Police power in paradise: Hawaii's quarantine rule is likely valid

By Jacob M. McIntosh and Joshua C. McDaniel

Compared to other states, Hawaii has seen few cases and deaths from COVID-19. It is easy to see why. Unlike other states, the Aloha State has no land borders. The surrounding Pacific Ocean that once attracted tourists now acts as an effective barrier in keeping infected individuals out. And on top of that geographic advantage, the state has adopted one of the strictest measures in the country: a fourteen-day quarantine for anyone who enters.

That policy is the subject of multiple lawsuits from Hawaiian residents and nonresidents hoping to travel to and from the mainland. *See For Our Rights v. Ige*, No. 1:20-cv-00268-DKW-RT (D. Haw. June 19, 2020); *Carmichael v. Ige*, No. 1:20-cv-00273 JAO-WRP (D. Haw. June 15, 2020). The plaintiffs claim the quarantine policy is unconstitutional, and the Department of Justice recently filed a statement of interest supporting them.

Just last Friday, U.S. District Judge Jill Otake preliminarily sided with the state, denying the plaintiffs' request for a temporary restraining order. But despite this setback, the litigation is not yet over and will likely wend its way to the Ninth Circuit.

These cases present an interesting case study on the interplay between individual rights and the states' power to curb a pandemic's spread. In the end, however, we think Judge Otake got it right. Although Hawaii's policy implicates fundamental rights to free travel, it will likely withstand court scrutiny.

Police power

We'll begin with the state's power. In contrast to the federal government's limited, enumerated powers, the states enjoy "police power"—the broad authority (subject to constitutional limits) to regulate health, safety, and morals. With this authority, a state's general ability to impose a quarantine is beyond dispute. Even a century ago, it was "well settled that a state . . . may establish quarantines against human beings, or animals, or plants, the coming in of which may expose the inhabitants, or the stock, or the trees, plants, or growing crops, to disease, injury, or destruction." *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87, 93 (1926). In short, as a general matter, "state quarantine laws and state laws for the purpose of preventing, eradicating, or controlling the spread of contagious or infectious diseases . . . are not repugnant to the Constitution of the United States."

Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380, 387 (1902). This of course makes perfect sense. Above all else, governments are instituted to protect lives.

Given the important interests at stake, courts will not override a state's health policy unless it is "palpably unreasonable and arbitrary," *Price v. People of State of Illinois*, 238 U.S. 446, 452 (1915), or a "plain, palpable invasion of [constitutional] rights," *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

Few would argue that Hawaii's quarantine policy—which has largely succeeded in limiting the global pandemic's spread—is arbitrary or unreasonable. Even so, as a part of its initiative to protect civil liberties during the COVID-19 pandemic, the DOJ has asserted that Hawaii's quarantine policy violates two constitutional rights: the privileges and immunities of citizenship and the right to travel. We'll consider each in turn.

Privileges and Immunities of citizenship

The Constitution guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., art. IV, § 2, cl. 1. At its core, the Privileges and Immunities clause, aims "to place the citizens of each State upon the same footing with citizens of other States." *Paul v. Virginia*, 8 Wall. 168, 180 (1869).

In practice, the clause serves as an antidiscrimination protection, invoked when a state law treats residents and nonresidents differently. When discrimination against out-of-state residents is shown, courts will strike down the law unless there is a "substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

That test poses a problem for any Privileges and Immunities clause attack on Hawaii's quarantine policy. On its face, the state's policy covers "all persons entering the State"—residents included. Office of the Governor, *Ninth Supplementary Proclamation Related to the COVID-19 Emergency* § IV.A, at 8 (June 10, 2020). Thus, while it's true that Texans, Iowans, and New Yorkers visiting the islands for a vacation must submit to the quarantine (likely defeating the point of a Hawaiian vacation), so must Hawaiians returning home from visiting the mainland. And while Hawaiians who never left the islands face no restrictions, the same is true of nonresidents already in the state before the quarantine was put in place. In short, the policy does not discriminate.

