



2020

PUBLIC HEALTH LAW
**VIRTUAL
SUMMIT**

**COVID-19 Response
and Recovery**

September
16-17

Challenges for Government, Business and Health Care Sectors

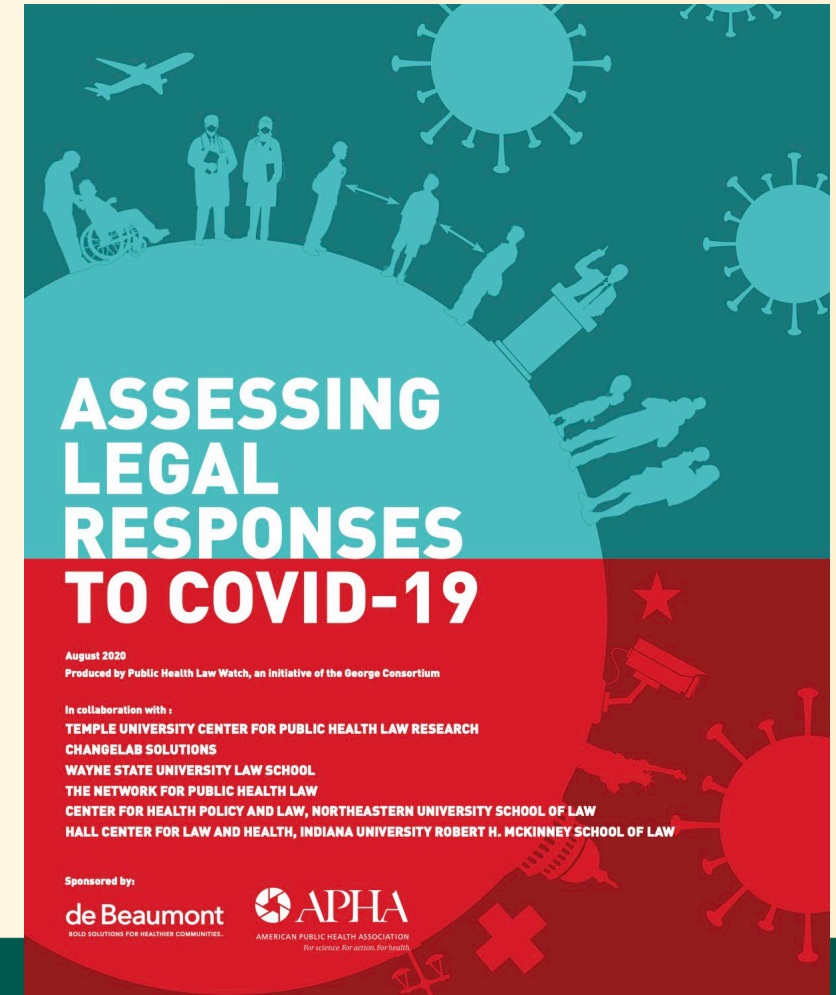
Government Authority: Mass Movement, Business and Property Control Measures

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Overview

- Government powers to restrict movement and activity
- Use of government powers during COVID-19
- Legal challenges to government powers
- Recommendations



Legal Landscape: Population-level restrictions

- Federal powers
 - Travel restrictions and entry restrictions
- State (and local) public health powers
 - Quarantine and isolation (addressed elsewhere)
 - Mass movement restrictions
 - Business closures
 - Gathering limits and conditions
- Emergency response authority
- Government authority is subject to some (but not much) constraint
- Restrictive powers have significant impacts that need to be considered



COVID-19: Population-level restrictions

- Federal actions
 - Travel restrictions and entry restrictions (China and Europe)
 - Federal agency guidance on closures was contradictory and politicized
 - Some federal actions were in opposition to closures
- State actions
 - By mid-March every state had declared an emergency
 - Most states implemented mass movement restrictions such as stay-at-home orders, business closures, and limits and conditions on gatherings
- Local actions included similar restriction, although some local/state tension occurred when policy choices differed



COVID-19: Population-level restrictions

- Gathering bans and conditions
 - Wide variety across states, rapidly amended through executive orders
 - Some states relied on person limits with exceptions for essential activities; others banned or exempted specific categories of gatherings
 - Over time, bans were lifted but other restrictions imposed (such as mask mandates)
- Stay-at-home orders
 - Widely used in March and April with a variety of approaches and specificity
- Business and school closures
 - Essential v non-essential activities



Movement restrictions: the results?

- Restrictions seem to have worked to flatten the curve
- Jurisdictions that imposed restrictions longer seem to have lowered rates of infection more successfully
- Economic and social impacts mitigated to some extent by federal and state support...although many of these programs and protections have lapsed or diminished
- Public health capacity has not been sufficiently built up
- Restrictions generated significant political backlash, and litigation



Legal challenges to government restrictions

- Numerous challenges filed
- Varied plaintiffs
 - Businesses
 - Individuals
 - Institutions
 - Legislatures
- Varied legal theories
 - Due process
 - Equal protection
 - Fundamental rights violations



Legal challenges to government restrictions

- Courts have not all adopted the same legal reasoning in their analyses of legal challenges
- Yet, states have prevailed against virtually all challenges to their powers, including in the two cases that have reached the US Supreme Court
- The strongest challenges came from religious organizations who were able to argue that they were being treated differently from secular activities
- Two rulings stand out as exceptions: one invalidating executive power as exceeding legislative delegation, the other attempting to resurrect *Lochner*



Legal challenges to government restrictions

- Courts have not all adopted the same legal reasoning in their analyses of legal challenges
- State public health powers implicate the precedent from *Jacobson v. Massachusetts*
- Courts have interpreted *Jacobson* either as 1) requiring extreme deference to state action during a public health emergency; 2) finding that deference is warranted but constitutional rights should still be considered; or 3) applying normal constitutional scrutiny to evaluate state public health powers.



Legal challenges to government restrictions

- States have prevailed against virtually all challenges to their powers, including:
 - Challenges alleging that the state exceeded its authority or violated the due process of plaintiffs in issuing restrictions
 - Challenges alleging violations of First Amendment rights of assembly, freedom of speech, and free exercise of religion
 - Challenges alleging equal protection violations for treating different types of businesses differently in closure orders, or treating religious and secular activities differently
 - Challenges from closed businesses implicating the takings clause



Legal challenges to government restrictions

- The strongest challenges came from religious organizations who were able to argue that they were being treated differently from secular activities
- Dissenters in the SCOTUS cases were concerned with imposition on religious liberty
- A church in Kentucky successfully argued to overturn a state order prohibiting mass gatherings, including drive-in gatherings, which the court ordered the state to allow



Legal challenges to government restrictions

- Two rulings stand out as exceptions:
- Wisconsin's Supreme Court invalidated the stay-at-home order issued by the state health director, finding the order exceeded the delegation of authority from the state legislature, in a case brought by the legislature
- *Butler v Wolf* found that PA gathering restrictions and business closures violated First Amendment, Due Process and Equal Protection clauses



What's next?

