17-1558

United States Court of Appeals
for the Second Circuit

Liberian Community Association of Connecticut, et al.,
Plaintiffs-Appellants,

v.
Governor Dannel P. Malloy, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the
District of Connecticut – Honorable Alfred V. Covello
Case No. 3:16-cv-00201 (AVC)

Brief of Amici Curiae in
Support of Appellants and Reversal of the District Court

Robert M. Palumbos
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1111

Counsel for Amici Curiae George J. Annas, Jennifer Bard, Leo Beletsky, Micah Berman, Scott Burris, Erwin Chemerinsky, Linda C. Fentiman, Lance Gable, Lawrence O. Gostin, Jonathan Hafetz, Helen Hershkoff, Peter D. Jacobson, Jonathan Kahn, Renee M. Landers, Sylvia A. Law, Jenny S. Martinez, Seema Mohapatra, Burt Neuborne, Wendy Parmet, Aziz Rana, and Charity Scott

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATEMENT OF INTEREST

All parties have consented to the filing of this amici curiae brief through their counsel. Amici have authority to file under Fed. R. App. P. 29(a)(2).[1]

The following law professors submit this brief as amici curiae:

- George J. Annas, J.D., M.P.H., William Fairfield Warren Distinguished Professor and Director, Center for Health Law, Ethics and Human Rights, Boston University School of Public Health, School of Medicine and School of Law;
- Jennifer Bard, J.D., M.P.H., Ph.D., Professor of Law, University of Cincinnati College of Law;
- Leo Beletsky, J.D., M.P.H., Associate Professor of Law and Health Sciences, Northeastern University;
- Micah Berman, J.D., Associate Professor of Public Health and Law, Ohio State University Moritz College of Law and the College of Public Health;
- Scott Burris, J.D., Professor of Law and Public Health, Temple University Beasley School of Law and Temple University School of Public Health;
- Erwin Chemerinsky, J.D., Dean and Distinguished Professor of Law, University of California, Irvine School of Law;
- Linda C. Fentiman, J.D., L.L.M, Professor of Law, Elizabeth Haub School of Law Pace University;
- Lance Gable, J.D., M.P.H., Associate Dean, Wayne State University;
- Lawrence O. Gostin, J.D., Founding Linda D. & Timothy J. O'Neill Professor of Global Health Law; Faculty Director, O'Neil Institute for National and Global Health Law, Director, World Health

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amici state that: (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no other person contributed money that was intended to fund preparing or submitting this brief.

Organization Collaborating Center of Public Health Law & Human Rights, University Professor, Georgetown Law;

- Jonathan Hafetz, J.D., Professor of Law, Seton Hall University School of Law;
- Helen Hershkoff, J.D., Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties, Co-Director, Arthur Garfield Hays Civil Liberties Program, New York University School of Law;
- Peter D. Jacobson, J.D., M.P.H., Professor of Public Health Law and Policy and Director, Center for Law, Ethics and Health, University of Michigan School of Public Health;
- Jonathan Kahn, J.D., Ph.D., James E. Kelley Professor of Law, Mitchell Hamline School of Law;
- Renee M. Landers, J.D., Professor of Law and Director of Health Law Concentration, Suffolk University Law School;
- Sylvia A. Law, J.D., Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, Co-Director, Arthur Garfield Hays Civil Liberties Program, New York University School of Law;
- Jenny S. Martinez, J.D., Professor of Law and Warren Christopher Professor in the Practice of International Law and Diplomacy, Stanford Law School;
- Seema Mohapatra, J.D., M.P.H., Associate Professor of Law, Barry University Dwayne O. Andreas School of Law;
- Burt Neuborne, J.D., Norman Dorsen Professor of Civil Liberties, Founding Legal Director, Brennan Center for Justice, New York University School of Law;
- Wendy Parmet, J.D., Associate Dean for Interdisciplinary Education & Research Support, Matthews Distinguished Professor of Law and Professor of Public Policy and Urban Affairs, Northeastern University;
- Aziz Rana, J.D., P.H.D., Professor of Law, Cornell Law School; and
- Charity Scott, J.D., M.S.C.M., Catherine C. Henson Professor of Law, Georgia State University College of Law.

