cir. 2009) (“Plaintiffs’ amended complaint alleges that . . . each vehicle crossing the Bridge . . . must pay a toll of 75 cents.”).

² *United States v. Guest*, 383 U.S. 745, 757 (1966).

³ *Aptheker v. Sec’y of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring) (“Freedom of movement is kin to the right of assembly and to the right of association. These rights may not be abridged . . .”).

⁴ See, e.g., *Roberts v. Neace*, 457 F. Supp. 3d 595 (E.D. Ky. 2020); see also Kari Pugh, *Dare County Settles Lawsuit over Out-of-Town Property Owners’ Rights*, OBX TODAY (July 6, 2020), <https://www.obxtoday.com/dare-county-settles-lawsuit-over-out-of-town-property-owners-rights/> [https://perma.cc/M4ED-F6HX].

tiny to apply, as well as with determining the appropriate lines of precedent to follow, largely split between the application of the forgiving standard offered in *Jacobson v. Massachusetts*⁵ and the more stringent tests supplied by the right to travel case law.⁶ Given the circumstances—a novel, worldwide pandemic that touched on a less settled area of constitutional law—it is perhaps unsurprising that district courts’ decisions were conflicting. The inconsistent outcomes are understandable, as the contours of the right to interstate travel are notoriously muddled,⁷ and quarantine authority has not been substantially tested in a century.⁸ Still, as states attempt to respond to the pandemic and plan for the future, the lack of a clear, consistent approach to travel rights questions is troubling.

In an attempt to clarify this confusion, this Comment advances two principal arguments: that some pandemic-related interstate travel restrictions can be evaluated under the Privileges and Immunities Clause of Article IV,⁹ and that, following from the holding in the Supreme Court’s most recent right to travel case, *Saenz v. Roe*,¹⁰ strict scrutiny is an inappropriate standard to apply in those cases. This Comment proceeds in five additional parts. Part II provides an overview of the jurisprudential development of the right to interstate travel, demonstrating that *Saenz*, rather than a variety of other travel cases, should control interstate travel questions. Part III discusses pertinent facets of quarantine law, including the reach of early quarantine precedents, key aspects of the Supreme Court’s seminal decision in *Jacobson*, and the potential effect of the Court’s holding in *Roman Catholic Diocese v. Cuomo*.¹¹ Part IV reviews COVID-19–related interstate travel restrictions and then examines contemporary court challenges to the restrictions. Part V argues that some COVID-19–related interstate travel restrictions need not receive strict scrutiny. Finally, in Part VI, a short conclusion follows.

⁵ 197 U.S. 11 (1905).

⁶ Compare *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 31 (D. Me. 2020) (applying the newer right to travel case law), with *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1141–43 (D. Haw. 2020) (applying the more forgiving *Jacobson* standard).

⁷ See, e.g., *Saenz v. Roe*, 526 U.S. 489, 499 (1999) (noting that the Court, in deciding a particular case, ruled “[w]ithout pausing to identify the specific source of the right”); see also Mark D. Rosen, *Marijuana, State Extraterritoriality, and Congress*, 58 B.C. L. REV. 1013, 1030 (2017) (describing the post-*Saenz* right to travel as a “chimeric amalgam”).

⁸ See *infra* Part III.C.

⁹ U.S. CONST. art. IV, § 2, cl. 1.

¹⁰ 526 U.S. 489 (1999).

¹¹ 141 S. Ct. 63 (2020).

II. THE RIGHT TO INTERSTATE TRAVEL

A. Development of the Right to Interstate Travel

1. Early interstate travel precedent

American courts have continually recognized a constitutional “right to travel,” beginning as early as the 1824 decision *Corfield v. Coryell*.¹² This reflects an older tradition: the Articles of Confederation contained an explicit guarantee of free movement between the states, and movement between the American colonies was commonplace and unremarkable.¹³ And even without a textual guarantee, longstanding consensus demonstrates that the Constitution protects a right to travel—indeed, “no Supreme Court justice in American history has voiced opposition to the general concept of a right to travel.”¹⁴

The Supreme Court, however, has not been consistent in identifying the constitutional origin of the right to travel.¹⁵ With Justice Bushrod Washington riding circuit, *Coryell* famously placed it among the privileges and immunities guaranteed by Article IV’s Privileges and Immunities Clause,¹⁶ yet in later cases the Court sought to ground the right in the Commerce Clause.¹⁷ The Court has also variously turned to five other constitutional provisions, and at times to extratextual justifications, when deciding interstate travel rights cases.¹⁸ Nevertheless, while the development of the right to travel doctrine is “fragmented, complex, and confusing,”¹⁹ it is not incomprehensible—there are clear trends in the Court’s travel jurisprudence. Understanding those trends provides useful context for the current state of the right to travel doctrine.

¹² 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (“The right of a citizen of one state to pass through, or to reside in any other state . . . may be mentioned as some of the particular privileges and immunities of citizens . . .”).

¹³ Bradley A. Meyer, Case Comment, *Constitutional Law—Right to Travel: The United States Supreme Court Invalidates a Statute Requiring Welfare Recipients to Reside in a State For One Year Before Receiving Full Benefits*, 76 N.D. L. REV. 427, 431 (2000).

¹⁴ Gregory Hartch, Comment, *Wrong Turns: A Critique of the Supreme Court’s Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457, 458 (1995). *But see* Robert Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1125–27 (2009).

¹⁵ *Saenz v. Roe*, 526 U.S. 489, 501 (1999) (“[W]e need not identify the source of that particular right in the text of the Constitution.”).

¹⁶ *Coryell*, 6 F. Cas. at 552.

¹⁷ U.S. CONST. art. I, § 8, cl. 3; *Lutz v. York*, 899 F.2d 255, 260–61 (3d Cir. 1990) (collecting cases).

¹⁸ *Lutz*, 899 F.2d at 260–61.

¹⁹ Bryan H. Wildenthal, Note, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557, 1557 (1989).

The earliest travel rights cases recognized a more limited, less formal right to travel, sometimes discussing the right without reference to any constitutional provision at all. The common thread was a particular sensitivity to concerns about the protection of a truly federal union.²⁰ *Crandall v. Nevada*,²¹ the first Supreme Court case in which a majority recognized a right to travel, is representative. There, the Court invalidated a Nevada tax on any person exiting the state.²² The Court took pains to emphasize the federal nature of the union,²³ but outside a specific rejection of the Commerce Clause as a basis for the decision, the textual justification for the holding was vague.²⁴ The right to travel recognized in *Crandall* was also relatively narrow, grounded in the federal government's "right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices."²⁵ This, the Court held, generated a corollary right of citizens to travel to various seats of government.²⁶

2. Traveling under the Commerce Clause

Though the Court in *Crandall* had resisted deciding the case under the Commerce Clause, later cases moved toward a Commerce Clause basis for the right to travel.²⁷ The Supreme Court decided a number of cases that could have raised right to travel questions under the Commerce Clause²⁸ and then, faced squarely with a right to travel question in 1941, built its decision in *Edwards v. California*²⁹ on that source only.

²⁰ See, e.g., *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43 (1868) ("The people of these United States constitute one nation.").

²¹ 73 U.S. (6 Wall.) 35 (1868).

²² *Id.* at 48–49.

²³ *Id.* ("Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State in the Union. . . . For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States." (quoting *Smith v. Turner*, 48 U.S. (7 How.) 283, 492 (1849))).

²⁴ *Id.* at 43 ("But we do not concede that the question before us is to be determined by [the Commerce Clause].").

²⁵ *Id.* at 43, 49.

²⁶ *Id.* at 44 ("[T]he citizen also has correlative rights.").

²⁷ Compare *Crandall*, 73 U.S. (6 Wall.) at 43, and *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), with *Edwards v. California*, 314 U.S. 160, 172–73 (1941). See also *infra* Part III.B.

²⁸ See Polly J. Price, *Epidemics, Outsiders, and Local Protection: Federalism Theater in the Era of the Shotgun Quarantine*, 19 U. PA. J. CONST. L. 369, 385–86 (2007) (discussing the surprising failure to raise right to travel issues in quarantine cases); see also *infra* Part III.B.

²⁹ 314 U.S. 160 (1941).

In *Edwards*, the Court struck down a California statute that criminalized “bringing into the State any indigent person who is not a resident of the State.”³⁰ It did so because the statute was an “unconstitutional barrier to interstate commerce,” and the Court considered no other provisions in deciding the case.³¹ *Edwards* was controversial for that reason immediately, but the basic concept of a person’s movement across borders constituting commerce had been established for decades.³² That said, while the holding in *Edwards* might have suggested a triumph for the Commerce Clause-based approach to travel rights, it was the opinion’s spirited concurrences that presaged the next era of the right to travel jurisprudence.³³

3. The right to travel as equal protection

The Court’s next major right to travel cases, *United States v. Guest*³⁴ and *Shapiro v. Thompson*,³⁵ moved toward an equal protection approach to the right to travel. In *Guest*, a case involving racially motivated violence to prevent interstate travel, the Court expanded the reach of the right to travel and held that the Constitution protected interstate travel even against private interference.³⁶ In *Shapiro*, the Court dealt with consolidated cases involving statutes that had required one year of residency in a state before a new resident could become eligible for any welfare benefits.³⁷ There, the Court held that the right to travel was a fundamental right, analyzing the welfare durational residency requirements under a compelling interest test.³⁸

³⁰ *Id.* at 171.