- Additional “waves” of infection – will more restrictive measures be needed? Impacts are complex. Effectiveness of reduced infection must be balanced against economic and social impacts.
- Test-trace-isolate?
- Continued support for workers, businesses, and the unemployed?
- Will courts reconsider deference to state action as pandemic continues?
- Will courts retain deference when cases are not parties seeking preliminary injunctions?



Recommendations

Federal government:

- Congress should fund and CDC should take the lead in developing a unified national approach to rapid testing, contact tracing, and isolation of people infected with SARS-CoV-2 to allow for targeted interventions for COVID-19 rather than widespread closures and limitations on physical interaction.
- Congress should appropriate significant, expanded, ongoing funding to support people who lose jobs or income due to state and local stay-at-home orders, business and school closures, and gathering restrictions and to allow them to comply with these restrictions.



Recommendations

Federal government:

- Congress should enact legislation that strengthens and extends legal protections against eviction, mortgage foreclosure, utility shut off, discrimination, and employment loss due to stay-at-home orders, business and school closures, and gathering restrictions.
- Congress should appropriate significant, expanded, ongoing funding to support small businesses and school systems that were forced to close due to closure orders.
- CDC should develop rigorous, scientifically-grounded, apolitical guidance for safe operation of schools, for safe operation of schools, business, and indoor and other settings to assist government officials in making risk assessment decisions to prevent the spread of COVID-19.



Recommendations

State government:

- States legislatures should enact legislation clarifying the scope and authority of state officials to limit person-to-person interaction and impose closures, movement restrictions, gathering bans, and physical distancing requirements.
- Governors or other designated officials should promote physical distancing to reduce the spread of COVID-19 through incentives, supportive programs, and legal protections that allow compliance with distancing guidance and reduce inequitable disparate impacts of gathering restrictions and closures. If mandatory restrictions and closures are implemented, state officials should base these measures on the best available epidemiological and scientific evidence.



Recommendations

State government:

- Governors, through executive orders, and/or legislatures, through amending legislation should empower local governments to implement targeted and scientifically-appropriate interventions to respond to COVID-19, including the ability of local jurisdictions to impose more stringent limitations than the state on movement of individuals, gathering sizes, mask requirements, and closure of businesses, schools, and other activities.
- Governors, through executive orders, and/or legislatures, through amending extant housing, utilities, and employment laws, should extend protections against eviction, mortgage foreclosure, utility shut off, discrimination, and employment loss due to stay-at-home orders, business and school closures, and gathering restrictions.



Recommendations

Local governments:

- Local ordinances should allow for the imposition of targeted and scientifically appropriate closure, movement, and physical distancing restrictions consistent with stopping the spread of COVID-19 in local communities.
- Mayors through executive orders, and/or local councils through amending extant housing, utilities, and employment laws, should extend protections against eviction, mortgage foreclosure, utility shut off, discrimination, and employment loss due to stay-at-home orders, business and school closures, and gathering restrictions.

Courts

- Courts should maintain the longstanding deference given to executive actions in the face of a public health emergency while protecting the public from measures based purely on fear, prejudice, or misinformation.



Liability Shields and Waivers

@nicolasterry

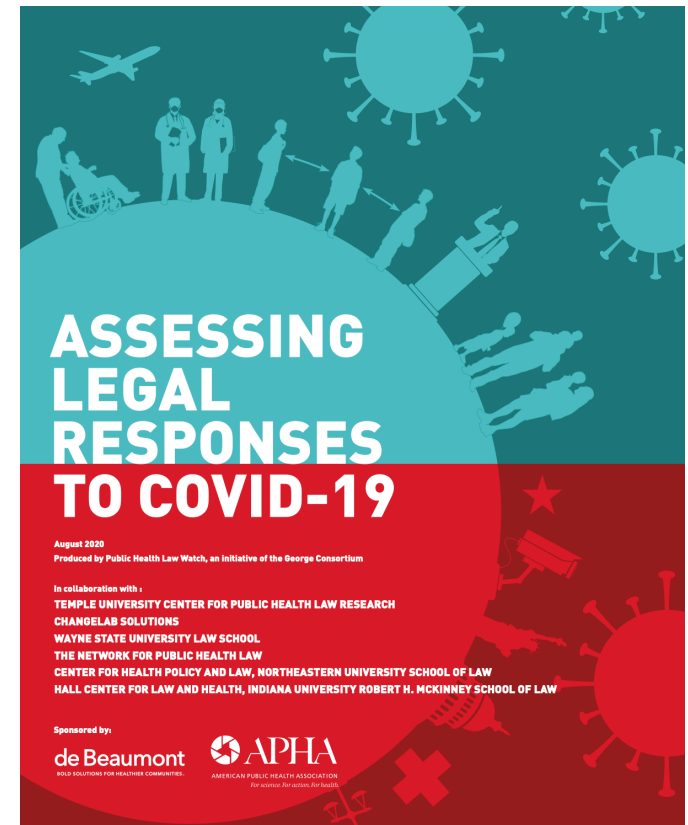
Hall Render Professor of Law
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Indiana University Robert H. McKinney School of Law

Summary

- Lawsuits 101
 - Potential Defendants
 - Liability Theories
 - Existing Barriers
- Pre-COVID-19 Shields
- COVID-19 Health Care Provider Shields
- COVID-19 Re-Opening Shields
- Waivers of Liability (aka Exculpatory Clauses)
- Recommendations



Burris, S., de Guia, S., Gable, L., Levin, D.E., Parmet, W.E., Terry, N.P. (Eds.) (2020). Assessing Legal Responses to COVID-19. Boston: Public Health Law Watch.