Amici are scholars of constitutional and public health law, the latter of whom have focused their careers on health law and policy, advocating for state and

federal laws that promote health and human rights. Amici have a substantial interest in this case because it implicates important constitutional law and public health issues. Specifically, this case raises critical questions of how judicial review interacts with and can facilitate good public health outcomes.

Amici are well positioned to explain the operation of constitutional law principles and the importance of ensuring that public health decisions by the executive branch are based on scientific evidence and best practices in the field of public health. They file this brief to provide the court with additional information about the need to safeguard personal liberties in the context of infectious outbreaks and to protect the health and safety of the public through meaningful judicial review in this area.

ARGUMENT

This case addresses whether the Constitution limits a state's ability to impose unnecessary and overreaching restrictions on the movements of its residents ostensibly to prevent a public health event. In late 2014, several of the plaintiffs returned to their homes in Connecticut from Liberia, which was experiencing an Ebola outbreak. Although the United States Centers for Disease Control and Prevention ("CDC") had issued comprehensive guidance on monitoring individuals who had traveled from West African countries affected by Ebola, the State of Connecticut, through its Commissioner of Public Health, issued

an Ebola response plan that imposed greater restrictions on residents than those recommended by the CDC. The Commissioner provided no clear rationale for the additional restrictions. She then ordered several of the plaintiffs to be quarantined under Connecticut's more restrictive plan.

The district court held that the plaintiffs lacked standing for prospective relief and that the Commissioner was entitled to qualified immunity on the plaintiffs' claims for damages, even though the Commissioner had not provided the plaintiffs with a hearing or another opportunity to challenge their quarantine. This brief does not address the issue of standing, the application of qualified immunity to this case, or the details of what due process requires in similar circumstances. Rather, it addresses the district court's misguided view that state health officials have nearly unreviewable discretion in responding to outbreaks of disease. *See* Dist. Ct. Op. at 26-28. The district court relied on a limited consideration of judicial decisions and failed to recognize critical, well-established developments in the law that cabin official discretion.

Perhaps more importantly, the district court's holding reflected a mistaken view of public health policy. Extreme judicial deference to executive quarantine decisions is not necessary to promote good public health outcomes. To the contrary, meaningful judicial review to ensure the state's compliance with

established constitutional standards is actually conducive to public health in a number of critical respects.

Among other things, meaningful judicial review helps ensure that the executive branch responds to infectious outbreaks based on scientific evidence and best health practices, not concerns about political consequences or public fear. Such review is also an important bulwark against the historic use of quarantine decisions to target disempowered groups and individuals. And by encouraging evidence-based decision making, the application of legal norms prevents the enactment of policies that discourage medical professionals and public policy experts from providing critical assistance at the locations of an outbreak for fear of the deprivation of their liberties and discriminatory treatment upon their return. The grant of essentially unreviewable discretion to the executive branch in this area is not only bad for the people subject to arbitrary decision making, it is also bad for public health.

Appropriate responses to outbreaks occur within a framework of legal norms that provide for meaningful judicial review. To the extent the district court suggested otherwise in its decision, it fundamentally misunderstood the public health considerations at play in this area of the law and policy.

In Section 1, we provide several examples of disease outbreaks in which panic-based public health responses led to discriminatory and ineffective

outcomes. Section 2 argues that the application of well-established due process principles to public health decisions by the executive branch promotes better health outcomes. In Section 3, we apply the lessons from this brief to the Ebola outbreak in 2014, out of which this case arises.

1. Driven by fear and panic, public health officials often respond to disease outbreaks with ineffective and discriminatory actions that harm public health.

