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The Validity of Tribal Checkpoints in South Dakota to Curb the Spread of COVID-19

Ann E. Tweedy[†]

This Article examines the question of whether, during a public health emergency, tribes located in a state that has adopted minimal protections to curb a pandemic may enact stronger protections for their own citizens and territories. Specifically, may they do so, even when enforcement of the tribes' protections causes inconvenience to those simply passing through the reservations and when the regulations affect nonmember residents of the reservations? If we take the Supreme Court at its word, tribes are within their rights in adopting and enforcing regulations designed to protect their citizens and other reservation residents from a public health emergency, even if these regulations affect nonmembers. While the Supreme Court's common law test for tribal jurisdiction over nonmembers is notoriously muddy, the relevant portion of the test in these circumstances measures nonmember threats or direct effects on a tribe's health or welfare. Given the existential threat that the pandemic poses to tribes and Native individuals and the lax approach of states like South Dakota in protecting public health, it is hard to escape the conclusion that, if the requirements of the Montana test ever can be met, they are met in these circumstances.

I. INTRODUCTION

Well over a year after it began, the COVID-19 pandemic continues to rage. As of this writing in August 2021, there have been over 215 million known cases of COVID-19 worldwide and over four million deaths, with over 650,000 of those deaths having occurred in the United States alone.¹ Late in 2019, the disease was discovered in China, with

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¹ *COVID Live Update*, WORLDOMETER, <https://www.worldometers.info/coronavirus/> [<https://perma.cc/KN8L-FCN6>] (last accessed Aug. 27, 2021).

the first case arising there in November or December 2019.² By mid-January, it had begun to spread beyond China, with the earliest case outside of that country reported in Thailand on January 13, 2020.³ The virus then began to spread rapidly throughout the world, producing the first known United States case on January 21.⁴ On January 30, the World Health Organization (WHO) declared the virus a World Health Emergency, and the Trump Administration followed suit the next day, declaring it a public health emergency.⁵ This was followed by the United States President's formal proclamation of a state of emergency on March 13, 2020.⁶

Within the United States, the governmental responses have been widely variable. At the national level, there was a sharp divide between the Trump Administration's response, which was described as "inconsistent and incoherent,"⁷ with a prominent White House historian noting pointedly that officials have "[c]learly . . . not told the truth" and that they have "politicize[d] attempts to save people's lives,"⁸ and the Biden Administration's approach, which has been described as "[d]riven by science, data and public health priorities," with the caveat that the public health system itself is in need of crucial improvements in management and implementation to function more effectively.⁹ Additionally, although federal powers such as the commerce power confer some

² Grace Hauck et al., *Five Months in: A Timeline of How COVID-19 Has Unfolded in the US*, USA TODAY (May 27, 2020), <https://www.usatoday.com/in-depth/news/nation/2020/04/21/coronavirus-updates-how-covid-19-unfolded-u-s-timeline/2990956001/> [<https://perma.cc/2SJE-CLTX>].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Stephanie Soucheray, *Trump Declares COVID-19 National Emergency, Details Sweeping Testing Program*, CIDRAP (Mar. 13, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/03/trump-declares-covid-19-national-emergency-details-sweeping-testing-program> [<https://perma.cc/F42E-ZBNT>].

⁷ Editorial, *Reviving the US CDC*, 395 LANCET 1521 (2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31140-5/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31140-5/fulltext) [<https://perma.cc/42UE-8VY7>].

⁸ Grace Segers, *Historian on White House Response to COVID: "Clearly, They Have Not Told the Truth"*, CBS NEWS (May 29, 2020), <https://www.cbsnews.com/news/historian-john-barry-coronavirus-white-house-response/> [<https://perma.cc/RSY6-SWUX>]; see also Dan Diamond, *Trump Officials Celebrated Efforts to Change CDC Reports on Coronavirus, Emails Show*, WASH. POST (Apr. 9, 2021), <https://www.washingtonpost.com/health/2021/04/09/cdc-covid-political-interference/> [<https://perma.cc/LK66-WD4G>] ("Even as career government scientists worked to combat the virus, a cadre of Trump appointees was attempting to blunt the scientists' messages, edit their findings and equip the president with an alternate set of talking points."). The actions of the group of Trump officials described in the *Washington Post* article included ordering the manufacture of statistics of deaths that would allegedly be caused indirectly by public health measures, and the tone of their emails to each other when they succeeded in altering public health messages to the public was—at least on some occasions—exultant, replete with exclamation points and expressions like "yippee!" Diamond, *supra*.