Lawsuits 101

Potential Defendants

- During first peak, emergency departments were overrun and patient care threatened by shortages of staff, PPE, ICU beds, and ventilators. Some providers, many of whom were practicing outside of their usual specialties, used improvised equipment and even prescribed untested drugs
- As hospitals reopened for routine care or elective surgeries, non-COVID patients faced the risk of COVID-19 as a hospital-acquired infection.
- Essential businesses that stayed open during the first peak, e.g., high-risk industries such as meatpacking or warehouse fulfillment
- Nursing homes for substandard infection control, failure to isolate residents with symptoms, sub-optimal staffing, lack of PPE, etc.
- Medium to high-risk businesses doing reopening, e.g., restaurants, gyms, personal care services, schools, and colleges

Liability Theories

- Most lawsuits claim that the defendant's failure to act with reasonable care caused the plaintiff's injuries (negligence). The standard of care in most cases will be ordinary negligence, posing the likely jury question whether the defendant acted as a reasonable person in all the circumstances.
- Cases brought against health care providers may be categorized as medical malpractice and turn on expert testimony as to the professional standard of care.
- Nursing home cases fortified by alleged breaches of state or federal regulatory standards applicable to long-term care facilities. False Claims Act claims also possible.
- A few cases will be brought alleging intentional or willful actions, possibly in an attempt to trigger exceptions in liability shields

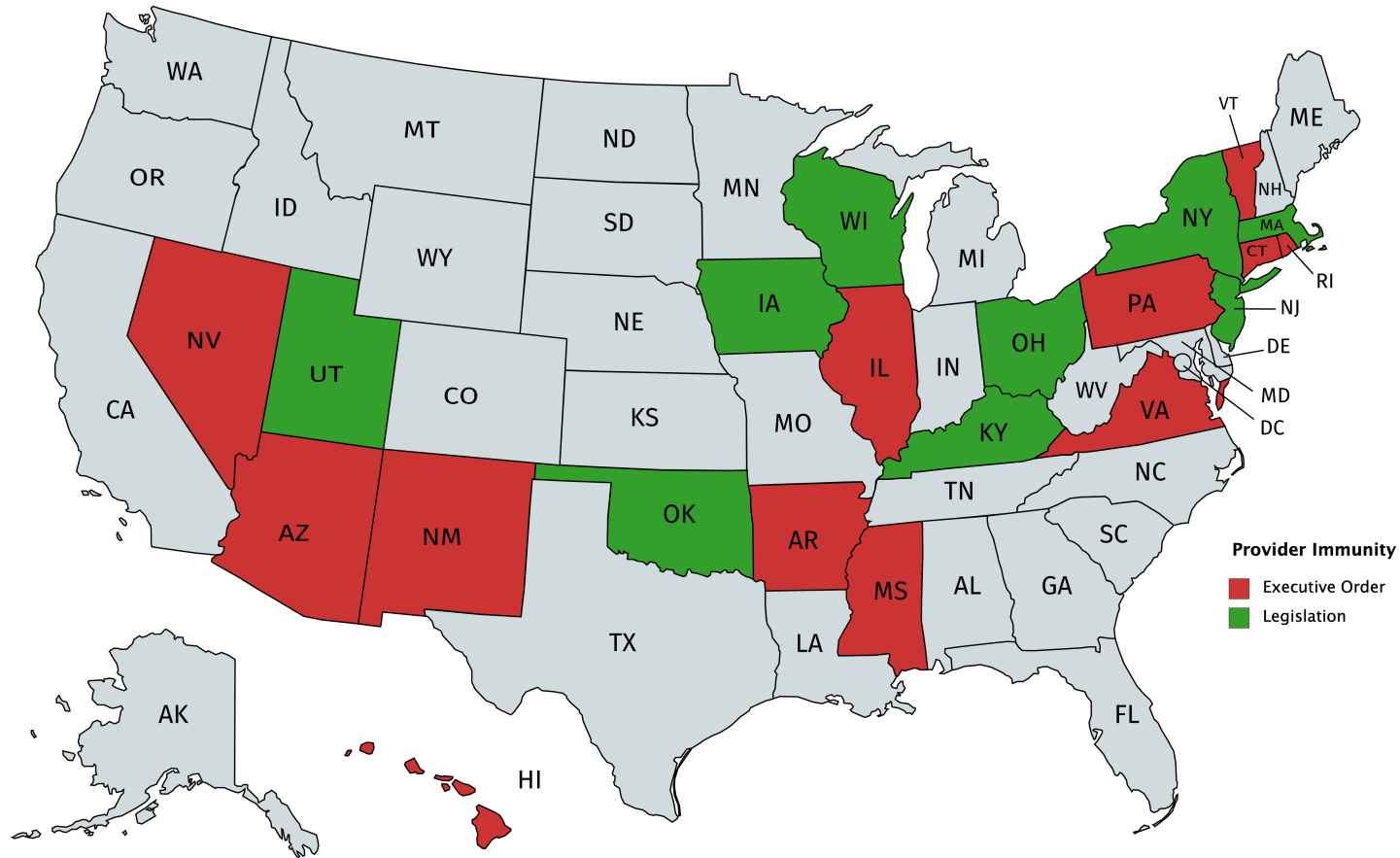
Existing Barriers

- Given the nature of COVID-19, viral transmission remains possible even where reasonable care is taken; proving that a lack of care caused transmission is therefore problematic.
- While a concurrent cause, such as a pre-existing lung disease, would not rule out liability, the unique and unknown features of the virus combined with multiple co-morbidities will create problems of proof for many plaintiffs.
- Nursing homes admissions contracts frequently include binding arbitration clauses that bar lawsuits.
- Health care providers also benefit from decades of state legislative action making them more difficult to sue or reducing damages.
- Workers Compensation creates immunity against negligent employers, hence novel theories such as Public Nuisance

Pre-COVID-19 Shields

- Federal
 - The Public Readiness and Emergency Preparedness (PREP) Act of 2005, applies to “covered countermeasures” tweaked by Families First Coronavirus Response Act
 - *Estate of Maglioli v. Andover Subacute Rehabilitation Center I* (D. NJ Aug. 12, 2020) (nursing home failed in attempt to use PREP Act to establish preemption, remove to federal court)
 - The Volunteer Protection Act (VPA) of 1997 immunizes volunteers who work for non-profits or government entities
 - The CARES Act of 2020 introduced a broader immunity for volunteering health care professionals without limitation as to profit/non-profit status of workplace
 - National Childhood Vaccine Injury Act of 1986 already shields manufacturers and provides a no-fault compensation scheme for those who suffer vaccine-related injuries
- State
 - Model State Emergency Powers Act of 2001
 - Immunity protects private actors who render “assistance or advice at the request of the State”