Since the late 19th century, there have been numerous reported cases of disease outbreaks in which public health officials responded with fear-based quarantines and other actions that did not contain the outbreak or promote public health. *See* Nancy Tomes, *The Making of a Germ Panic: Then and Now*, 90 American Journal of Public Health 191-98 (2000). In an outbreak, determining what is in the public's best interest with respect to the health of the collective is more nuanced than simply forcing infected or exposed individuals into locked spaces. According to the CDC, public health is a much broader concept that is defined as follows:

> Public health is the science of protecting and improving the health of families and communities through promotion of healthy lifestyles, research for disease and injury prevention and detection and control of infectious diseases.
>
> Overall, public health is concerned with protecting the health of entire populations. These populations can be as small as a local neighborhood, or as big as an entire country or region of the world.

> Public health professionals try to prevent problems from happening or recurring through implementing educational programs, recommending policies, administering services and conducting research – in contrast to clinical professionals like doctors and nurses, who focus primarily on treating individuals after they become sick or injured. Public health also works to limit health disparities. A large part of public health is promoting healthcare equity, quality and accessibility.

What is Public Health?, CDC Foundation, https://www.cdcfoundation.org/content/what-public-health.

Many historical responses to outbreaks demonstrate less effective public health interventions that result in vilification of immigrants, the poor, and other marginalized groups; public overreaction; stigmatization; non-compliance with public health directions; and the perpetuation of ineffective disease outbreak responses. *See, e.g.*, Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 Temp. L. Rev. 53, 61 (2007). Fortunately, in some of these instances, public health officials gradually learned from their mistakes resulting in more positive public health outcomes.

A. The Bubonic Plague.

An early example of a public health crisis that ultimately resulted in better outcomes was the 1900 outbreak of Bubonic Plague in San Francisco. *See* George J. Annas, Wendy K. Mariner, & Wendy E. Parmet, *Pandemic Preparedness: The Need for a Public Health—Not a Law Enforcement/National Security—Approach*,

ACLU 9 (2008). A city health official identified suspected Bubonic Plague bacteria during the autopsy of a Chinese man. *Id.* at 9. Under then-current regulations, a quarantine was established around Chinatown, with the effect of essentially closing in people of Asian descent. The government also forcibly vaccinated those who were quarantined and planned to travel with an experimental injection. *Id*. When this response was challenged, a federal district court concluded that the government's response violated the Fourteenth Amendment and was "not based upon any established distinction in the conditions that are supposed to attend this plague, or the persons exposed to its contagion." *Wong Wai v. Williamson*, 103 F. 1, 7 (N.D. Cal. 1900). Rather, the court noted that the response was "boldly directed against" people of Asian descent exclusively. *Id.*

Following the *Wong Wai* decision, city officials tried another approach by imposing a quarantine map around the homes of only Chinese-Americans. When the city's actions were challenged, the court found that the officials' actions were actually more likely to cause the plague to spread. *Jew Ho v. Williamson*, 103 F. 10, 24-27 (N.D. Cal. 1900); *see also* Annas, *supra*, at 9. Once again, the court struck down the quarantine because it violated the Fourteenth Amendment. *Jew Ho*, 103 F. at 24-27.

Finally, the government developed a more refined and considered approach. When the plague appeared again, city officials worked to create a strategy to

eradicate the rodents whose fleas carried the illness and the garbage that attracted the rodents in order to control the spread of disease at its source. Annas, *supra*, at 9. That response effectively controlled the plague.

B. Smallpox.

Examples of how public health officials have addressed smallpox outbreaks also demonstrate how more thoughtful responses promote good public health policy. Although smallpox may affect people of all classes, historic public health responses blamed immigrants and the poor as "ignorant and dangerous people whose liberty had to be restrained for the common goal of fighting smallpox." *Id.* In 1894, Milwaukee officials responded to a smallpox outbreak by quarantining immigrants and poor people. That response did nothing to contain the illness, and only caused distrust and rioting. *Id*.