⁹ Katie D. Schenk, *Biden's COVID Plan is Just a Beginning: The Public Health System Needs Wide-Ranging Reform to Address Weaknesses Exposed by the Pandemic*, SCI. AM. (Feb. 25, 2021), <https://www.scientificamerican.com/article/bidens-covid-plan-is-just-a-beginning/>

level of authority on the federal government to regulate public health, most public health measures in the United States have historically been enacted by state and local governments pursuant to broadly defined state police power.¹⁰

States and tribes were left for roughly the first year of the pandemic to individually determine what measures to enact to best protect public health within their own jurisdictions, a framework that produced wide-ranging results.¹¹ This variability was partly due to the Trump Administration's rudderless response to the pandemic—which included legally dubious orders to states to eliminate some public health protections¹² and federal favoritism among, and competition with, states for medical supplies¹³—and partly due to the fact that states' police power has traditionally been the most frequently invoked source of authority to regulate public health.¹⁴ Several states have imposed stringent

[<https://perma.cc/L3AP-F8U4>].

¹⁰ See, e.g., JOHN FABIAN WITT, *AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19* 4–5 (2020). Questions about the scope of federal authority to protect public health under the commerce power may well explain President Biden's cautious response to putting public health mandates in place once he entered into office. Although, as a presidential candidate, President Biden voiced support for a national mask mandate, he later clarified that what he actually meant was that he would attempt to convince all fifty state governors (and, failing that, individual counties, cities, and towns) to institute mask mandates, eventually suggesting that a president lacks the authority to order a nationwide mask mandate in the United States. Grace Hauck, *Biden Wants Mask Mandates Nationwide, but He Can't Actually Enforce Them. Here's What He Could Do Instead.*, USA TODAY (Nov. 11, 2020), <https://www.usatoday.com/story/news/nation/2020/11/11/joe-biden-national-face-mask-mandate-covid/6233249002> [<https://perma.cc/P3C6-HSYG>]; Andrew Solender, *Biden Backtracks on Mask Mandate Legality, Would Call Mayors to Circumvent Hostile Governors*, FORBES (Sept. 18, 2020), <https://www.forbes.com/sites/andrewsolender/2020/09/18/biden-backtracks-on-mask-mandate-legality-would-call-mayors-to-circumvent-hostile-governors/?sh=4076fdd033ef> [<https://perma.cc/8QSA-YR6H>]. Within the first two days of his presidential tenure, he did issue, as expected, executive orders requiring the wearing of masks in federal buildings and on federal lands and requiring the wearing of masks on public transportation. Exec. Order No. 13,991, 86 Fed. Reg. 7,045 (Jan. 20, 2021); Exec. Order No. 13,998, 86 Fed. Reg. 7,205 (Jan. 21, 2021).

¹¹ Kamran Rahman & Alice Miranda Ollstein, *How States are Responding to Coronavirus, in 7 Maps*, POLITICO (Mar. 25, 2020), <https://www.politico.com/news/2020/03/24/coronavirus-state-response-maps-146144> [<https://perma.cc/W7SB-SJX2>].

¹² See, e.g., Peter Baker, *Firing a Salvo in Culture Wars, Trump Pushes for Churches to Reopen*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/2020/05/22/us/politics/trump-churches-coronavirus.html> [<https://perma.cc/LT3Y-LBTK>].

¹³ Jonathan Allen et al., *Want a Mask Contract or Some Ventilators? A White House Connection Helps*, NBC NEWS (Apr. 24, 2020), <https://www.nbcnews.com/politics/white-house/political-influence-skews-trump-s-coronavirus-response-n1191236> [<https://perma.cc/SP3A-WF5E>]; Keya Vakil, *Trump Told States to Get Their Own Medical Supplies. Then the Feds Started Seizing Them.*, COURIER NEWSROOM (May 12, 2020), <https://couriernewsroom.com/2020/04/21/trump-told-states-to-get-their-own-medical-supplies-then-the-feds-started-seizing-them/> [<https://perma.cc/2KB7-UBM6>].