COVID-19 Health Care Provider Shields

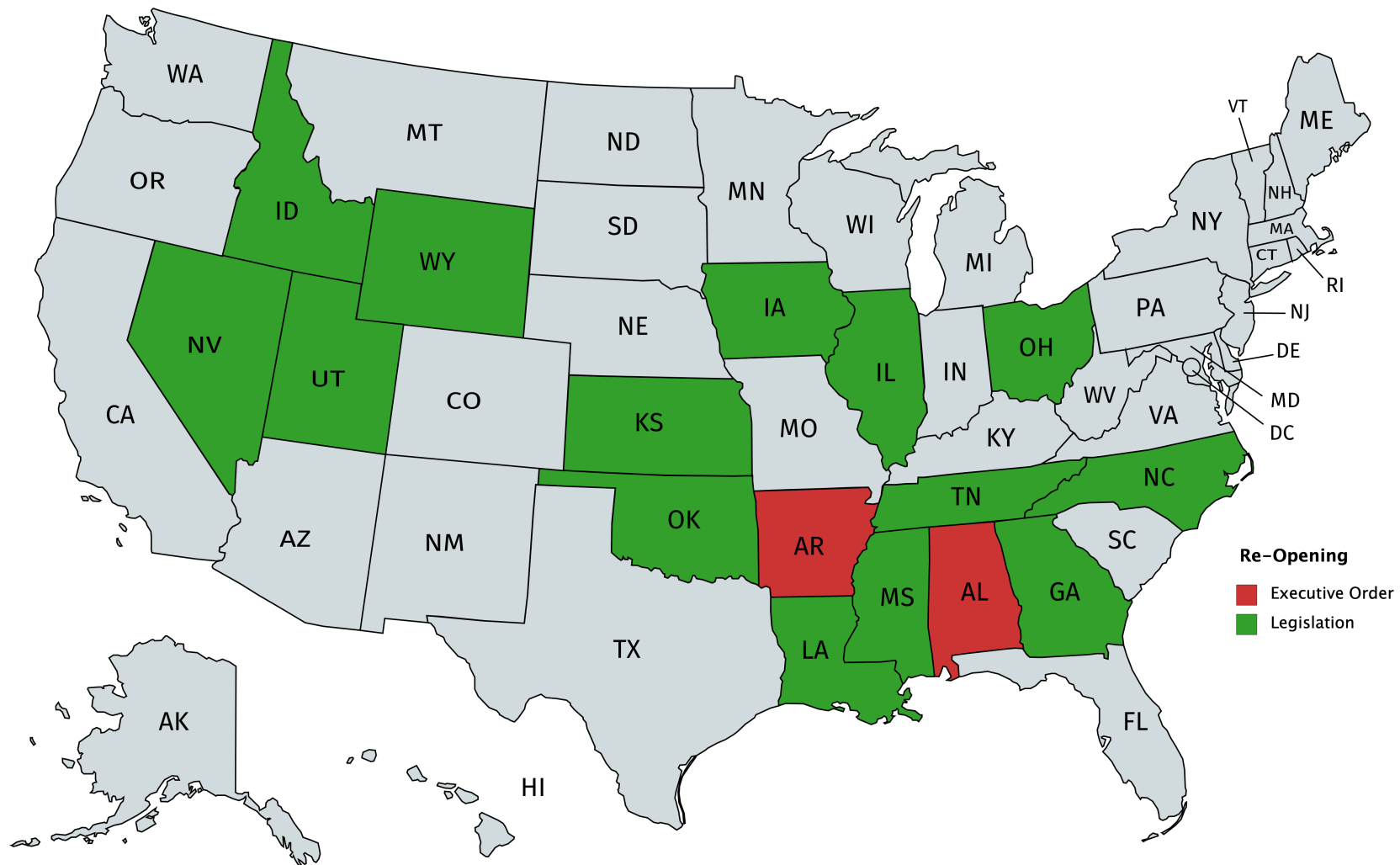


- 8 by statute, 11 by executive order
- Issues/variants:
 - Breadth of providers covered (e.g., nursing homes?)
 - Exceptions, e.g., willful and wanton
 - “Arising from” COVID-like questions going to connection between COVID and intervention
 - Duration/Expiry issues

- NY Public Health Law § 3081-82 (2020)
 - Broadest first wave immunity, reportedly drafted by health care provider and nursing home lobbyists
 - Explicitly immunizes health care professionals and facilities, including nursing homes, home care services, and even health care facility administrators and executives.
 - Scope of the immunity was particularly broad, extending to “the *diagnosis, prevention, or treatment* of COVID-19” and “the *care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration.*”
- NY Senate Bill S8835 (July 2020), partially repealed immunity restricting it to
 - “the diagnosis or treatment of COVID-19 or “the assessment or care of an individual as it relates to Covid-19, when such individual has a confirmed or suspected case of COVID-19.
 - Removes immunity for “arranging for health care services”

- Tended to track first wave, e.g., as providers poured into NE
- Since then, relatively little activity. Exceptions:
 - Ohio, House Bill 606, the Good Samaritan Expansion Bill, Sep. 2020, broad civil immunity to the health care community
 - Michigan, Executive Order 2020-30 had extremely broad immunity (regardless of how injury sustained). Rescinded Apr. 29, 2020. Aug. 10, 2020, Gov. Whitmer vetoed S.B. 899, that revived the immunity until Jan. 1, 2021
 - Connecticut next to rescind nursing home liability?

COVID-19 Re-Opening Shields



- 14 by statute, 2 by executive order
- Tended to track second wave/(early) re-opening
- Sunbelt and west, very little action in NE (cf. Provider Shields)
- Issues to Focus on:
 - Scope, e.g., only restaurants (La. Act No. 305)
 - Causative/arising from COVID-19 issues
 - Role of compliance/non-compliance with federal/state/local rules/guidances

Examples of Statutory Language

- Utah § 78B-4-517 (2020)
 - a person is immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the premises owned or operated by the person, or during an activity managed by the person
- Ohio HB 606
 - Qualified immunity to any person sued for causing harm by exposure to, or the transmission or contraction of, COVID-19
 - Prohibits class actions
 - Presumption that government orders, recommendations and guidelines related to COVID-19 are not admissible as evidence "that a duty of care, a new cause of action, or a substantive legal right has been established." (Section 2, (B))

Safe to Work Act, S.4317, 116th Cong. (2019-2020)

- GOP “line-in-the-sand” proviso in any new stimulus bill
- Retrospective, Exclusive Remedy for COVID-19 exposure claims
- Clear and Convincing evidence
- 1 year Statute of Limitations
- Safe harbor for businesses
 - Δ making reasonable efforts in light of all the circumstances to comply with the applicable government standards and guidance
 - Not gross negligence/willful conduct
 - Actual exposure to COVID-19 caused the injury
- Gross negligence/willful standard for health care providers
- Limitations on noneconomic and punitive damages

Waivers of Liability (aka Exculpatory Clauses)

COVID-19 Warning

We have taken enhanced health and safety measures—for you, our other Guests, and Cast Members. You must follow all posted instructions while visiting Walt Disney World Resort.