³¹ *Id.* at 173.

³² See Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 792–824 (1996) (tracing doctrinal development of people as “articles of commerce”).

³³ *Edwards v. California*, 314 U.S. 160, 182 (1941) (Jackson, J., concurring) (“[T]he migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights.”); *id.* at 177 (Douglas, J., concurring) (“I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel[,] and coal across state lines.”).

³⁴ 383 U.S. 745 (1966).

³⁵ 394 U.S. 618 (1969), *overruled in part on other grounds by* *Edelman v. Jordan*, 415 U.S. 561 (1974).

³⁶ *Guest*, 383 U.S. at 762.

³⁷ *Shapiro*, 394 U.S. at 621.

³⁸ *Id.* at 634 (“But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.”).

Shapiro conspicuously declined to identify the source of the right to travel,³⁹ but it was a clear turning point in the Court's right to travel jurisprudence: the fundamental rights approach to the right to travel offered plaintiffs a new and apparently effective avenue for challenging state legislation that drew distinctions between citizens of different states.

Shapiro's standard, analyzing right to travel issues under strict scrutiny, initially appeared durable. In the immediate aftermath of the case, other states' durational residency requirements were struck down by the Court under strict scrutiny. In *Dunn v. Blumstein*,⁴⁰ the Court invalidated a one-year residency requirement for voting,⁴¹ and in *Memorial Hospital v. Maricopa County*,⁴² the Court struck down a similar residency requirement for access to nonemergency medical care.⁴³

The apparent stability began breaking down shortly thereafter, when the Court decided *Sosna v. Iowa*.⁴⁴ The case concerned a one-year residency requirement regarding eligibility for divorce. The Court changed course and upheld the durational residency requirement under an apparent rational basis test.⁴⁵ *Sosna* was the first of a number of cases in which the Court analyzed durational residency requirements under a lower (though somewhat more ambiguous) standard than it had used in *Shapiro*.⁴⁶ In *Zobel v. Williams*,⁴⁷ for instance, the Court struck down an Alaska oil dividend scheme that paid more to older than to newer residents, and the Court declined to reach heightened scrutiny because it held the scheme had no rational basis at all.⁴⁸

The Court then decided a pair of cases related to veterans' benefits that further complicated existing doctrine. The benefits were again con-

³⁹ *Id.* at 630 ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.").

⁴⁰ 405 U.S. 330 (1972).

⁴¹ *Id.* at 332–34.

⁴² 415 U.S. 250 (1974).

⁴³ *Id.* at 254–55 (1974) ("Whatever its ultimate scope, however, the right to travel was, involved in only a limited sense in *Shapiro*. The Court was there concerned only with the right to migrate, 'with intent to settle and abide' or, as the Court put it, 'to migrate, resettle, find a new job, and start a new life.'").

⁴⁴ 419 U.S. 393 (1975).

⁴⁵ *Id.* at 410; *id.* at 418, 420 (Marshall, J., dissenting) ("The Court today departs sharply from the course we have followed in analyzing durational residency requirements since *Shapiro v. Thompson*.").

⁴⁶ *Maldonado v. Houstoun*, 157 F.3d 179, 186 (3d Cir. 1998) ("Since *Shapiro* and *Maricopa County*, a majority of the Court has never subjected a durational residency requirement to strict scrutiny.").

⁴⁷ 457 U.S. 55 (1982).

⁴⁸ *Id.* at 65.

ditioned on length of residency. In *Hooper v. Bernalillo County Assessor*,⁴⁹ a Nevada veterans' benefit was struck down under a rational basis test because it denied the benefit to some Vietnam War veterans but not to others.⁵⁰ A similar provision was at issue in *Attorney General of New York v. Soto-Lopez*.⁵¹ The petitioners had challenged New York's decision to provide benefits to certain veterans on equal protection and right to travel grounds.⁵² Though it is difficult to discern any meaningful difference between the benefit schemes at issue in *Hooper* and *Soto-Lopez*, Justice Brennan's plurality opinion in the latter revived the heightened scrutiny approach to durational residency requirements, striking down New York's law under strict scrutiny.⁵³

B. Three Components of *Saenz v. Roe*

It was against this jumbled backdrop that the Court decided its most recent right to travel case, *Saenz v. Roe*.⁵⁴ *Saenz*, as both the majority opinion and Chief Justice Rehnquist's dissent recognized, was a conscious effort to clarify the Court's right to travel jurisprudence.⁵⁵ At issue in the case was a California restriction on welfare benefits—the extent of available benefits had been conditioned on length of residency, and California argued that, because at least *some* benefits were available to all residents, the statute was distinguishable from those invalidated in Court's prior durational residency requirement cases.⁵⁶ The Court in *Saenz* still struck this residency requirement down, but it did so under a new framework. Justice Stevens delineated “three different components” of the right to travel:

⁴⁹ 472 U.S. 612 (1985).

⁵⁰ *Id.* at 615–16.

⁵¹ 476 U.S. 898, 899 (1986).

⁵² *Id.* at 900–01.

⁵³ *Id.* at 911 (“The State has not met its heavy burden of proving that it has selected a means of pursuing a *compelling* state interest which does not impinge unnecessarily on constitutionally protected interests. Consequently, we conclude that New York's veterans' preference violates appellees' constitutionally protected rights . . .” (emphasis added)); *see id.* at 919 (O'Connor, J., dissenting) (“In pursuing this new dual analysis, the plurality simply rejects the equal protection approach the Court has previously employed in similar cases.”); *id.* at 912 (Burger, C.J., concurring) (“The classification held invalid on equal protection grounds in *Hooper* was remarkably similar to the one at issue here; *Hooper*, therefore, would appear to be controlling. The plurality opinion, however, instead *begins* the analysis by addressing the ‘right to migrate.’ Moreover, heightened scrutiny is employed . . .” (citations omitted)).

⁵⁴ 526 U.S. 489 (1999); *see also* Hartch, *supra* note 14, at 462 (labelling the pre-*Saenz* case law “inexplicable”).

⁵⁵ *Saenz*, 526 U.S. at 500 (“The debate about the appropriate standard of review, together with the potential relevance of the federal statute, persuades us that it will be useful to focus on the source of the constitutional right on which respondents rely.”); *id.* at 515 (Rehnquist, C.J., dissenting) (“The Court today tries to clear much of the underbrush created by these prior right-to-travel cases . . .”).

⁵⁶ *Id.* at 492, 499–500.

The “right to travel” discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.⁵⁷

The new three component framework—the right to enter and leave, the right to be treated as a welcome visitor, and the right for new residents to be treated like other citizens—was a sharp departure from the Court’s prior right to travel jurisprudence.

In *Saenz*, the Court associated each component of the right to travel with a different part of the Constitution; in consequence, different kinds of violations could be subject to a different standard of review. The Court offered a structural justification (about the nature of the Union) for the first component of the right to travel (the right to enter and leave) and signaled that violations of it would receive strict scrutiny.⁵⁸ The Court pointed to *Edwards* and *Guest* as examples of violations of the first component.⁵⁹ This is notable in itself, as the Court had never suggested the two cases were part of an overarching component before, but it is also important for another reason: *Edwards* was originally decided under the Commerce Clause, while *Guest* was an equal protection case. By grouping the two within a component of the right to travel grounded in structural considerations, the Court cast doubt on the underlying rationale (though not the outcome) of both cases.

The second component, “the right to be treated as a welcome visitor,” was held to be explicitly protected by the Privileges and Immunities Clause of Article IV.⁶⁰ The Court explained that “the Clause [bars] discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.”⁶¹ Here, the Court indicated that the proper

⁵⁷ *Id.* at 500.

⁵⁸ *Id.* at 501 (“The right of free ingress and regress to and from neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.” (internal quotations and citations omitted)).

⁵⁹ *Id.* at 500–01.

⁶⁰ *Id.* at 501 (“The second component of the right to travel is, however, expressly protected by the text of the Constitution.”).