¹⁴ WITT, *supra* note 10, at 4–5; see also Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 745–48, 778–79 (2007) (describing the origin of the notion of police power in United States Supreme Court jurisprudence and tying it to the powers reserved to the states in the Tenth Amendment of the United States Constitution).

measures, with others taking a more lax approach.¹⁵ Tribes have also varied in their responses,¹⁶ although their decisions generally have been less widely reported. For example, several tribes in South Dakota and throughout the country have implemented checkpoints, including the Makah Tribe, Zia Pueblo and other Pueblo tribes, the Crow Tribe, the Navajo Nation, and the Northern Cheyenne Tribe, as well as the two tribes that are the focus of this essay, the Cheyenne River Sioux Tribe and the Oglala Sioux Tribe or Oglala Lakota Nation.¹⁷ Tribal approaches to the checkpoints vary, with some tribes preventing entry by those who are neither tribal members nor reservation residents and others briefly stopping vehicles and then allowing most traffic to proceed.¹⁸ And many of the nation's 574 federally recognized tribes¹⁹ have

¹⁵ *Id.*

¹⁶ See, e.g., Kirsten Carlson, *Tribal Leaders Face Great Need and Don't Have Enough Resources to Respond to the Coronavirus Pandemic*, CONVERSATION (Mar. 25, 2020), <https://theconversation.com/tribal-leaders-face-great-need-and-dont-have-enough-resources-to-respond-to-the-coronavirus-pandemic-134372> [<https://perma.cc/D5E7-6W62>]; see also *Issues Affecting Native American Communities During the COVID-19 Crisis*, A.B.A. (Apr. 7, 2020), https://www.americanbar.org/groups/crsj/events_cle/recent/covid-native-americans/ [<https://perma.cc/WKB4-2YQK>].

¹⁷ See, e.g., Mitch Lagge, *Crow Tribe Puts up Roadside Checkpoints to Curb Travel to Reservation*, KTVQ (Mar. 31, 2020), <https://www.ktvq.com/news/coronavirus/crow-tribe-puts-up-roadside-checkpoints-to-curb-travel-to-reservation> [<https://web.archive.org/web/20200718054625/https://www.ktvq.com/news/coronavirus/crow-tribe-puts-up-roadside-checkpoints-to-curb-travel-to-reservation>]; Kathleen McLaughlin, *Montana's Tribal Nations Preserve COVID Restrictions to Preserve Their Cultures*, MONT. FREE PRESS (June 5, 2020), <https://montanafreepress.org/2020/06/05/montanas-tribal-nations-preserve-covid-restrictions-to-preserve-their-cultures/> [<https://perma.cc/F2VT-YMRZ>]; Marjorie Childress, *State Says It Will Help Erect Roadblocks to Pueblo Land*, N.M. IN DEPTH (Apr. 8, 2020), <https://nmindepth.com/2020/04/08/state-says-it-will-help-erect-roadblocks-to-pueblo-land/> [<https://perma.cc/37AW-LC6W>]; Simon Romero, *New Mexico Invokes Riot Law to Control Virus Near Navajo Nation*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2020/05/04/us/coronavirus-new-mexico-gallup-navajo.html> [<https://perma.cc/2ULE-8MB2>]; *Makah Tribe Public Announcement* (June 16, 2021), <https://makah.com/> [<https://perma.cc/MME5-Q3GR>]; OGLALA SIOUX TRIBE, ORDINANCE OF THE OGLALA SIOUX TRIBAL COUNCIL OF THE OGLALA SIOUX TRIBE ADOPTING A COVID-19 PINE RIDGE RESERVATION BORDER MONITORING HEALTH ORDER & COORDINATED BORDER MONITORING PROGRAM, No. 20-28 (Apr. 1, 2020); Arielle Zionts, *Cheyenne River Sioux Tribe Creates Checkpoints to Protect Against COVID-19*, RAPID CITY J. (May 9, 2020), https://rapidcityjournal.com/news/local/cheyenne-river-sioux-tribe-creates-checkpoints-to-protect-against-covid-19/article_948aee93-5131-5027-ad1f-2e4dd1783dd5.html [<https://perma.cc/ATV8-A77Y>].