An inherent risk of exposure to COVID-19 exists in any public place where people are present. COVID-19 is an extremely contagious disease that can lead to severe illness and death. According to the [Centers for Disease Control and Prevention](#), senior citizens and guests with underlying medical conditions are especially vulnerable.

By visiting Walt Disney World Resort, you voluntarily assume all risks related to exposure to COVID-19.

Help keep each other healthy.

**RELEASE AND ASSUMPTION OF RISK
FOR EXPOSURE TO OR INFECTION WITH
COVID-19 AT OREGON BAR EXAM**

I acknowledge that in spite of all of the policies and procedures in place to protect test-takers, attending any bar examination could lead to my exposure to or infection with COVID-19. COVID-19, also known as Coronavirus, is a highly contagious virus and can result in serious illness, debilitating injury, or death.

I have evaluated my decision to sit for the July 2020 exam, in light of the risks of exposure to and infection with COVID-19, and I have consulted with my health providers about my individual risks as necessary. I understand that I could opt to withdraw from the exam and receive full credit toward one of the next two bar exams offered in Oregon or a partial refund at any time.

I have decided to sit for the exam despite the risk of exposure to or infection with COVID-19. I acknowledge that the Oregon State Bar, the Oregon State Board of Bar Examiners, and their directors, officers, agents, employees and volunteers (the "Oregon State Bar Parties") are absolutely immune from any liability related to administering the Oregon Bar Exam under ORS 9.537.

I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS, BOTH KNOWN AND UNKNOWN, EVEN IF ARISING FROM THE NEGLIGENCE OF THE OREGON STATE BAR PARTIES, TO THE FULLEST EXTENT PERMITTED BY LAW. I ASSUME FULL RESPONSIBILITY FOR MY PARTICIPATION IN THIS BAR EXAM.

I, FOR MYSELF AND ON BEHALF OF MY PARENTS, MY HEIRS, ASSIGNS, PERSONAL REPRESENTATIVES AND ESTATE HEREBY RELEASE, INDEMNIFY, AND HOLD HARMLESS THE OREGON STATE BAR PARTIES WITH RESPECT TO ANY AND ALL INJURY, DISABILITY, DEATH, OR LOSS OR DAMAGE TO PERSON OR PROPERTY, WHETHER ARISING FROM THE NEGLIGENCE OF THE OREGON STATE BAR PARTIES OR OTHERWISE, TO THE FULLEST EXTENT PERMITTED BY LAW.

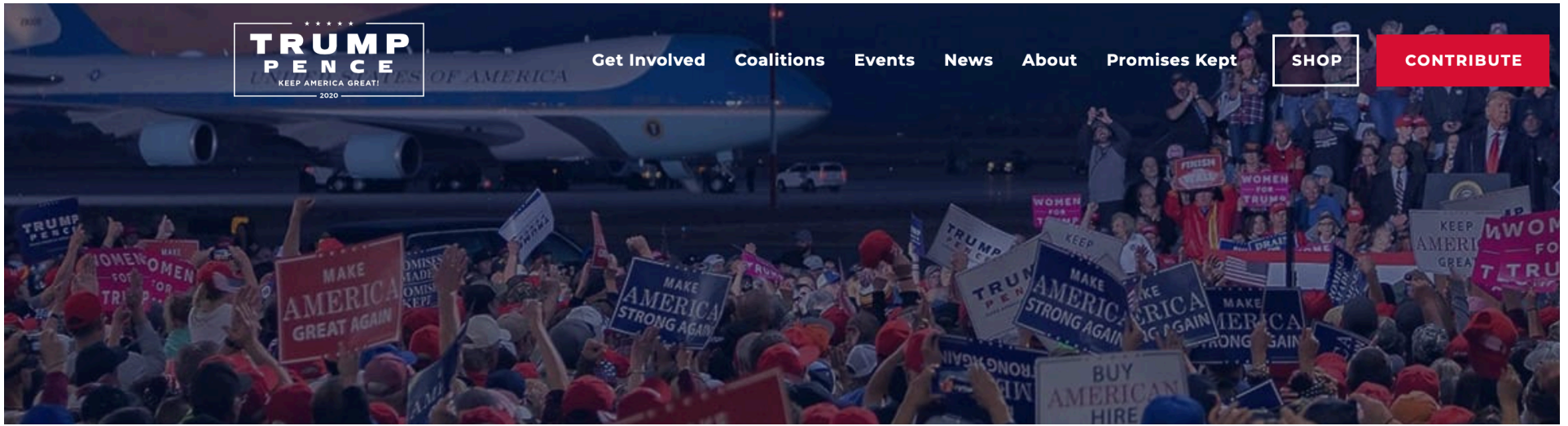
I have read the contents of this release and I sign this voluntarily and with full understanding of its contents.