By contrast, in a later outbreak in 1947, New York City public health officials worked to educate the public about smallpox and instituted a large-scale voluntary vaccination program. *Id.* at 10. Because the educational campaign helped to show the importance of vaccination, the population viewed the program as an effort by the city to help its citizens rather than attack them. *Id.* The result was one of the largest voluntary vaccination campaigns in the world. Most importantly, the epidemic was halted. *Id.* Notably, the officials did not target particular groups for unequal treatment or foment unnecessary fear. By working to educate the public,

officials were able to demystify the spread of illness and provide solutions to a public that, justifiably, wanted to protect itself against smallpox. *Id.*

C. HIV/AIDS

These lessons of the first half of the twentieth century on positive public health responses were tested during the human immunodeficiency virus and acquired immunodeficiency syndrome ("HIV/AIDS") outbreak later in the century. Through the 1980s, there was a widespread social panic about the outbreak. During this time, the narrative was largely one of fear and stigmatization. *See* Michael S. Sinha & Wendy E. Parmet, *The Perils of Panic: Ebola, HIV, and the Intersection of Global Health and Law*, 42 Am. J.L. Med. 223, 227 (2016) (citing Peter Washer, *Emerging Infectious Diseases and Society* (2010)). "HIV taught us that stigma and fear drive people away from both testing and medical attention, which thereby perpetuates transmission." Paul K. Drain, *Ebola: Lessons Learned from HIV and Tuberculosis Epidemics*, 15 Lancet 146, 146 (2015). Gay men were evicted from their homes, fired from jobs, and denied medical care; foreigners were barred from entering the nation; and children were prohibited from attending school. For example:

- In 1985, the City of New York shuttered a bath house frequented by gay men because of a perceived risk of HIV transmission. A state court rejected the bath house's assertion that other less drastic means

may better address the public health issue. *City of N.Y. v. New St. Mark's Baths*, 130 Misc. 2d 911, aff'd, 122 A.D.2d 747 (1986).

- Following a 1991 military coup in Haiti, tens of thousands of refugees were redirected to Guantanamo Bay Naval Base in Cuba for "health and safety reasons." *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1034-35 (E.D.N.Y. 1993), *vacated by* Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994).[2] Refugees found to have HIV were subject to additional screening interviews and, unless repatriated to Haiti, were detained on the base in a separate camp. *Id.* at 1036-37. Those refugees were segregated from the rest of the refugees by razor wire, used garbage bags to protect themselves from the elements, slept on cots, were not permitted to leave without military escort, and were subject to military sweeps by soldiers in full riot gear. *Id.* at 1037.
- Many children with HIV were excluded from school due to panic about the "mystery of the virus and its communicability." *See Ray v. Sch. Dist. of DeSoto County*, 666 F. Supp. 1524, 1529 (1987). In one famous case of exclusion, Ryan White, a hemophiliac boy who was

[2] Although this decision was vacated by a Stipulated Order Approving Class Action Settlement Agreement dated February 22, 1994, the circumstances that gave rise to the decision and the reasoning of the decision itself remain instructive.

diagnosed with AIDS in 1984 after a blood transfusion, was expelled from school. *White v. W. Sch. Corp.*, No. 85-1192-C, 1985 U.S. Dist. LEXIS 16540, at *1 (S.D. Ind. Aug 23, 1985).

Medical and public health experts were gradually able to convince the public that the risk of transmission of HIV by children at school was essentially nonexistent and the children were permitted to return to school. *District 27 Cmty. Sch. Bd. by Granirer v. Bd. of Educ. of City of N.Y.*, 130 Misc. 2d 398, 413 (N.Y. Sup. Ct. 1986). After nearly two years, the Haitians were released. *Haitian Ctrs. Council, Inc.*, 823 F.Supp. at 1049-50. Also, the Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101–381, 104 Stat. 576 (codified in scattered sections of 42 U.S.C.), was passed to provide federal funding for treating persons with HIV.

During the outbreaks of the Bubonic plague, smallpox, and HIV, the initial responses by public health officials resulted in discriminatory and less effective outcomes caused in part by panic-driven public health policies. More targeted responses based on best evidence-based practices promoted better public health outcomes, including education of the public on the disease and its prevention; greater compliance and participation with public health programs; further development of science and policy for future outbreaks; and the protection of fundamental civil liberties for individuals and marginalized groups.