¹⁸ Compare Makah Tribe Public Announcement, *supra* note 17 (reservation closed to nonmembers generally), and HEALTH ORDER 02-21 OF THE MAKAH TRIBAL COUNCIL (Feb. 16, 2021), <https://makah.com/wp-content/uploads/2021/02/health-order-02-21.pdf> [<https://perma.cc/5QM3-9QN6>] (same but delineating limited exceptions), with Lisa Kaczke, *Oglala Spokesman: Noem Is Putting Lives at Risk in Checkpoint Dispute*, SIOUX FALLS ARGUS LEADER (May 21, 2020), <https://www.argusleader.com/story/news/politics/2020/05/21/ogla-sioux-tribe-gov-kristi-noem-putting-lives-risk-checkpoint-dispute-coronavirus/5235329002/> [<https://perma.cc/CYC8-FWXP>] (noting that Oglala Spokesman Chase Iron Eyes has stated that over 99 percent of people are allowed to pass through the Oglala Lakota checkpoints after answering a few questions).

¹⁹ 85 Fed. Reg. 5,462 (Jan. 30, 2020) (listing federally recognized tribes and stating that there are currently 574).

adopted numerous other public health measures in response to COVID-19 as well.²⁰

In South Dakota, as further explained in Parts II and III, the state and many of the tribes whose reservations are within its borders have been at loggerheads due to diametrically opposed approaches to the necessity of public health measures.

This Article explores what measures tribal governments can take to enforce regulations and policies designed to protect their own citizens and others within their territories from COVID-19. Specifically, are the tribes in South Dakota legally able to operate checkpoints on state and federal highways running through their reservations to enforce regulatory measures designed to curb the spread of COVID-19? The short answer appears to be yes.

Part II examines South Dakota's approach to the pandemic and the State's resistance to tribal public health measures that affect nonmembers. Part III describes regulatory measures enacted by the Oglala Lakota Nation and the Cheyenne River Sioux Tribe in response to the pandemic. Part IV explains the Supreme Court's common law test for tribal civil regulatory jurisdiction and argues that its strictures are met in the unique circumstances of the pandemic. Part V elucidates the reasons that tribal members are particularly vulnerable to COVID-19. Part VI describes and critiques the Bureau of Indian Affairs' interim guidance relating to tribal checkpoints, and Part VII briefly explores the requirement that seizures be conducted reasonably. Part VIII discusses the difficulties posed by the *Montana* test in less exigent circumstances, and, finally, Part IX offers some concluding thoughts.

II. SOUTH DAKOTA'S APPROACH TO THE PANDEMIC AND ITS RESISTANCE TO TRIBAL PUBLIC HEALTH MEASURES THAT AFFECT NONMEMBERS

As further described below, South Dakota has taken an extremely hands-off approach to protecting its citizens from the pandemic, an approach that is in sharp contrast to the much more cautious approaches

²⁰ See, e.g., Press Release, Havasupai Tribal Council, The Havasupai Tribal Council to Suspend Tourism for 30 Days in Response to COVID-19 Pandemic (Mar. 14, 2020) (on file with journal); NAVAJO DEPT OF HEALTH, PUBLIC HEALTH EMERGENCY ORDER NO. 2020-007 (Apr. 17, 2020), <https://turtletalk.files.wordpress.com/2020/04/ndoh-public-health-emergency-order-2020-007-dikos-ntsaaigii-19.pdf> [<https://perma.cc/QC87-2LWV>]; Press Release, Hopi Tribe, Hopi Tribe Voices Support for the Navajo Nation's 57-Hour Curfew (Apr. 8, 2020) (on file with journal); Tohono O'odam Nation Exec. Order No. 2020-03 (Mar. 30, 2020), <https://turtletalk.files.wordpress.com/2020/03/authorizing-action-for-covid-19-public-health-emergency-2020-03.pdf> [<https://perma.cc/45RT-BGEQ>] (stating that visitors are not allowed in the borders of the reservation).