⁶¹ *Id.* at 502.

standard of review in such a case would be a kind of intermediate scrutiny, in accordance with Article IV Privileges and Immunities case law more broadly.⁶²

The Court then identified the third component of the right to travel, the right of new permanent residents to equal treatment as citizens of a state, with the Privileges or Immunities Clause of the Fourteenth Amendment.⁶³ With a focus on durational residency requirements—until then evaluated as equal protection issues under varying degrees of scrutiny—the Court held strict scrutiny applicable to the third component.⁶⁴

Following *Saenz*, lower courts have generally applied this component-based framework when deciding cases where the right to travel is implicated.⁶⁵ Thus, the Second Circuit held strict scrutiny applicable if a state's highway tolls did in fact violate the third (and only the third) component.⁶⁶ It has similarly applied a form of intermediate scrutiny where the “only relevant component is . . . the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in [a] second State.”⁶⁷ Some courts have also dismissed cases for failure to state a claim which violates a specific component of the right. For example, the Seventh Circuit has dismissed a right to travel claim under the second component because it alleged no discrimination between residents and non-residents.⁶⁸ The Sixth Circuit has likewise dismissed a claim that failed to allege any violation of the second (welcome visitor) or third (becoming a resident) components of the right to travel.⁶⁹ In sum, one thrust of *Saenz* and the cases which have followed

⁶² *Id.* at 501–02 (collecting Privileges and Immunities cases).

⁶³ *Id.* at 502–04.

⁶⁴ *Id.* at 504.

⁶⁵ See, e.g., *M.S. Willman v. Att’y Gen. of the U.S.*, 972 F.3d 819, 826–27 (6th Cir. 2020) (two of three components implicated); *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 104 (2d Cir. 2009) (dismissing a claim under the second component); *Romeu v. Cohen*, 265 F.3d 118, 127 (2d Cir. 2001) (“The second and third components of the travel right are not implicated at all.”); *Bach v. Pataki*, 408 F.3d 75, 87 (2d Cir. 2005) (“The . . . only relevant component is merely a restatement of rights arising under Article IV”); *Chavez v. Ill. State Police*, 251 F.3d 612, 648–49 (7th Cir. 2001) (“This is a legal claim based on the first component of the right to interstate travel, and the district court should have examined whether the complaint properly stated a claim under this component.”); *Peterson v. Martinez*, 707 F.3d 1197, 1213 (10th Cir. 2013).

⁶⁶ *Selevan*, 584 F.3d at 99 (“Taken together, plaintiffs’ allegations clearly implicate a violation of plaintiffs’ right to travel under the Fourteenth Amendment’s Privileges and Immunities Clause”).

⁶⁷ *Bach*, 408 F.3d at 75, 87 (quotations and citations omitted).

⁶⁸ *Chavez*, 251 F.3d at 649 (“Plaintiffs’ complaint does not allege that the ISP discriminates against nonresidents, however, but that the ISP targets all African-American and Hispanic motorists, regardless of their state of origin. This allegation does not state a claim under the Privileges and Immunities Clause of Article VI [sic].”).

⁶⁹ *M.S. Willman*, 972 F.3d at 826 (dismissing claim where challenged requirement “would not

it is that, in right to travel cases, different components can invite different inquiries.

III. QUARANTINE LAW

This Part addresses certain relevant aspects of quarantine law. As courts,⁷⁰ scholars,⁷¹ and practitioners⁷² have noted, in the context of a pandemic, the right to travel jurisprudence intersects with prominent quarantine precedents. The first section briefly reviews the early history of American quarantine. The second scrutinizes some of the Supreme Court's earlier quarantine precedents, with a focus on the Commerce Clause, and the third considers two of the Court's influential public health cases: *Jacobson* and *Compagnie Francaise De Navigation A Vapeur v. Louisiana State Board of Health*.⁷³ The fourth examines the potential effects of the Court's recent decision in *Roman Catholic Diocese* on quarantine law.

A. Early Development of Quarantine in the United States

Quarantine has a long history in American law, appearing as early as 1647.⁷⁴ Significantly, that first American quarantine was directed at incoming ships—the Massachusetts Bay Colony was targeting arrivals from the Caribbean.⁷⁵ While colonies and later states subsequently imposed land-based quarantines, quarantine was and remained “especially relevant for port cities through which goods and people entered and intermingled.”⁷⁶ New York opened its first maritime quarantine station in 1784; Boston imposed a May-to-October quarantine requirement for incoming ships in 1808.⁷⁷ Each was representative of a broader

affect the temporary-visit component of the right to travel” or treat an incoming sex offender differently than an existing resident sex offender).

⁷⁰ See, e.g., *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1145–46 (D. Haw. 2020) (applying right to travel jurisprudence to state quarantine efforts).

⁷¹ See, e.g., Anthony Michael Kreis, *Contagion and the Right to Travel*, HARV. L. REV. BLOG (Mar. 27, 2020), <https://blog.harvardlawreview.org/contagion-and-the-right-to-travel/> [<https://perma.cc/PX82-T5C8>].

⁷² See, e.g., *The Constitutional Consequences of Governmental Responses to COVID-19: The Right to Travel and the Dormant Commerce Clause*, GIBSON DUNN (May 1, 2020), <https://www.gibsondunn.com/the-constitutional-consequences-of-governmental-responses-to-covid-19-the-right-to-travel-and-the-dormant-commerce-clause/> [<https://perma.cc/7HBV-V8QW>].

⁷³ 186 U.S. 380 (1902).

⁷⁴ Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 62–67 (2007) (reviewing development of quarantine in the United States).

⁷⁵ *Id.* at 63.

⁷⁶ *Id.* at 64.

⁷⁷ *Id.*

trend across American port cities, which imposed similar requirements throughout the nineteenth century.⁷⁸

The first federal quarantine legislation appeared in 1799, and initial federal efforts to address the problem of infectious disease were mostly limited to support for states and localities.⁷⁹ The exception was the nation's ports, where federal authority was considered strongest.⁸⁰ It was not until the twentieth century and the passage of the 1944 Public Health Service Act that federal authority in quarantine reached something like true independence; even with a clearer base of Congressional authorization, the federal government's actual role in quarantine has arguably still been limited to support for states and localities.⁸¹

B. The Commerce Clause, Police Powers, and Challenges to Quarantine Authority

As quarantine has been a common practice in the United States, American courts have entertained a variety of challenges to the use of quarantine as a public health measure. In general, they have reviewed state action under lenient standards. The Supreme Court, for its part, heard the majority of its quarantine cases before the 1930s, prior to the development of an effective vaccination regime.⁸² The Court has historically expressed substantial deference toward states with respect to their quarantine authority and characterized quarantine as a traditional police power maintained by states in the absence of federal legislation to the contrary.⁸³

The most recent major test of state quarantine authority prior to the COVID-19 pandemic occurred during a series of yellow fever out-

⁷⁸ *Id.*; see also Price, *supra* note 28, at 383–86 (discussing similar quarantine procedures at other ports).

⁷⁹ Batlan, *supra* note 74, at 63–64; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 205 (1824) (“On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens.”).

⁸⁰ Batlan, *supra* note 74, at 66 (“[F]ederal quarantine jurisdiction remained limited to goods and people flowing into and out of the United States . . .”).

⁸¹ See generally Price, *supra* note 28 (arguing for more expansive use of federal quarantine authority).

⁸² Joseph B. Topinka, *Yaw, Pitch, and Roll: Quarantine and Isolation at United States Airports*, 30 J. OF LEGAL MED. 51, 72 (2009) (discussing quarantine's decline “in light of the power of antibiotics and vaccines designed to eradicate . . . diseases”).

⁸³ See, e.g., *Compagnie Francaise De Navigation A Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) (“That from an early day the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question. That until Congress has exercised its power on the subject, such state quarantine laws and state laws . . . are not repugnant to the Constitution of the United States . . .”).

breaks in the late nineteenth century. These outbreaks eventually generated federal responses, but their more immediate legal effect was litigation challenging state quarantines.⁸⁴ Here, again, courts acted differentially toward states implementing quarantines, though they also attempted to impose some outer limits on quarantine authority.⁸⁵ During the period, challenges to a state's ability to impose quarantines focused on state authority to burden interstate commerce;⁸⁶ the Constitution, of course, grants the federal government authority to regulate commerce.⁸⁷ In two cases decided under the Commerce Clause, the Supreme Court acknowledged expansive state quarantine powers while establishing some limitations on a state's ability to thereby interfere with interstate commerce.⁸⁸ In *Morgan's Louisiana & T. R. & S. S. Company v. Board of Health of State of Louisiana*,⁸⁹ the Court upheld a Louisiana quarantine that severely restricted interstate commerce while also acknowledging that Congress had the authority to abrogate state quarantine laws inasmuch as they conflicted with federal law.⁹⁰ Further, in *Railroad Company v. Husen*,⁹¹ the Court held that states could not impose quarantines that interfered with interstate commerce "beyond what is absolutely necessary for [their] self-protection."⁹² These cases show that, even in the Commerce Clause context, quarantine power is not unlimited.