To be sure, the policy affects nonresidents disproportionately. For that reason, the DOJ argues that the policy violates the privileges and immunities of citizenship by *effectively* discriminating against nonresidents. But as the Tenth Circuit has explained, "[i]t is irrelevant to the Clause whether the practical effect of the [State's policy] burdens nonresidents disproportionately." *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1047 (10th Cir. 2009). Rather, what the clause forbids is facial or de facto "classification that creates a difference in status for residents and nonresidents." *Id.*; *see, e.g.*, *Chalker v. Birmingham & N. W. Ry. Co.*, 249 U.S. 522, 527 (1919).

The privileges and immunities clause thus "does not preclude disparity of treatment" between citizens and noncitizens "in the many situations where there are perfectly valid independent reasons for it." *Toomer*, 334 U.S. at 396. And blocking a deadly virus is likely the sort of reason that justifies a generally applicable and temporary quarantine policy, even if it impacts more nonresidents than residents. As a result, it seems unlikely that the challengers' discrimination claim will gain any traction in the courts.

Right to travel

The challengers' right to travel argument, by contrast, may present a closer call.

Although the Constitution has no express "right to travel" clause, courts have long recognized that the right to "free ingress and egress" between states is "obviously an essential part of our federal structure." *United States v. Guest,* 383 U.S. 745, 764 (1966). The "right to travel" is in fact a bundle of rights—encompassing freedom of movement across state lines, the right of nonresidents to be treated as welcome visitors, and the right of those who move to a new state to claim all the rights a state's native-born residents enjoy. These protections have been traced to article IV's Privileges and Immunities clause, the 14th amendment's Privileges or Immunities clause, and the Constitution's implicit guarantees. But wherever the right comes from, it at a minimum protects the right of any U.S. citizen to enter another state.

Judge Otake dismissed the challengers' right-to-travel challenge mainly because the quarantine is not in fact a ban. Under the policy, she reasoned, "individuals from other states may freely travel to Hawai‘i," provided that they "simply comply with the quarantine."

But while Judge Otake is correct that the quarantine is not an outright ban on travel, the Constitution protects the "right to *unimpeded* interstate travel." *Id.* at

767 (emphasis added). Like many constitutional rights, the right to travel can be infringed if it is excessively burdened.

By compelling a two-week quarantine on those entering the state, Hawaii has surely burdened the fundamental right to interstate travel. As a result, a court should proceed to ask whether Hawaii's quarantine is "necessary to promote a compelling governmental interest." *Dunn v. Blumstein*, 405 U.S. 330, 339 (1972). Because preventing a deadly disease from spreading is no doubt a compelling government interest, the policy's validity should turn on whether it is narrowly tailored to that end.

According to the DOJ, Hawaii can more narrowly tailor its policy. As a case in point, the DOJ points to Alaska, which allows state entrants to forgo the quarantine if they test negatively for the virus.

But identifying the point at which a state's COVID-19 policies are sufficiently tailored is no easy task. For instance, in evaluating Maine's similar 14-day quarantine rule, one federal district court noted that it was "not at all clear that there are any less restrictive means for the state to still meet [its] goal of curbing COVID-19." *Bayley's Campground Inc. v. Mills*, No. 2:20-CV-00176-LEW, 2020 WL 2791797, at *11 (D. Me. May 29, 2020). Pointing to the "scientific uncertainty" surrounding the disease, the court declined to second-guess Maine's policy, saying it was a matter of public policy "to be implemented by politicians and to be evaluated by voters, not by unelected judges." *Id.*

If anything, those concerns are heightened in Hawaii's case. The CDC has cautioned that while COVID-19 spreads through any type of travel, the biggest culprits are travel by air or sea—the only means of getting to Hawaii. And testing is by no means a perfect solution. Even putting aside questions of testing availability, COVID-19 tests can be wrong twenty percent of the time. All in all, there are "fairly debatable questions" about the reasonableness of Hawaii's quarantine policy, and judges may rightly be hesitant to plunge themselves into matters that are typically "not for the determination of courts, but for the legislative body." *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 191 (1938).

Thus, while we would stop short of saying Hawaii's quarantine requirement is immune to any right-to-travel challenge merely because it is not an outright travel ban, Judge Otake is likely correct that Hawaii's restriction "is a reasonable one." At least for now, the challengers have not presented a better alternative.

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