of the tribes within South Dakota's borders.²¹ Moreover, the State has not been content to refuse to impose public health protections in areas within which it has jurisdiction. Instead, as further described below, it has challenged tribal public health measures as well, particularly those that affect nonmembers attempting to enter or pass through tribal reservations.²²

A. South Dakota's Response to the Pandemic

South Dakota has been described as the state with the "least restrictive COVID-19 policy environment."²³ Throughout the pandemic, the state governor Kristi Noem has almost without fail refused to impose mandatory public health measures,²⁴ even going so far as to disparage the efficacy of masks.²⁵ Although Governor Noem has insisted that the rural character of South Dakota obviated the need for mandatory protective measures, pointedly claiming that "South Dakota is not New York City,"²⁶ over the course of the pandemic, the state went from being home to a single, notorious hotspot, the Smithfield meatpacking plant, to its status in April 2021 as the state with the second-highest per capita total number of COVID-19 infections in the country.²⁷ The

²¹ See generally Parts II.A and B, *infra*, and Part III, *infra*.

²² See generally Part II.B, *infra*.

²³ Dhaval Dave et al., *The Contagion Externality of a Superspreading Event: The Sturgis Motorcycle Rally and COVID-19*, 87 S. ECON. J. 769, 772 (2021); see also *id.* at 769–772.

²⁴ Chris Cillizza, *This GOP Governor Has It All Wrong on COVID-19*, CNN POLITICS (Mar. 2, 2021), <https://www.cnn.com/2021/03/02/politics/kristi-noem-covid-19-south-dakota-cpac/index.html> [<https://perma.cc/V3UN-5S56>]. But see Joe Sneve, *As Noem Scores Points for Her Pro-Liberty Approach to COVID-19, Here's a Look at What She's Done*, ARGUS LEADER (Mar. 2, 2021), <https://www.argusleader.com/story/news/2021/03/02/how-governor-kristi-noem-handled-covid-19-south-dakota/6876347002/> [<https://perma.cc/XH8F-85EH>] (detailing limited measures Governor Noem undertook in the early days of the pandemic).

²⁵ Stephen Groves, *Governor Pushes Schools to Remain Open, Disparages Masks*, AP NEWS (July 28, 2020), <https://apnews.com/article/sioux-falls-school-boards-south-dakota-kristi-noem-virus-outbreak-faedb1d1cb9faf7ac2046391466f461a> [<https://perma.cc/JS2H-374R>]; Governor Kristi Noem, *Gov. Noem: Update on South Dakota's COVID-19 Response*, RAPID CITY J. (Oct. 20, 2020), https://rapidcityjournal.com/opinion/gov-noem-update-on-south-dakota-s-covid-19-response/article_586e2456-23c0-5ba0-bb06-5fc78d084593.html [<https://perma.cc/S45R-QY6S>]; Joel Shannon, *The Dakotas Are 'As Bad As It Gets Anywhere in the World' for COVID-19*, USA TODAY (Nov. 14, 2020), <https://www.usatoday.com/story/news/health/2020/11/14/covid-19-north-south-dakota-masks-kristi-noem/6237635002/> [<https://perma.cc/9V26-YWAK>]; see also *Kurtenbach v. Howell*, 509 F. Supp. 3d 1145, 1152 (D.S.D. 2020) ("South Dakota has done little, if anything, to curtail the spread of the virus. The Governor has steadfastly refused to impose a statewide mask mandate. She has often questioned publicly the scientific fact that mask wearing prevents the virus from spreading.").

²⁶ Griff Witte, *South Dakota's Governor Resisted Ordering People to Stay Home. Now It Has One of the Nation's Largest Coronavirus Hot Spots.*, WASH. POST (Apr. 13, 2020), https://www.washingtonpost.com/national/south-dakotas-governor-resisted-ordering-people-to-stay-home-now-it-has-one-of-the-nations-largest-coronavirus-hot-spots/2020/04/13/5cff90fe-7daf-11ea-a3ee-13e1ae0a3571_story.html [<https://perma.cc/DR8G-MLD6>].