C. The (Limited) Reach of Leading Quarantine Cases

Two other public health cases are especially relevant to the development of quarantine law. One, *Compagnie Francaise*, is another Commerce Clause case. Its facts have clear parallels to current COVID-19-related travel restrictions.⁹³ In *Compagnie Francaise*, a foreign-flagged ship carrying some U.S. passengers was denied entry to the ports of

⁸⁴ For a thorough overview of this history, see Price, *supra* note 28, at 398–413.

⁸⁵ Batlan, *supra* note 74, at 97–110 (reviewing limitations on quarantine authority imposed after 1892 yellow fever outbreak).

⁸⁶ See *supra* Part II.A.

⁸⁷ See Price, *supra* note 28, at 385–86 (suggesting the primary reason for a lack of a right to travel or dormant commerce clause challenge to quarantine laws may have been the severity of health risks).

⁸⁸ *Id.* at 400–02.

⁸⁹ 118 U.S. 455 (1886).

⁹⁰ *Id.* at 463–64 (“[W]henver Congress shall undertake to provide . . . a general system of quarantine . . . all state laws on the subject will be abrogated, at least so far as the two are inconsistent . . .”).

⁹¹ 95 U.S. 465 (1877).

⁹² *Id.* at 472.

⁹³ See, e.g., *Bayley's Campground v. Mills*, 463 F. Supp. 3d 22, 30 n.9 (D. Me. 2020) (acknowledging parallels); Kreis, *supra* note 71 (same).

Louisiana, then experiencing a yellow fever outbreak, despite confirmation that none of the passengers were infected.⁹⁴ Writing for the majority, Justice White held that the state possessed quarantine authority extensive enough to prevent the ship from landing “although [it] affect[s] foreign and domestic commerce.”⁹⁵

At least on its face, *Compagnie Francaise* appears to stand for an expansive quarantine power.⁹⁶ Yet a number of considerations are likely to limit its reach. Despite Justice White’s sweeping language, the exercise of quarantine power at issue took place in familiar circumstances: a foreign ship at a port. Quarantine was closely associated with ports,⁹⁷ and federal quarantine authority in particular developed and remained almost exclusively at ports for much of the nation’s history.⁹⁸ (Few question quarantine authority, even over citizens, at external borders.⁹⁹) Though the holding seemed broad, the case’s facts were confined to a context where traditional quarantine authority was strongest.

Additionally, the factual background in *Compagnie Francaise* was more complex than it appears. In brief, Louisiana’s actual purpose for quarantine may have been unrelated to yellow fever. The ship carried Italian emigrants; the state’s purpose, some have argued, was simply to block their entry.¹⁰⁰ In this respect, it might be useful to compare the case with *Wong Wai v. Williamson*¹⁰¹ and *Jew Ho v. Williamson*,¹⁰² two cases from the same period that struck down local quarantines because they discriminated against racial groups.¹⁰³ Though the Court upheld

⁹⁴ *Compagnie Francaise De Navigation A Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 380–81 (1902); see also *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (noting that *Compagnie Francaise* affirmed “Louisiana’s right to quarantine passengers aboard vessel—even where all were healthy—against a Fourteenth Amendment challenge”).

⁹⁵ *Compagnie Francaise*, 186 U.S. at 391.

⁹⁶ Price, *supra* note 28, at 385 (acknowledging the case appears to stand for a “seemingly unlimited local police power for quarantine”).

⁹⁷ Topinka, *supra* note 82, at 55–61 (tracing history of quarantines).

⁹⁸ *Id.*

⁹⁹ But see J. Nicholas Murosko, Note, *Communicable Diseases and the Right to Re-Enter the United States*, 24 WM. & MARY BILL OF RTS. J. 913, 913–14 (arguing for a constitutional right to re-enter the United States).

¹⁰⁰ See *Compagnie Francaise*, 186 U.S. at 386 (“The excited public discussions at the time as to the right of the state board, under the then existing law, to prevent the landing of the emigrants and as to its duty in the premises, were so extended as to authorize us to take judicial notice of the fact, and in our opinion the clause in the present act which covers that precise matter was inserted therein for the express purpose of placing the particular question outside of the range of controversy.” (internal quotations omitted)); see also *id.* at 398–99 (Brown, J., dissenting) (“In other words, the Board of Health is authorized and assumes to prohibit in all portions of the State which it chooses to declare in quarantine, the introduction or immigration of all persons . . . I think this is not a necessary or proper exercise of the police power . . .”).

¹⁰¹ 103 F. 1 (C.C.N.D. Cal. 1900).

¹⁰² 103 F. 10, 26 (C.C.N.D. Cal. 1900).

¹⁰³ *Wong Wai*, 103 F. at 10; *Jew Ho*, 103 F. at 26 (“[T]his quarantine . . . is unreasonable, unjust, and oppressive, and therefore contrary to the laws limiting the police powers of the

the quarantine at the time, the true motivations behind it would likely receive much more stringent scrutiny today.¹⁰⁴

The holding in *Compagnie Francaise* is also notably in tension with the Court's holding in *Jacobson*, decided three years later. *Jacobson*, a seminal public health case, has served as a constant reference point for cases involving the conflict between individual rights, public health, and the extent of state police powers; courts have repeatedly made reference to *Jacobson* throughout the COVID-19 pandemic.¹⁰⁵ *Jacobson*'s facts may be familiar: *Jacobson* challenged a Massachusetts statute requiring citizens to be vaccinated against smallpox, and the Court upheld the statute.¹⁰⁶ The standard proffered in the case—approving public health laws so long as they bear a “real or substantial relation” to the state's objective¹⁰⁷—is likely even more familiar.

Two other points may be more relevant in the right to travel context: the composition of the *Jacobson* majority and the permissible quarantine example offered in the case.¹⁰⁸ Justice Harlan wrote the opinion in *Jacobson* and also joined the dissent in *Compagnie Francaise*. In terms of its principles, the dissent in *Compagnie Francaise* bears a strong resemblance to the quarantine standard set in *Jacobson*.¹⁰⁹ *Jacobson* contains an explicit discussion of state quarantine power, a power the Court defined more narrowly than the holding in *Compagnie Francaise*.¹¹⁰ The example of a permissible quarantine presented in *Jacobson* is more limited:

An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever

state . . .”).

¹⁰⁴ The case is also strange on scientific grounds: it upholds a quarantine to prevent yellow fever even though it was well established by 1902 that yellow fever was spread by mosquitoes, not people. Under *Jacobson*, that oddity might have changed the calculus. See *Jacobson v. Massachusetts*, 197 U.S. 11, 30–36 (1905) (taking into account scientific evidence on vaccination); see also Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST. J.L. & POL'Y 1, 12–14 (2018) (discussing development of doctrine post-*Compagnie Francaise*).

¹⁰⁵ *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1142 (D. Haw. 2020) (collecting cases).

¹⁰⁶ *Jacobson*, 197 U.S. at 35.

¹⁰⁷ *Id.* at 31.

¹⁰⁸ *Id.* at 29.

¹⁰⁹ Compare *Compagnie Francaise De Navigation A Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 398 (1902) (Brown, J., dissenting) (“I have no doubt of the power to quarantine all vessels arriving in the Mississippi from foreign ports for a sufficient length of time to enable the health officers to determine whether there are among her passengers any persons afflicted with a contagious disease.”), with *Jacobson*, 197 U.S. at 29 (“An American citizen, arriving at an American port . . . may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection . . . that the danger of the spread of the disease . . . has disappeared.”).

¹¹⁰ See *Jacobson*, 197 U.S. at 29.

or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared.¹¹¹

This is more than an historical peculiarity; as courts have frequently made reference to *Jacobson* during the COVID-19 crisis, it makes sense to be sensitive to tensions between the two cases.¹¹² Of note, no right to travel question was raised in *Compagnie Francaise*, which was decided under the Commerce Clause. Further, the much more often cited *Jacobson* offers a more circumscribed example of lawful quarantine powers, one that does not appear to grant states the authority to indefinitely quarantine travelers known to be healthy. Though some have pointed to *Compagnie Francaise* in relation to the right to travel during the current pandemic,¹¹³ it is not likely to control interstate travel cases for the reasons discussed above.

D. *Roman Catholic Diocese v. Cuomo*

The *Jacobson* standard itself has come under new scrutiny during the current pandemic.¹¹⁴ Early in COVID-19's course, however, criticism of *Jacobson*'s deferential standard went largely unheeded. Courts across the country applied the *Jacobson* standard in cases covering a remarkable range of constitutional issues; the result was an expanding body of case law upholding most COVID-19-related public health measures.¹¹⁵ These courts received support in the form of a concurrence in a denial of certiorari written by Chief Justice Roberts in *South Bay United Pentecostal Church v. Newsom*.¹¹⁶ Chief Justice Roberts's concurrence suggested that *Jacobson* was relevant wherever regulations

¹¹¹ *Id.*

¹¹² *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1142 (D. Haw. 2020) (collecting cases).