Applicant Name (please print)

Signature

Date

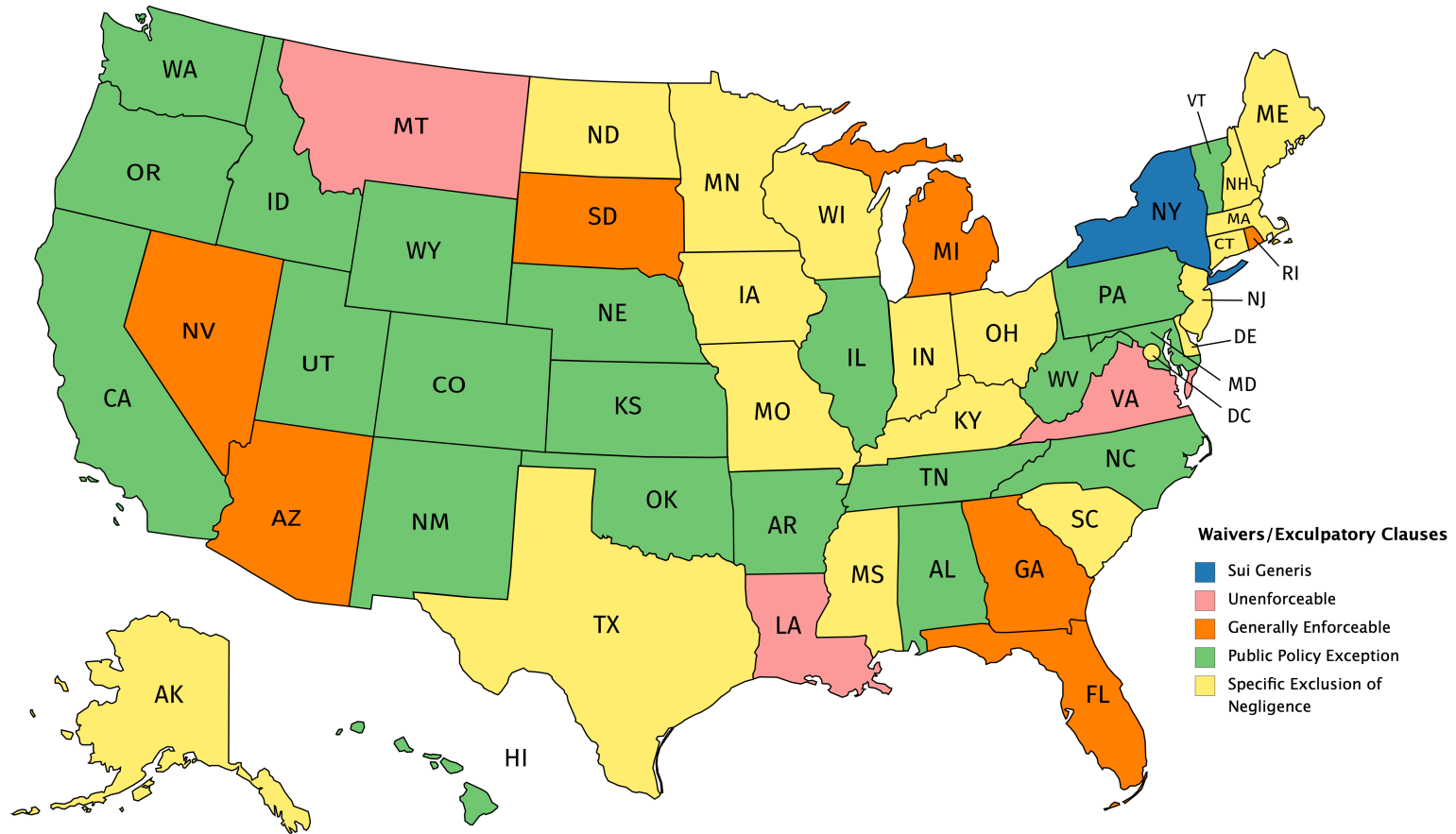
http://www.osbar.org/_docs/admissions/COVID/COVID-19_Code_of_ConductDeclaration.pdf



By clicking register below, you are acknowledging that an inherent risk of exposure to COVID-19 exists in any public place where people are present. By attending the Rally, you and any guests voluntarily assume all risks related to exposure to COVID-19 and agree not to hold Donald J. Trump for President, Inc.; BOK Center; ASM Global; or any of their affiliates, directors, officers, employees, agents, contractors, or volunteers liable for any illness or injury.