These examples show that to advance better public health, courts must be ready to offer meaningful due process review of public health decisions based on scientific evidence and best practices. Such review improves health outcomes and prevents the unfair or discriminatory imposition of quarantines and other measures in violation of due process norms.

2. Judicial standards for reviewing quarantine decisions based on constitutional due process principles have developed significantly since the 1905 *Jacobson* decision and provide predictable norms that promote positive public health outcomes.

There is an alternative to overbroad judicial deference to the executive branch that focuses on better public health outcomes. In particular, developments in due process law since the 1970s better support modern public health practices by incorporating specific protections into the assessment of public health officials' determinations to detain individuals for medical reasons, including a requirement to provide basic procedural due process protections and ensure that detention is the least restrictive means necessary. *See, e.g.*, *City of New York v. Antoinette R.*, 165 Misc. 2d 1014, 1015 (Sup. Ct. N.Y. 1995); *City of Newark v. J.S.*, 279 N.J. Super 178, 197 (1993); *Greene v. Edwards*, 164 W.Va. 326, 327 (1980). These developments are the subject of a significant body of academic literature. *See, e.g.*, Michael R. Ulrich, *Law and Politics, an Emerging Epidemic: A Call for Evidence-Based Public Health Law*, 42 Am. J.L. & Med. 256, 281 (2016); Annas, *supra*, at 32; Lawrence O' Gostin, *Jacobson v Massachusetts at 100 Years: Police Power &*

Civil Liberties in Tension, 95 Am. J. of Public Health 576-80 (2005); Wendy K. Mariner, George J. Annas, & Leonard H. Glantz, *Jacobson v Massachusetts: It's Not Your Great-Great Grandfather's Public Health Law*, 95 Am. J. of Public Health 584-87 (2005); Carlos A. Ball and Mark Barnes, *Public Health and Individual Rights: Tuberculosis Control and Detention Procedures in New York City*, 12 Yale Law & Policy Review 38, 51-60 (1994). The decisions of public health officials "must be based upon the latest knowledge of epidemiology, virology, bacteriology, and public health." *J.S.*, 279 N.J. Super at 197 (citing *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987), which reviewed decision to terminate a teacher with TB under the Rehabilitation Act of 1973). Further, "[c]ourts must guard against the risk that governmental action may be grounded in popular myths, irrational fears, or noxious fallacies rather than well-founded science." *Id.*

A. The misapplication of *Jacobson*

The district court misread *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), as standing for the proposition that nearly unassailable deference should be afforded to public health officials. This interpretation of the case fails to contextualize the decision within its time. *Jacobson* did not apply modern notions of due process because such standards had not been developed when *Jacobson* was decided. Nevertheless, even in the absence of modern

conceptions of due process, *Jacobson* offered a "systematic statement of individual rights as limitations imposed on government" by the Court. Lawrence O. Gostin & Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint* 128 (2016). In doing so, the Court established a baseline of constitutional protection that requires "deliberate governmental process to safeguard liberty." *Id.*

Jacobson concerned the right of the Commonwealth of Massachusetts to permit local boards of health "to require and enforce the vaccination and revaccination of all the inhabitants thereof" and to impose a fine of $5 on any individual who did not comply. *Jacobson*, 197 U.S. at 12. In 1902, the city of Cambridge adopted a regulation requiring mass vaccination against smallpox based on the opinion of the city's board of health that vaccination was warranted. *Id*. at 12-13. Henning Jacobson had refused to be vaccinated on the grounds that it could cause harmful consequences, particularly because a prior vaccination had caused him "extreme suffering for a long period of time." *Id*. at 36. The case was not about Jacobson's procedural due process rights—in fact he had had the full process of a criminal proceeding and was fined $5—but rather whether constitutional rights are implicated at all by government restrictions that affect the person. *See id*. at 13, 31. Also, *Jacobson* concerned a vaccination program, not a quarantine, and the individuals had the option of being vaccinated or paying a fine. They were not subjected to detention.