¹¹³ *See, e.g.*, Kreis, *supra* note 71.

¹¹⁴ *See, e.g.*, Lindsay Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179 (2020).

¹¹⁵ *See, e.g.*, *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020); Best Supplement Guide, LLC v. Newsom, No. 20-cv-00965, 2020 U.S. Dist. LEXIS 90608, at *1 (E.D. Cal. May 22, 2020); *Carmichael*, 470 F. Supp. 3d at 1142 (collecting cases).

¹¹⁶ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) ("The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" (citing *Jacobson*, 197 U. S. 11, 38 (1905))).

were facially neutral, even in the context of a First Amendment challenge.¹¹⁷

The Supreme Court has since issued new guidance. The Court's recent decision in *Roman Catholic Diocese*, also a free exercise case, is highly relevant.¹¹⁸ In *Roman Catholic Diocese*, the Court applied its highest standard of review, explaining that “[b]ecause the challenged restrictions are not neutral and of general applicability, they must satisfy strict scrutiny, and this means that they must be narrowly tailored to serve a compelling state interest.”¹¹⁹ The Court sent a strong signal that, where there was possible discrimination, normal standards of review would not be suspended.¹²⁰ Justice Gorsuch's concurring opinion was even more explicit:

To justify its result [in *South Bay*], the concurrence reached back 100 years in the U.S. Reports to grab hold of our decision in *Jacobson v. Massachusetts*. But *Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.¹²¹

The Court reaffirmed this view when, on appeal, it reconsidered *South Bay United Pentecostal Church v. Newsom* and applied strict scrutiny to strike down California's restrictions on religious services.¹²² Following on these cases, it appears that *Jacobson*, widely cited early the pandemic, simply has less purchase after the Court's decision in *Roman Catholic Diocese*.¹²³

¹¹⁷ *Id.*

¹¹⁸ *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020).

¹¹⁹ *Id.* (internal quotations omitted).

¹²⁰ *Id.* at 68 (“But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment’s guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.”).

¹²¹ *Id.* at 212 (Gorsuch, J., concurring) (citations omitted).

¹²² *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (Gorsuch, J., concurring) (plurality opinion) (“In cases implicating this form of ‘strict scrutiny,’ courts nearly always face an individual’s claim of constitutional right pitted against the government’s claim of special expertise in a matter of high importance involving public health or safety. It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. . . . The whole point of strict scrutiny is to test the government’s assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard. . . . Even in times of crisis—perhaps especially in times of crisis—we have a duty to hold governments to the Constitution.” (internal citations omitted)). This portion of Justice Gorsuch’s concurrence garnered five votes.

¹²³ See, e.g., *Robinson v. Murphy*, 141 S. Ct. 972, 972 (2020) (remanding for reconsideration in light of *Roman Cath. Diocese*); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889, 889 (2020) (same).

IV. INTERSTATE TRAVEL RESTRICTIONS DURING THE COVID-19 PANDEMIC

A. COVID-19–Related Interstate Travel Restrictions

State governments have responded to the COVID-19 outbreak with a variety of actions designed to arrest its spread, including measures intended to deter or restrict travel into their states. At present, at least twenty-four states have promulgated public health orders or legislation which affects interstate travel during the COVID-19 pandemic.¹²⁴ This Part provides a brief overview of characteristic features of the restrictions and reviews contemporaneous court challenges related to interstate travel rights.

Restrictions on interstate travel have been similar at the broadest level. The basic outline across states is comparable: Initially, many states established quarantine procedures for certain entrants into the state.¹²⁵ The quarantine period has typically been fourteen days, in keeping with the incubation period for COVID-19.¹²⁶ At least facially, regardless of which groups the quarantine requirement applies to, states' restrictions have not distinguished between residents and non-residents.¹²⁷ Commonalities begin to break down thereafter, and the most prominent difference may be that states have imposed quarantines on different classes of entrants. Some states have imposed a general quarantine on all entrants from any state, notwithstanding state citizenship status or local infection rates.¹²⁸ Others have imposed more targeted restrictions, requiring only entrants from certain states to quarantine upon entry.¹²⁹ States have also moved between these two regimes.¹³⁰

There are two other major distinctions, both of which relate to the enforcement regime.¹³¹ First, some states have made their quarantine

¹²⁴ Studdert et al., *Partitioning the Curve – Interstate Travel Restrictions During the Covid-19 Pandemic*, 383 NEW ENG. J. MED. e83(1), e83(2) (2020).

¹²⁵ *Id.* at e83(1).

¹²⁶ *Id.*

¹²⁷ This distinction (or lack thereof) is critical.

¹²⁸ Studdert et al., *supra* note 124, at e83(2).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Though beyond the scope of this Comment, the orders have at least one other important characteristic. Some states have exempted commercial travel from their public health orders.

regimes voluntary.¹³² These appear to be less problematic constitutionally.¹³³ Other states have made breaches of COVID-related travel restrictions criminal violations.¹³⁴ Second, state enforcement regimes have varied widely. Unguided self-quarantine has been a common measure, such that an entry violation might not be caught.¹³⁵ States have also used their public health agencies to enforce restrictions. One representative example is Maine, which required that entrants present a negative COVID-19 test or demonstrate an ability to quarantine for two weeks before being allowed into the state.¹³⁶ A smaller number of states have used police to enforce restrictions at their borders, posting officers along major roads and instructing them to stop drivers who are not authorized to enter.¹³⁷ Some have enforced these orders by identifying drivers based on their license plates.¹³⁸ In Rhode Island, for instance, the state police have stopped drivers with New York license plates while allowing others to pass through unimpeded.¹³⁹

Some local governments have imposed additional restrictions on travel. These restrictions have tended to be more stringent, up to and including complete bans on entry by non-residents.¹⁴⁰ In North Carolina, the Outer Banks attempted to restrict substantially all travel to the islands by out-of-staters, even those who owned property there.¹⁴¹ Gunnison County, a small municipality in Colorado, did likewise but went a step further and ordered that all non-residents leave in its public health order.¹⁴² The same order prohibited all entry or re-entry by non-residents.¹⁴³ These kinds of restrictions, much stronger than a mere

¹³² See, e.g., *Roberts v. Neace*, 457 F. Supp. 3d 595, 603 n.5 (E.D. Ky. 2020) (favorably noting that comparable “Ohio provisions are *requests*”).

¹³³ *Id.*

¹³⁴ *Bayley’s Campground v. Mills*, 463 F. Supp. 3d 22, 28 n.4 (D. Me. 2020) (noting Maine has “criminalize[d] any ‘violation of this Order’”).

¹³⁵ Studdert et al., *supra* note 124, at e83(1) (“[N]ews reports suggest that states are not actively monitoring compliance.”).

¹³⁶ *Keep Maine Healthy*, OFF. OF THE GOVERNOR, STATE OF ME., <https://www.maine.gov/covid19/keepmainehealthy-2020> [<https://perma.cc/Y2WM-LSQT>].

¹³⁷ Phil McCausland, *Rhode Island Police, Troops Stopping Incoming New Yorkers to Force Quarantine*, NBC NEWS (Mar. 28, 2020), <https://www.nbcnews.com/news/us-news/rhode-island-police-troops-stopping-incoming-new-yorkers-force-quarantine-n1171106> [<https://perma.cc/3G9L-QY7B>].

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Fifth Amended Standing Public Health Order, Gunnison Cnty. (Apr. 3, 2020), https://covid19.gunnisoncounty.org/wp-content/uploads/2020/04/5th-Amended-Public-Health-Order_Signed_Recorded_4032020.pdf [<https://perma.cc/B4ML-WA43>].

¹⁴¹ Kari Pugh, *Outer Banks Property Owners File Federal Suit Challenging Restrictions to Their Homes*, OBXTODAY (Apr. 7, 2020), <https://www.obxtoday.com/outer-banks-property-owners-file-federal-suit-challenging-restrictions-to-their-homes/> [<https://perma.cc/8QYH-L4AZ>].

¹⁴² Fifth Amended Public Health Order, *supra* note 140.