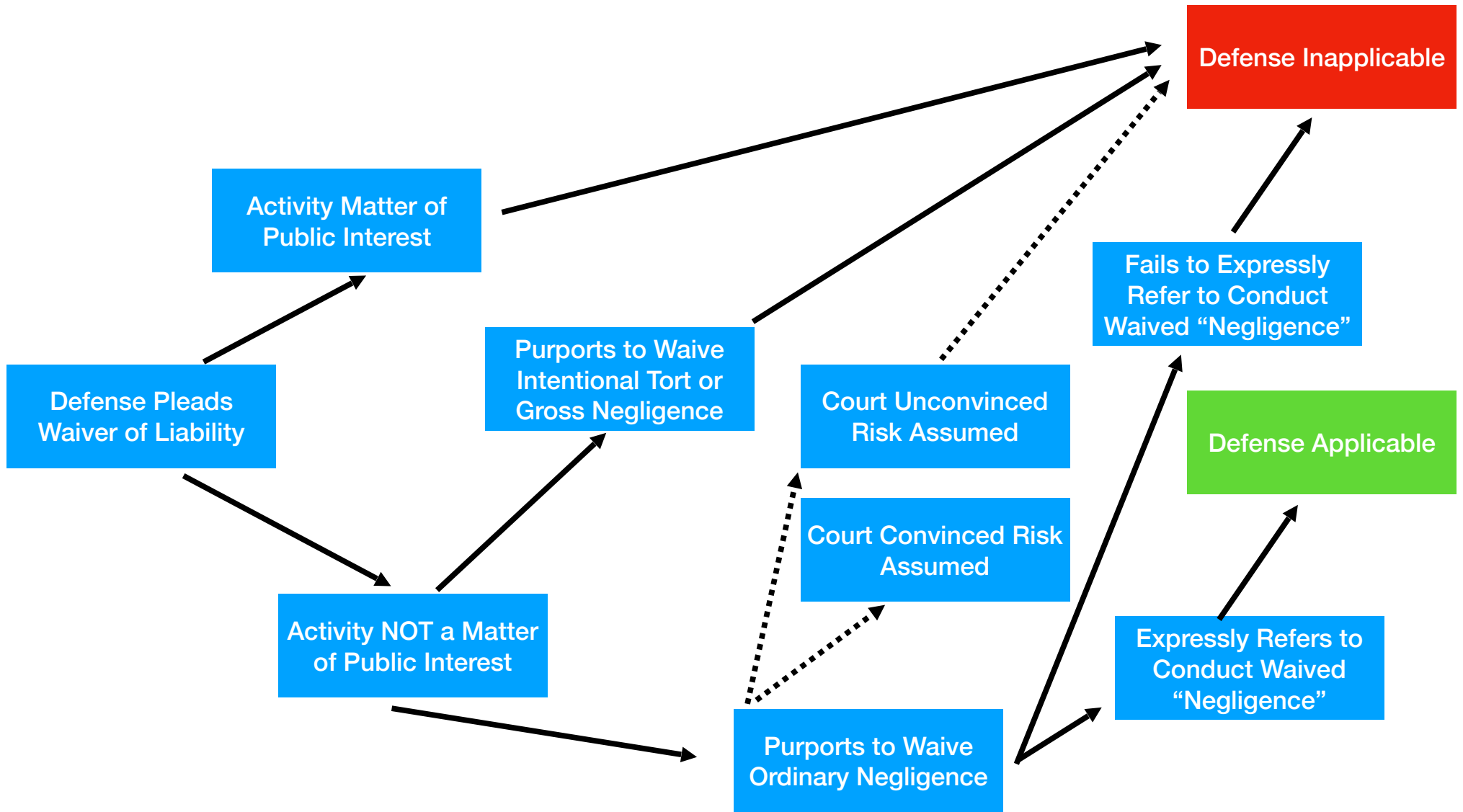
June, 2020

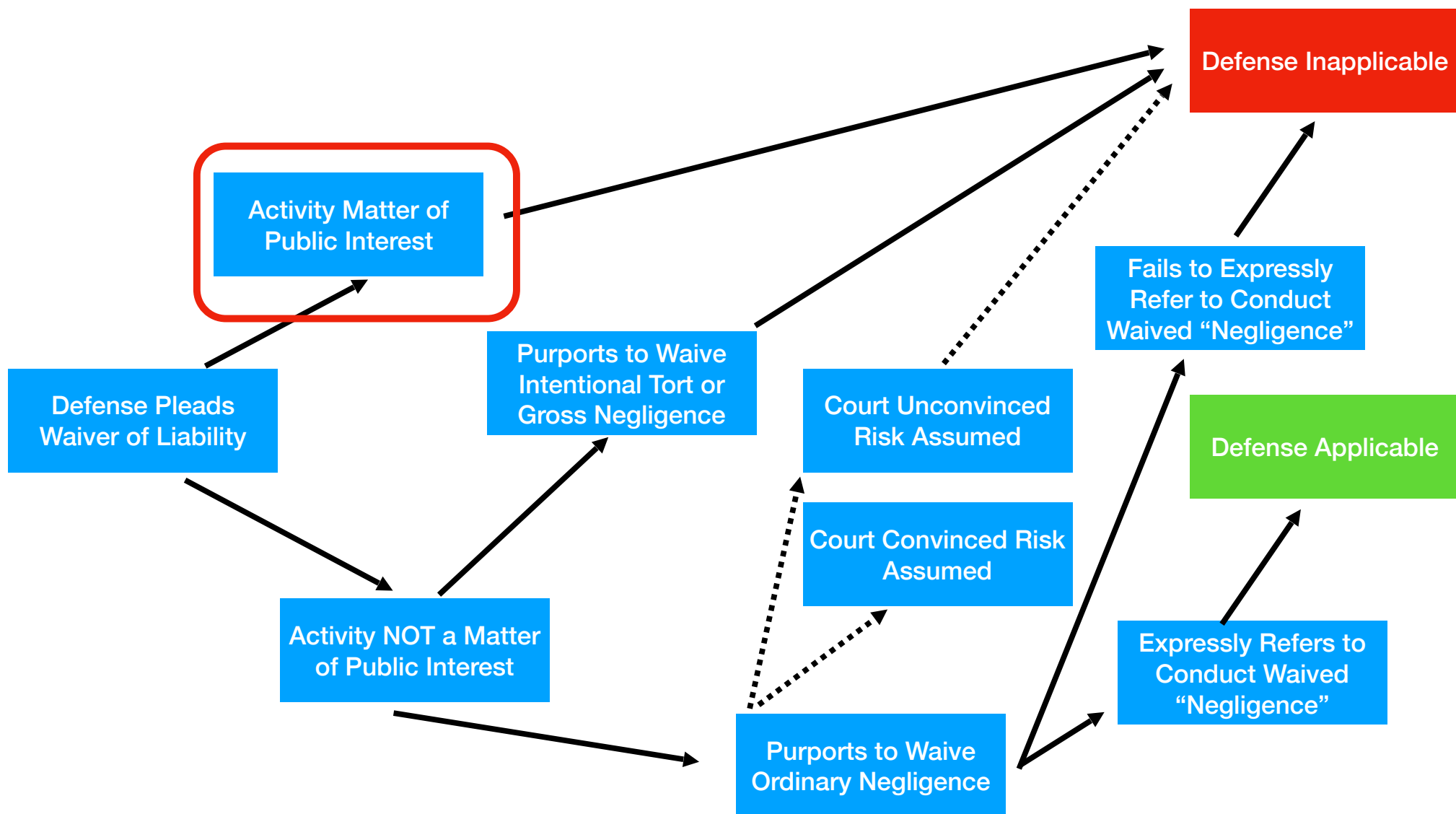
- Waivers/Exculpatory Clauses creatures of Contract more than Tort Law... now ConTort
- Originally waivers universally disapproved. Now, generally approved if recreational pursuits are being excluded
- Modern doctrine more complicated with more variants and, because of ill-advised doctrinal linkage to assumption of risk, increasingly designed just to confuse first-year law students!



Sui Generis—New York

- General Obligations Law § 5-326
 - Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any *pool, gymnasium, place of amusement or recreation, or similar establishment* and the user of such facilities, pursuant to which such owner or operator *receives a fee or other compensation for the use* of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be *deemed to be void as against public policy and wholly unenforceable*.
- Otherwise exculpatory clauses are generally enforceable, *Fazzinga v. Westchester Track Club*, 48 AD3d 410, 411 (2nd Dep't 2007)





“[T]he attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns *a business of a type generally thought suitable for public regulation*. The party seeking exculpation is engaged in *performing a service of great importance to the public*, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. *As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services*. In exercising a superior bargaining power the party confronts the public with a *standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence*. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.” (*Tunkl v. Regents of University of California* (1963), 60 Cal.2d 92, 98–101)