Despite these differences, and the Court's affirmation that liberty may sometimes be restrained to protect public health, the Court in *Jacobson* made clear that there were limits to the state's ability to abridge individual rights in the name of public health. In particular, the Court recognized that there may be cases in which "the police power of a state . . . may be exerted in such circumstance, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression." *Id.* at 38. Given the Court's admonition as well as subsequent developments in due process law, *Jacobson* does not stand as a preemptive force against all future developments in civil rights in the public health context, including through quarantine. *See* Lawrence O. Gostin & Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint* 134-35 (2016). Rather, courts should look to due process law in order to provide meaningful review in quarantine scenarios.

B. Due process is the correct mode of analysis for deprivations of constitutional and civil rights as the result of a public health measure.

Since *Jacobson* was decided, courts have developed a body of case law on due process protections in public health scenarios. Some of this law arises in the context of civil commitments for health purposes, a context that is analogous to

quarantine in that both restrict the individual's right of free movement outside of the context of criminal conviction.[3]

These cases establish that the court must guard against abuses of rights by consistently applying due process safeguards. *See J.S.*, 279 N.J. Super. at 191-92. While amici leave for the parties the task of laying out in detail the requirements of a due process analysis in this context, in general terms that analysis requires courts to weigh the "private interest that will be affected by the official action" against the interest of the government, including the costs of providing additional process. *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). A court must then balance these interests, considering the private interest's "risk of an erroneous deprivation" and the projected value of "additional or substitute procedural safeguards." *Id.* Put simply, the court needs to address whether the private interest in liberty, autonomy, respect, equal treatment, dignity, and accurate decision-making is outweighed by government interests in quick or no process, given that the government shares an interest in treating individuals with respect and dignity and in ensuring the accuracy of its own

[3] This brief does not discuss in detail the contours of the due process analysis or the requirements for qualified immunity. Of course, qualified immunity is related to the question of what judicial review is appropriate where plaintiffs seek damages. The focus of this brief, however, is to address the district court's mistaken assumption that public health protection requires giving officials unreviewable discretion. That argument touches on some, but not all, of what must be shown to overcome qualified immunity.

decisions. *See id.*; *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991). As discussed further below, that balancing of interests is precisely what will facilitate good public health outcomes.

Antoinette R., *J.S.*, and *Greene* are examples of cases in which the courts have applied these principles while reviewing public health orders to detain individuals with tuberculosis ("TB") who are either unwilling or unable to comply with medical directives. In these cases, the courts have recognized that the Constitution requires expansive procedural protections. *See* Annas, *supra*, at 33.

For instance, *J.S.* involved a TB patient with a history of failing to follow guidelines in and out of the hospital, including disappearances, releases against medical advice, and, on one occasion, wandering into the pediatric ward of the hospital. *J.S.*, 279 N.J. at 185-86. The patient was labeled non-compliant when he failed to show up to an appointment at a TB clinic. *Id.* Because of the risk to the patient and the public, the Newark board of health sought civil commitment. *Id.* at 189-90. Applying a due process analysis that had been used in other civil commitment cases, the court methodically analyzed the facts and weighed the patient's interest in remaining free against the state and public interest in civil commitment. *Id* at 203-04. It found by "clear and convincing" evidence that the patient had active TB and posed a risk to others. *Id.* at 203.

Likewise, in *Antoinette R.*, a similarly noncompliant patient was found by clear and convincing evidence to be unable to comply with her treatment in a less restrictive way—a home observation program—and was committed to a hospital setting for treatment. 165 Misc. 2d at 1019-20. The statutory procedural safeguards generally included "an appraisal of the risk posed to others and a review of less restrictive alternatives which were attempted or considered." 165 Misc. 2d. at 1015.