¹⁴³ *Id.*

self-quarantine requirement, are harder to justify; though it is not possible to know with certainty, it may be for this reason that some of the most egregious local restrictions, when challenged in court, have been settled outside it.¹⁴⁴

B. COVID-Related Travel Restrictions in the Courts

The district courts have decided multiple cases on COVID-19-related interstate travel restrictions. Though the U.S. District Court for the District of Hawaii was not the first federal court squarely confronted with a relevant restriction, its holding cogently laid out the two major questions raised by these policies. The first of those questions was whether the public health order discriminated against nonresidents. The court concluded the regulations did not discriminate against non-residents.¹⁴⁵ Hawaii's regulations, the court reasoned, were most notable for what they did *not* do: establish different standards for residents and non-residents of the state.¹⁴⁶ Instead, they applied equally to all entrants.¹⁴⁷ The second question was the proper standard of review. The Court considered both the application of strict scrutiny and application of the "highly deferential standard" outlined in *Jacobson*.¹⁴⁸ Following what it saw as a general trend among cases considered during the coronavirus pandemic, the court decided the case under the aegis of *Jacobson* and upheld the restrictions, emphasizing they were temporary.¹⁴⁹ The court also conducted a strict scrutiny review, though it maintained that *Jacobson* was likely the proper framework.¹⁵⁰ There, too, the restrictions passed muster.¹⁵¹

By contrast, the U.S. District Court for the Eastern District of Kentucky struck down Kentucky's similar restrictions as a violation of the right to travel.¹⁵² The facts in this case were not as straightforward as in the Hawaii case—the court considered both the effects of the regulations on the right to interstate travel and seemed to consider the effects

¹⁴⁴ See, e.g., Pugh, *supra* note 4.

¹⁴⁵ *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1146 (D. Haw. 2020).

¹⁴⁶ *Id.* at 1145–46.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1148 ("Although the right to travel within the United States is constitutionally protected, that does not mean that a temporary quarantine cannot be instituted . . .").

¹⁵⁰ *Id.* at 1146 ("Even assuming the quarantine imposed a burden on Plaintiffs' right to travel, thereby triggering strict scrutiny . . .").

¹⁵¹ *Id.* at 1146–47. Two other cases were decided on similar reasoning. See *Bannister v. Ige*, No. 20-00305, 2020 U.S. Dist. LEXIS 129127, at *7 (D. Haw. July 22, 2020) ("[M]uch of the analysis herein mirrors *Carmichael*."); *Page v. Cuomo*, 478 F. Supp. 3d 355, 366 (N.D.N.Y. 2020) (citing *Carmichael*, 470 F. Supp. 3d at 1142 n.6).

¹⁵² See *Roberts v. Neace*, 457 F. Supp. 3d 595, 603 (E.D. Ky. 2020).

on a possible right to intrastate travel, without carefully distinguishing the two.¹⁵³ Still, applying strict scrutiny,¹⁵⁴ the court found the public health order was unconstitutional because it was “not narrowly tailored.”¹⁵⁵ The court looked beyond the language of the order and to its practical effects, finding that the restrictions were essentially arbitrary, especially as between residents and non-residents.¹⁵⁶ Yet the court also presented the state with a way out. In a footnote, Judge Bertelsman offered a series of amendments which might make the statute more likely to pass muster.¹⁵⁷ These amendments included the elimination of criminal penalties for violations of the order and an exclusion for travelers who did not intend to stay within the state for more than twenty-four hours.¹⁵⁸

The U.S. District Court for the District of Maine also decided an interstate travel rights case under strict scrutiny, but it reached a different result.¹⁵⁹ In brief, the court upheld an order which placed onerous burdens on anyone seeking to enter the state of Maine.¹⁶⁰ However, in so doing, the court expressed concerns about its ruling and repeatedly emphasized that the challenged restrictions were time-limited.¹⁶¹ As in Kentucky, the Maine district court looked to the actual effects of the state’s public health order—rather than the language of the order on its face—and it found that the state’s order had the “practical effect of discriminating against [non-residents].”¹⁶² Maine’s unique order closed the state’s hotels and campgrounds to non-residents, while effectively leaving those lodgings open to residents.¹⁶³ Because it found the right to travel was burdened, the court turned to the standard for review, considering *Jacobson* and the Supreme Court’s leading right to travel case, *Saenz*. The court concluded *Saenz* was the appropriate reference

¹⁵³ *Neace*, 457 F. Supp. 3d at 602 (citing *Johnson v. City of Cincinnati*, 310 F.3d 484, 502 (6th Cir. 2002) (intrastate travel)).

¹⁵⁴ *See id.* at 603. The court did not cite *Jacobson*. *See generally id.*

¹⁵⁵ *Id.* at 603.

¹⁵⁶ *Id.* at 601–603.

¹⁵⁷ *See id.* at 603 n.5. (favorably contrasting “Ohio’s rules . . . [which] do not appear overbroad and have a rational basis for combating the coronavirus, while still preserving the population’s constitutional rights”).

¹⁵⁸ *Id.*

¹⁵⁹ *Bayley’s Campground v. Mills*, 463 F. Supp. 3d 22, 38 (D. Me. 2020).

¹⁶⁰ *Id.* at 34 (“Restrictions of the kind challenged in this action—i.e., restrictions that indiscriminately impact strangers from away who do not own property in the state—clearly burden fundamental rights.”).

¹⁶¹ *Id.* at 34, 35–37.

¹⁶² *Id.* at 24.

¹⁶³ *Id.* at 34 (“Although the quarantine rule purports a certain neutrality insofar as it imposes a restriction on all who enter the state, including state residents, it effectively discriminates among members of the public in practical application because it grants or denies access to Maine’s goods and services based on citizenship status and access to realty . . .”).

point.¹⁶⁴ Significantly, the court found both the first and second components of the right to travel were implicated by the state restrictions.¹⁶⁵ Therefore, it applied strict scrutiny.¹⁶⁶ Still, on a limited factual record, the district court concluded Maine's actions narrowly survived review.¹⁶⁷

Though these cases each presented distinct facts, some common threads emerged. The courts have consistently noted that the temporary nature of state restrictions makes those restrictions less troublesome.¹⁶⁸ In addition, though states have attempted to craft facially neutral travel restrictions, courts have not been uniformly willing to stop at the plain language of a public health order.¹⁶⁹ To ensure no discrimination is occurring, courts have looked past the language of orders to examine their practical effects.¹⁷⁰ Further, these courts confronting the tension between interstate travel rights and state quarantine authority have failed to settle on a uniform standard under which they must review restrictions, relying on different methods.¹⁷¹ The courts have moved between strict scrutiny and a kind of ad-hoc inquiry under *Jacobson*; the benefit of prior cases has not fostered the development of a consistent approach.¹⁷²

¹⁶⁴ *Bayley's Campground*, 463 F. Supp. 3d at 32 (“Instead, the permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review. This may help explain why the Supreme Court established the traditional tiers of scrutiny in the course of the 100 years since *Jacobson* was decided.”).

¹⁶⁵ *Id.* at 32 (“The Supreme Court has defined the right to travel to contain three components, two of which are at issue here: the right of a citizen of one State to enter and to leave another State, and the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State.” (internal quotations and citations omitted)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 38.

¹⁶⁸ See, e.g., *Roberts v. Neace*, 457 F. Supp. 3d 595, 603 n.5 (E.D. Ky. 2020).

¹⁶⁹ See, e.g., *Bayley's Campground*, 463 F. Supp. 3d at 34 (D. Me. 2020) (“Although the quarantine rule purports a certain neutrality . . . it effectively discriminates among members of the public in practical application . . .”).

¹⁷⁰ *Neace*, 457 F. Supp. 3d at 602 (“The Court questioned counsel for defendants . . . about some of these potential applications of the Travel Ban . . .”).

¹⁷¹ Compare *Bayley's Campground*, 463 F. Supp. 3d at 32, with *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1146 (D. Haw. 2020).

¹⁷² *Carmichael*, 470 F. Supp. 3d at 1142 n.6 (“Plaintiffs argue that *Jacobson* is inapplicable. But the cases they rely upon did not address *South Bay*.”).

V. QUARANTINES PRESENT AND FUTURE

A. Interstate Travel: COVID-19 and Beyond

The COVID-19 pandemic has produced a new set of travel restrictions and related cases that raise unsettled questions about interstate travel rights during an epidemic.¹⁷³ In the district courts, two of the four courts to decide a case have applied strict scrutiny to restrictions on travel understood to discriminate between residents and non-residents of a state, but the court in *Bayley's Campground* based this inquiry on the Supreme Court's holding in *Saenz*, while the court in *Roberts v. Neace*¹⁷⁴ drew its standard from cases that addressed both intrastate and international travel.¹⁷⁵ The *Neace* court struck down an order because it violated the constitutional right to travel.¹⁷⁶ Two others have upheld public health orders that placed some burden on the right to interstate travel under an arbitrariness test drawn from *Jacobson*.¹⁷⁷ The conflicting standards should be concerning: there is growing evidence that restrictions on travel are effective, and the lack of a predictable standard may make responding to burgeoning crises more difficult for state governments.¹⁷⁸

B. Making Sense of *Saenz*

Central to any coherent approach to the right to travel in a pandemic or other kind of crisis is the Supreme Court's decision in *Saenz*. *Saenz* deliberately reworked the Court's approach to right to travel cases,¹⁷⁹ and though the holding is complex, the case law that has followed it does show that different components of the right to travel can receive differing levels of scrutiny.¹⁸⁰ *Saenz* grouped prior precedents in new buckets.¹⁸¹ *Edwards*, in which the Court invalidated California's criminalization of support for impoverished travelers into the state, was

¹⁷³ Compare *Bayley's Campground*, 463 F. Supp. 3d at 32, with *Carmichael*, 470 F. Supp. 3d at 1146.