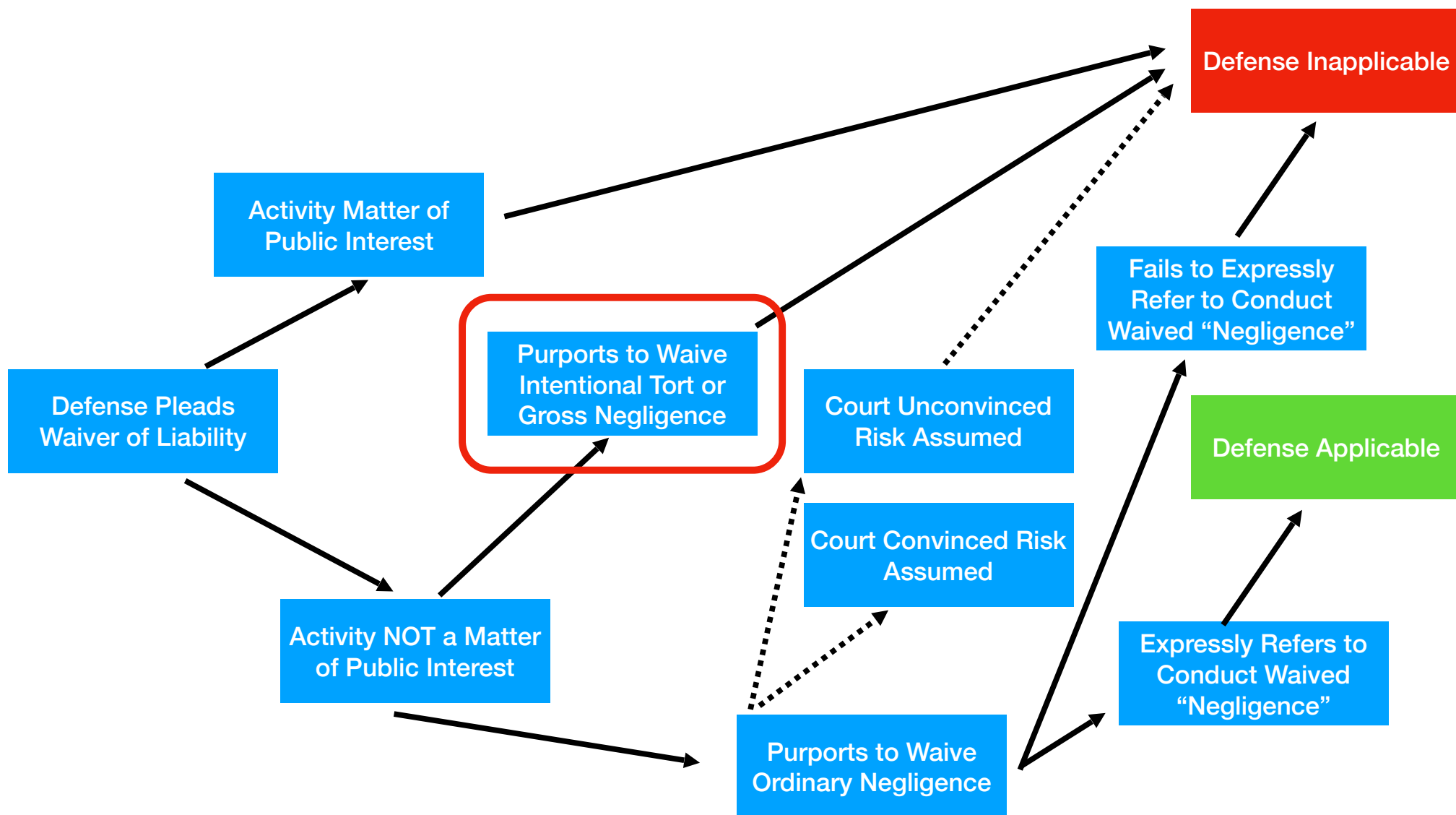
Public Interest

Yes

- Residential landlord
- Provider of child care services
- Provider of harbor boat berth
- Auto repair shop
- Banking services
- Escrow company
- Managed health care
- Medical research
- Interscholastic public high school activities

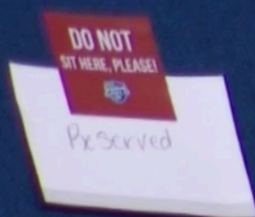
No

- Gymnasiums and fitness clubs (Cf. NY, *infra*)
- Auto and motorcycle racing events
- Ski resorts and ski equipment
- Bicycle races
- Skydiving or flying in “ultra light” aircraft
- Horseback riding
- White-water rafting
- Hypnotism
- Scuba diving



June 20

Tulsa, Oklahoma



CORONAVIRUS PANDEMIC

WAPO: TRUMP CAMPAIGN WORKERS REMOVED THOUSANDS OF STICKERS AT TULSA RALLY THAT PROMOTED SOCIAL DISTANCING

CORONAVIRUS PANDEMIC

GLOBALLY

TOTAL CASES	DEATHS
9,949,767	498,100

IN THE UNITED STATES

TOTAL CASES	DEATHS
2,507,874	125,504

SOURCE: JOHNS HOPKINS UNIVERSITY

TOMORROW 10P ET

**TRUMP
& THE LAW**
AFTER IMPEACHMENT
A JAKE TAPPER SPECIAL



CNN

9:34 PM ET

Recommendations

- Federal government:
 - There is no evidence that a broad federal shield is necessary. Demands for such not only are unwarranted but also typify unconscionable, opportunistic behavior by industries with poor safety records.
 - A broad federal shield is unprecedented, would face major obstacles in Congress, and is likely unconstitutional.
 - Any limited immunity granted at the federal level (for example, to protect vaccine manufacturers and prescribers) should be carefully calibrated and include a federal compensation scheme.

Recommendations

- State governments:
 - Calls for broader immunity shields should be resisted, particularly where the conduct for which the shield is sought was not in mitigation of the pandemic but actually increased the transmission.
 - State policymakers would better serve businesses and other stakeholders not by providing immunity from unreasonable care but by reducing uncertainty with transparent, data-driven guidance on reopening and allowing that to inform the existing and appropriate reasonable care standard.

Recommendations

- Courts:
 - Should interpret emergency COVID-19 shields narrowly to avoid creating unjustifiably broad immunities, recognize they were designed to protect front-line workers during a limited period of unprecedented demand, stress, and shortness of supplies.
 - Should carefully scrutinize the constitutionality of shields and not show the same deference to legislative action given to malpractice reform.
 - Should void the exculpatory clauses being inserted into theme park and other contracts.
 - First, they should be denied applicability unless they explicitly exclude liability for failing to take reasonable care.
 - Second, where they impact services of general public interest (such as political rallies) or necessity they fall outside the narrow category of recreational activities and should be voided.

Q & A

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