In *Greene*, a West Virginia patient with TB challenged his isolation under the State's Tuberculosis Control Act, arguing that he had been denied due process because the court-appointed counsel for his commitment hearing was not appointed until after the commencement of the proceeding and "could not have been properly prepared to defend" him. *Id.* at 330. Finding no provision in the statute that enumerated his due process rights, the court imported the requirements from the Act for the Involuntary Hospitalization of the Mentally Ill, holding that patients were entitled to:

> (1) an adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel and, if indigent, the right to appointed counsel; (3) the right to be present, cross-examine, confront, and present witnesses; (4) the standard of proof to warrant commitment to be by clear, cogent, and convincing evidence; and (5) the right to a verbatim transcript of the proceedings for purposes of appeal.

Greene, 164 W. Va. at 329. Under those standards, the court determined that Greene had been denied his due process right to counsel and granted his writ of habeas corpus. *Id.* at 330-31.

Similarly, in *Haitian Centers Council*, the court determined that Haitian refugees were detained for a public health purpose—isolation due to HIV infection—but were denied their due process rights. 823 F. Supp. at 1041-44. The court systematically analyzed the type and amount of procedure that the refugees were due and determined that the lack of counsel for screenings, their nearly-two-year detainment, the prison-like conditions in which they lived, and their lack of medical care violated their due process rights. *Id.* Underscoring the gravity of due process violations, the court noted that, without due process protections, the governmental actors "would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process . . . or to discriminate among them based on the color of their skin." *Id.* at 1042.

Courts applying a due process analysis to quarantine decisions may still decide that isolation is the best option, as the courts did in *Antoinette R.* and *J.S.* But the provision of due process before such a decision is critical to facilitating good health outcomes. The focus on the procedural due process protections in civil commitment cases can and should be imported to judicial review of executive responses to outbreaks.

3. The response to the outbreak of Ebola reflects the continued need for meaningful judicial review.

The panic surrounding the 2014 Ebola outbreak resulted in several unfortunate public health outcomes. For instance, Connecticut's quarantine orders unnecessarily detained medical professionals returning from regions of disease outbreak after assisting in treatment. The superfluous quarantines discouraged other medical professionals from assisting at the point of outbreak. Robert Gatter, *Ebola, Quarantine, and Flawed CDC Policy*, 23 U. Miami Bus. L. Rev. 375, 396-97 (2014-15). This "chilling effect" was identified by Doctors Without Borders, an organization engaging in such efforts, following the detention of Kaci Hickox, a nurse returning from a stint with the organization in Sierra Leone. *Id.* at 397. Connecticut's unnecessary quarantines provided precisely the wrong incentives to health professionals who could assist in preventing the outbreak from spreading.

In addition, the Ebola outbreak saw several instances of discrimination. *Id*. at 398. Teachers and students were excluded from classrooms due to their connections to West Africa, medical professionals who had treated Ebola patients were barred from businesses or had their children turned away from child care, and students at a school in New York City beat up two classmates from Senegal while yelling "Ebola" at them. *Id.* These events show how easy it is to repeat the history of discrimination in responses to outbreaks. History also teaches that such discriminatory responses tend to result in worse health outcomes.

In the case of a blanket quarantine of people arriving from nations with Ebola outbreaks—or even a narrower quarantine of those who worked in medical facilities with Ebola patients or otherwise had contact—the risk of erroneous deprivation is high. The lack of individualized assessment inherent in any blanket quarantine makes it likely that people will be quarantined unnecessarily, particularly because Ebola is only communicable by a person who displays the symptoms of the disease. Ctrs. for Disease Control, CS250586D, Facts about Ebola in the U.S., http://www.cdc.gov/vhf/ebola/pdf/infographic.pdf.