¹⁷⁴ 457 F. Supp. 3d 595 (E.D. Ky. 2020).

¹⁷⁵ *Bayley's Campground*, 463 F. Supp. 3d at 32; *Neace*, 457 F. Supp. 3d 595 at 602.

¹⁷⁶ *Neace*, 457 F. Supp. 3d 595 at 603.

¹⁷⁷ *Carmichael*, 470 F. Supp. 3d at 1142; *Page v. Cuomo*, 478 F. Supp. 3d 355, 366 (N.D.N.Y. 2020).

¹⁷⁸ See, e.g., Haug et al., *Ranking the Effectiveness of Worldwide COVID-19 Government Interventions*, 4 NAT. HUM. BEHAV. 1303, 1304 (2020); Abdulkadir Atalan, *Is the Lockdown Important to Prevent the COVID-19 Pandemic? Effects on Psychology, Environment and Economy-Perspective*, 56 ANNALS MED. & SURGERY 38, 38 (2020).

¹⁷⁹ *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

¹⁸⁰ See, e.g., *Bach v. Pataki*, 408 F.3d 75, 87 (2d Cir. 2005) (applying intermediate scrutiny to violation of second component).

¹⁸¹ *Saenz*, 526 U.S. at 500-04.

grouped with *Guest*, concerning racially motivated private restraints on interstate travel.¹⁸² The Court considered this pair (*Guest* and *Edwards*) examples of direct restraints on interstate travel, violations of the first component of the interstate travel right.¹⁸³ It suggested strict scrutiny was appropriate for that category of restraint.¹⁸⁴

At the same time, the Court grouped a second set of precedents—also a series of standard references in the Article IV Privileges and Immunities Clause case law¹⁸⁵—under the second component of the right to travel. This right to be treated as a welcome visitor, in conjunction with the citations made by the Court, can only be read to direct a lower standard of review where the second component is implicated.¹⁸⁶ None of the cases the court cited regarding the second component involved strict scrutiny.¹⁸⁷ Instead, they use a test that closely resembles intermediate scrutiny.¹⁸⁸ Though that test has other forms, courts have often made use of the standard given in *Supreme Court of New Hampshire v. Piper*.¹⁸⁹

The third component, which the Court identified with the Fourteenth Amendment's Privileges or Immunities Clause, is less likely to be relevant in the immediate context of this or any other pandemic. No state has imposed restrictions on becoming a citizen or conditioned welfare benefits on length of residency. But this aspect of the holding is significant for another reason. *Saenz*, it is true, does not explicitly abrogate any of the Court's prior right to travel opinions. However, both the dissent and many scholars have recognized what the holding's functional effect is—*Saenz* clearly disfavors the equal protection approach

¹⁸² *Id.* at 500–01.

¹⁸³ *Id.* (characterizing the cases as first-component violations).

¹⁸⁴ *Id.* at 501 (“directly impair”); *see also, e.g.*, *Bayley’s Campground v. Mills*, 463 F. Supp. 3d 22 (D. Me. 2020).

¹⁸⁵ Compare *Saenz*, 526 U.S. at 501–02, with Thomas H. Burrell, *Privileges and Immunities and the Journey From the Articles of Confederation to the United States Constitution: Courts on National Citizenship and Antidiscrimination*, 35 WHITTIER L. REV. 199, 290–93 (2014) (reviewing modern Privileges and Immunities case law).

¹⁸⁶ *See also* *Peterson v. Martinez*, 707 F.3d 1197, 1213 (10th Cir. 2013) (“*Saenz* specifies that a right to travel claim based on the ‘welcome visitor’ doctrine is a Privileges and Immunities Clause claim.”).

¹⁸⁷ Burrell, *supra* note 185, at 290–93.

¹⁸⁸ *Id.*

¹⁸⁹ 470 U.S. 274, 284 (1985) (“The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective. In deciding whether the discrimination bears a close or substantial relationship to the State’s objective, the Court has considered the availability of less restrictive means.” (internal citations omitted)).

to the right to travel drawn from *Shapiro* and its progeny, replacing it with the Privileges or Immunities inquiry outlined in the case.¹⁹⁰

Under the *Saenz* framework, strict scrutiny is inappropriate as a matter of law in some circumstances. Not all violations of the broader right to travel necessarily implicate all three components of the right. Sometimes, travel regulations implicate only the second component—which concerns discrimination based on the “mere fact” of different state citizenship—and therefore only raise questions as potential violations of Article IV’s Privileges and Immunities Clause.¹⁹¹ This, following *Saenz*, points to a lower standard of review.¹⁹²

As an initial matter, therefore, the first priority when facing a potential violation of the right to interstate travel is to identify the components which have been violated. As above, the third component (equal treatment of new permanent residents) seems largely irrelevant to the current crisis. The first (free entry and exit) and the second (welcome visitor) components are more plausibly burdened. Some local restrictions imposed during the pandemic—for example, Gunnison County’s ban on all entry by non-residents¹⁹³—seem to plainly burden both.¹⁹⁴ As the right to travel protects a right to entry, as well as equal treatment for other states’ residents, outright bans on non-resident travel both directly impair the entry right under first component and potentially violate the second component by treating in and out-of-state residents differently. Under the *Saenz* framework, those restrictions should rightly receive strict scrutiny.¹⁹⁵

Outright bans, however, have been rare. Less direct contemporary restrictions are harder to categorize. Maine’s public health order is an illustrative example of a more marginal case: as the district court noted, despite facial neutrality, the functional effect of the state’s public health order was to deter any “out-of-stater who does not own or rent property”

¹⁹⁰ See *Saenz*, 526 U.S. at 516 (Rehnquist, C.J., dissenting) (“The Court has thus come full circle by effectively disavowing the analysis of *Shapiro*”); see also, e.g., Rosen, *supra* note 7, at 1028–29 (“For some time the Court grounded the right to travel in the Equal Protection Clause, though *Saenz* appears to have rejected this approach.” (internal citations omitted)); Nicole I. Hyland, *On the Road Again: How Much Mileage is Left on the Privileges or Immunities Clause and How Far Will It Travel*, 70 *FORDHAM L. REV.* 187, 224–25 (2001) (noting that *Saenz* disregarded *Shapiro*’s equal protection framework). But see R. Linus Chan, *The Right to Travel: Breaking Down the Thousand Petty Fortresses of State Self-Deportation Laws*, 34 *PACE L. REV.* 814, 847 (2014) (acknowledging that “*Saenz* appears to repudiate *Shapiro*’s equal protection analysis” but arguing that its “framework for the right to travel continues to survive”).

¹⁹¹ *Saenz*, 526 U.S. at 502 (internal citations omitted).

¹⁹² *Id.* at 502 (using the “substantial reason” language of lesser scrutiny); see also *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 390 (1978); *Hicklin v. Orbeck*, 437 U.S. 518, 525–26 (1978).

¹⁹³ See Birkeland, *supra* note 140.

¹⁹⁴ See *id.*

¹⁹⁵ *Saenz*, 526 U.S. at 501; see also, e.g., *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013) (assuming first component receives strict scrutiny).

in Maine from entering the state.¹⁹⁶ It is harder to say whether the right to entry and exit was directly impaired in that situation, especially because such a deterrent effect has little in common with the kind of restrictions the Court identified as examples of violations of the first component.¹⁹⁷ Neither an *Edwards*-style criminal penalty for transporting travelers into the state, nor any *Guest*-style racial animus maps on to a ban on camping. Further, though the state closed its hotels to non-residents, there is enough rental property in Maine to support some portion of “roughly 22 million people” entering in a typical summer.¹⁹⁸ At the same time, it is easy to see a potential violation of the second component, the right to be treated as a welcome visitor, protected by Article IV’s Privileges and Immunities Clause. The functional effect of the order was to favor residents of Maine.¹⁹⁹ Following *Saenz*, this might or might not be permissible, but as a violation the second component, it would draw less scrutiny.²⁰⁰

A lower standard of review would have made a difference in Kentucky, early in the COVID-19 pandemic, when the state’s travel order was struck down under strict scrutiny.²⁰¹ Kentucky’s order was not more restrictive than the order at issue in Maine—with multiple carve-outs, and no complications related to hotels and campgrounds, it was likely less so.²⁰² Yet the district court, deciding the case under strict scrutiny, was obligated to enjoin the order if it did not reflect the least restrictive means available for achieving the state’s goals.²⁰³ Under a lower standard, the order would have likely passed muster. The court’s recommended changes were quite minor, again suggesting that a lower standard of review might have saved the order.²⁰⁴

Hawaii’s order is also relevant. The district court there noted that “individuals from other states may freely travel to Hawai’i; they must simply comply with the quarantine.”²⁰⁵ That does not appear to be the kind of direct burden on the right to travel that the Supreme Court was concerned about when it identified the first component of the right to travel, as it bears essentially no resemblance to the travel restrictions found unconstitutional in *Guest* or *Edwards* and, as the district court

¹⁹⁶ *Bayley’s Campground v. Mills*, 463 F. Supp. 3d 22, 35 (D. Me. 2020).

¹⁹⁷ *Saenz*, 526 U.S. at 500–501.

¹⁹⁸ *Bayley’s Campground*, 463 F. Supp. 3d at 27.

¹⁹⁹ *Id.* at 34.

²⁰⁰ See Burrell, *supra* note 185, at 290–93.

²⁰¹ See *Roberts v. Neace*, 457 F. Supp. 3d 595, 601–03 (E.D. Ky. 2020).

²⁰² *Id.* at 598–99.

²⁰³ *Id.* at 600, 603.

²⁰⁴ *Id.* at 603 n.5.

²⁰⁵ *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1145 (D. Haw. 2020).

noted, does not block entry into the state.²⁰⁶ It has no obvious relationship with durational residency requirements. The only real question about the order might be whether it offends the Privileges and Immunities Clause: in other words, that Hawaii's order could have discriminated in fact against out-of-state residents.²⁰⁷ This was the district court's primary concern, and it found no such discrimination occurred.²⁰⁸ Still, the court felt it necessary to go through a strict scrutiny inquiry—on the facts, which included no direct barriers to entry into the state, intermediate scrutiny might have sufficed.²⁰⁹

Saenz distinguishes between different types of travel regulations, which can give rise to differing levels of scrutiny. The above discussion is not meant to exhaust all possibilities therein, only to suggest a novel way around a problem faced by the courts. The dichotomous approach to travel rights—either strict scrutiny, or almost none—that has sprung up in the aftermath of COVID-19 is not required as a matter of law. Consider the Hawaiian example: a facially neutral regulation which did not discriminate in fact and left any person who wished to free to travel to Hawaii.²¹⁰ Nothing in *Saenz* demands that strict scrutiny apply in that scenario, and a lower standard might allow Hawaii—or another state with an equally neutral, non-discriminatory, indirect regime—to avoid the pitfalls of strict scrutiny at a time when flexibility is most valuable.

There is still, independently, a concern that *Saenz* might not apply at all. The general case law which has developed during the COVID-19 pandemic might suggest that strict *or* intermediate scrutiny is inapposite.²¹¹ Though the Supreme Court has recognized a right to travel,²¹² potential violations of other fundamental rights have been subject to diminished scrutiny by courts at every level throughout the COVID-19

²⁰⁶ See *Saenz*, 526 U.S. at 500–01.

²⁰⁷ Facial discrimination is not a requirement for a Privileges and Immunities claim. See, e.g., *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 67 (2003) (“[A]bsence of an express statement in the . . . laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [the] claim.”); *Nat’l Ass’n for the Advancement of Multijurisdiction Prac. v. Berch*, 973 F. Supp. 2d 1082, 1111 (D. Ariz. 2013) (“[A] claim for a violation under the Privileges and Immunities Clause cannot be dismissed merely because the challenged law does not discriminate against out-of-state residents on its face.”).

²⁰⁸ *Carmichael*, 470 F. Supp. 3d at 1145–46.

²⁰⁹ *Id.* at 1146–47.

²¹⁰ *Id.* at 1146.

²¹¹ See *id.* at 1142 (collecting cases applying *Jacobson* during the pandemic).

²¹² See *Saenz v. Roe*, 526 U.S. 489, 504 (1999).

pandemic.²¹³ At least for a time, those courts had good reason to do so, in the form of Supreme Court's denial of certiorari in *South Bay*.²¹⁴

Yet, in light of the Court's more recent holding in *Roman Catholic Diocese*, as well as its reconsideration of *South Bay*, the reflexive application of *Jacobson* in COVID-19 cases is no longer tenable. The second component of the right to travel, derived from the Privileges and Immunities Clause, also seems well-suited to addressing the concerns about discrimination raised in *Roman Catholic Diocese*. The Clause, after all, was "designed to prevent discriminatory actions by the states."²¹⁵

C. The Darker Side of Quarantine?

If *Jacobson*, post-*Roman Catholic Diocese*, appears to offer too little scrutiny, some might offer the same objection to any form of intermediate scrutiny. Many scholars have argued that right to travel cases during a pandemic or other kind of crisis should be analyzed under strict scrutiny.²¹⁶ Motivated by legitimate concerns over the potential for the powers acquired in crises to be retained long after they have finished, others have similarly argued for the maintenance of normal standards of review during emergencies.²¹⁷ Given quarantine's history, that position is hardly unjustified. Even more "normal" quarantines have historically placed burdens on various disfavored groups, among others immigrants, paupers, and those "who stood on the margins of society."²¹⁸ Other quarantines resulted in widespread economic dysfunction, and another class of historical quarantines were explicitly motivated by racial animus.²¹⁹ Furthermore, quarantine cases decided by American courts have placed extraordinary burdens on individual citizens; in

²¹³ See, e.g., *S. Bay United Pentecostal Church v. Newsom*, No. 20-cv-00965, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in denial of certiorari) (free exercise); Best Supplement Guide, *LLC v. Newsom*, 2020 U.S. Dist. LEXIS 90608 at *8 (E.D. Cal. May 22, 2020) (free speech and assembly).

²¹⁴ *S. Bay United Penecostal Church*, 140 S. Ct. at 1613–14 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

²¹⁵ Martin H. Redish & Brandon Johnson, *The Underused and Overused Privileges and Immunities Clause*, 99 B.U. L. REV. 1535, 1552–53 (2019).

²¹⁶ See, e.g., Maryam Jamshidi, *The Federal Government Probably Can't Order Statewide Quarantines*, 2020 U. CHI. L. REV. ONLINE 1, 6 (2020) (strict scrutiny); Lawrence O. Gostin, *The Resurgent Tuberculosis Epidemic in the Era of AIDS: Reflections on Public Health, Law, and Society*, 54 MD. L. REV. 1, 99 (1999) (strict scrutiny); Jennifer Jolly-Ryan, *Ebolamania and Equal Protection of Health Care Workers Under Rational Basis with Bite Review*, 120 W. VA. L. REV. 575, 617–20 (2017) (same).

²¹⁷ See, e.g., Wiley & Vladeck, *supra* note 114.

²¹⁸ See Batlan, *supra* note 74, at 56, 60.

²¹⁹ *Id.* at 107–09; see also Price, *supra* note 84, at 391–94.

some, quarantined patients died while in quarantine, largely without meaningful opportunities for judicial review.²²⁰

However, in the narrower context of interstate travel restrictions, concerns about the misuse of quarantine authority may be less consequential. More severe, or more straightforwardly discriminatory restrictions, would likely prompt strict scrutiny under *Saenz*.²²¹ It is only for certain, less stringent restrictions on interstate travel that this Comment argues intermediate scrutiny could be appropriate. This pandemic has seen a mix of restrictions imposed by states and localities, but at the state level the restrictions have been comparatively less severe. Rhode Island's decision to have police enforce the state's quarantine order against drivers with certain license plates was likely the most extreme action taken; had it reached it a court, that action would surely have violated both the first and second components of the right to travel, thus triggering strict scrutiny.²²² Similarly discriminatory actions would likely engender the same result, offering additional protection against the very real dangers of quarantine.

VI. CONCLUSION

This Comment identifies a novel approach to interstate travel rights cases during a pandemic, an approach grounded in a faithful reading of *Saenz*, the leading case on the right to travel. In so doing, it also shows that certain quarantine precedents have less reach over right to travel cases than their broad holdings might suggest, especially in light of the Supreme Court's recent decision in *Roman Catholic Diocese*. Along the same lines, the Comment demonstrates that, post-*Roman Catholic Diocese*, the application of *Jacobson*-style minimal scrutiny is likely to be inappropriate with respect to the right to travel. Instead, the analysis suggests, courts are free to apply either a form of intermediate or strict scrutiny, depending on the nature of the travel regulations at issue. For neutral, non-discriminatory, and indirect restrictions on interstate travel, this Comment suggests *Saenz* allows courts to apply a more forgiving standard without thereby conceding any ability to subject more troublesome regulations to a more searching standard of review.

²²⁰ Batlan, *supra* note 74, at 102.

²²¹ *Cf. Saenz v. Roe*, 526 U.S. 489, 501–02 (1999).

²²² *See McCausland*, *supra* note 137.