The state has a valid interest is in preventing the introduction or spread of Ebola, but quarantining an asymptomatic person without providing any due process simply because she has come from one of the nations affected by an Ebola outbreak does not align with the accepted medical understanding of Ebola transmission. *See* Wendy E. Parmet & Michael S. Sinha, *A Panic Foretold: Ebola in the United States*, 27 Critical Pub. Health 148, 152 (2017) ("Public health officials repeatedly warned that border closings and quarantining of asymptomatic individuals would be counterproductive"). The case of Kaci Hickox exemplifies this problem. Hickox was a nurse who travelled to Sierra Leone during the Ebola outbreak. *Id.* Upon her return to New Jersey, she was quarantined. *Id.* After being released in New Jersey, she then faced another quarantine order when she travelled home to Maine. *Id.* A court struck down the quarantine order, agreeing with

established medical science that quarantine of an asymptomatic individual does not achieve the state's goal. *See* Order Pending Hearing at 3, *Mayhew v. Hickox*, No. CV-2014-36 (Me. Dist. Ct., Fort Kent, Oct. 31, 2014).

The 2014 Ebola outbreak created widespread public panic about the possibility of the disease spreading to the United States. This panic, fomented by the media, drove the public health response. *See* Parmet, *supra*, at 148. When that happens, there is a significant risk that government action will be incorrectly tilted in favor of quarantine or other stern measures to quell public panic and to appear proactive. The proper focus should always be on public health.

This district court's willingness to rely on *Jacobson*—an inapposite case about the state's power to fine people who were non-compliant in a vaccination scheme—compared with its unwillingness to look to modern civil commitment case law reflects a misconception about the benefits of deference to public health officials. *See* Lawrence O. Gostin & Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint* 134-35, 138 (2016). While a court cannot substitute its own medical judgment for that of public health officials, it is fallacious to transfer this deference on medical judgment to the process by which the judgments are made. *See J.S.*, 279 N.J. Super. at 197. Failure to scrutinize the decision-making process of a quarantine order can result in deference to an order that defies "the latest knowledge of epidemiology, virology, bacteriology, and public health." *Id*. This

can have devastating results. *See, e.g.*, Annas, *supra*, at 9 (explaining that, absent judicial intervention in *Wong Wai* and *Jew Ho*, the public health response would have continued as a fear-based, discriminatory practice and there would have been no impetus to address the actual cause of the disease outbreak).

CONCLUSION

Meaningful judicial review of responses to infectious outbreaks is conducive to good public health outcomes. Courts today recognize that the application of constitutional standards to public health actions secures public health while reducing the risk of arbitrary, discriminatory, and ineffective responses to a disease outbreak. In particular, due process concepts developed under the civil commitment case law of the last thirty years reflects modern public health practices and encourage evidence-based decision making.

/s/ Robert M. Palumbos
Robert M. Palumbos
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1111

Counsel for Amici Curiae George J. Annas, Jennifer Bard, Leo Beletsky, Micah Berman, Scott Burris, Erwin Chemerinsky, Linda C. Fentiman, Lance Gable, Lawrence O. Gostin, Jonathan Hafetz, Helen Hershkoff, Peter D. Jacobson, Jonathan Kahn, Renee M. Landers, Sylvia A. Law, Jenny S. Martinez, Seema Mohapatra, Burt Neuborne, Wendy Parmet, Aziz Rana, and Charity Scott

July 10, 2017

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Local Rule 29.1 because this brief contains _____ words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared with a minimum font size of 14 point Times New Roman, a proportionally spaced typeface, using Microsoft Office Word 2016.

/s/ Robert M. Palumbos
Robert M. Palumbos
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1000

Counsel for Amici

July 10, 2017

CERTIFICATE OF SERVICE

I certify that on July 10, 2017, the foregoing was filed via the Court's ECF system and thus served on the following counsel of record:

Jeremy Creelan
Jeremy Ershow
Susan J. Kohlmann
Irene Ten Cate
JENNER & BLOCK LLP
39th Floor
919 3rd Avenue
New York, NY 10022

Michael Joel Wishnie
Yale Law School
Jerome N. Frank Legal Services Organization
P. O. Box 209090
New Haven, CT 06520

Counsel for Appellants

Robert Deichert
Assistant Attorney General
Connecticut Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford CT 06141

Counsel for Appellees

/s/ Robert M. Palumbos
Robert M. Palumbos
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103-4196
(215) 979-1000

Counsel for Amici Law Professors

DM1\7925681.11