²⁷ Pam Louwagie, *South Dakota Under Fire for Stance on Fighting COVID-19*, STAR TRIB.

rural state, which is home to only about 885,000 people,²⁸ experienced a peak in new cases per day in mid-November 2020, when, on November 12, over two thousand new cases were identified.²⁹ Its peak in deaths per day came slightly later, with fifty-four deaths occurring on November 28, 2020.³⁰

In mid-November 2020, over 42 percent of the state's COVID-19 tests were coming back positive, which was well over four times higher than the national positivity rate at the time.³¹ There was a shortage of adult intensive care unit beds in the state, and South Dakota's largest

(Apr. 24, 2020), <https://www.startribune.com/south-dakota-s-stance-on-fighting-covid-19-draws-criticism/569897642/> [<https://perma.cc/M6UZ-GK3H>]; *Novel Coronavirus (Covid-19) Updates and Information*, S.D. DEP'T OF HEALTH, <https://doh.sd.gov/news/coronavirus.aspx> [<https://perma.cc/8K9Z-MU98>] (last accessed June 17, 2021); John Elfein, *Death Rates from Coronavirus (COVID-19) in the United States as of April 8, 2021, by State*, STATISTA, <https://www.statista.com/statistics/1109011/coronavirus-covid19-death-rates-us-by-state/> [<https://web.archive.org/web/20210408231621/https://www.statista.com/statistics/1109011/coronavirus-covid19-death-rates-us-by-state/>] (updated Apr. 8, 2021) [hereinafter "Elfein, April 8, 2021"]; see also John Elfein, *Rate of Coronavirus (COVID-19) Cases in the United States as of October 30, 2020, by State*, STATISTA, <https://www.statista.com/statistics/1109004/coronavirus-covid19-cases-rate-us-americans-by-state/> [<https://web.archive.org/web/20201101004856/https://www.statista.com/statistics/1109004/coronavirus-covid19-cases-rate-us-americans-by-state/>] (updated Oct. 30, 2020) (reflecting that South Dakota was ranked as the second state for total cases per capita as of October 30, 2020).

²⁸ *Quick Facts: South Dakota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/SD> [<https://perma.cc/4SXG-WGNL>].

²⁹ *Impact of Opening and Closing Decisions by State: South Dakota – New Confirmed Cases*, JOHNS HOPKINS UNIV. OF MED. CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/data/state-timeline/new-confirmed-cases/south-dakota/0> [<https://perma.cc/8EWW-DWBD>] (last accessed June 17, 2021).

³⁰ *Impact of Opening and Closing Decisions by State: South Dakota – New Deaths*, JOHNS HOPKINS UNIV. OF MED. CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/data/state-timeline/new-deaths/south-dakota/0> [<https://perma.cc/69Z2-C5R4>] (last accessed June 17, 2021).

³¹ Connor Perrett, *South Dakota's Governor Encouraged People to Go Shopping the Same Day the State Reported Its Highest Single-Day COVID-19 Death Total*, BUS. INSIDER (Nov. 29, 2020), <https://www.businessinsider.com/noem-shopping-south-dakota-coronavirus-death-total-2020-11> [<https://perma.cc/EAP5-9QCW>]; see also Tracy Connor, *S. Dakota COVID-19 Deaths Bust Record—and Noem Tweets About Shopping*, DAILY BEAST (Nov. 28, 2020), <https://www.thedailybeast.com/south-dakota-covid-19-deaths-bust-record-and-noem-tweets-about-shopping> [<https://perma.cc/P74P-WDFX>] (reporting a 43 percent positivity rate on November 28, 2020). The WHO prefers to see a percent positive rate of less than five percent, and "[a] higher percent positive suggests [both] higher transmission and that there are likely more people with coronavirus in the community who haven't been tested." David Dowdy & Gypsyamber D'Souza, *COVID-19 Testing: Understanding the "Percent Positive"*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Aug. 10, 2020), <https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html> [<https://perma.cc/C56S-NYQG>].

healthcare systems reported that “they were operating at or above capacity.”³² As of April 2021, South Dakota was ranked ninth in the country for per capita deaths from COVID-19,³³ a per capita death rate that was roughly “four times” that of “similarly populated but tightly compacted San Francisco.”³⁴ Dr. Ali Mokdad, a public health expert at the University of Washington, compared South Dakota’s approach to the disease and the resulting public health outcomes in the state to the approaches and outcomes in third world countries like Yemen and Somalia.³⁵

Although the pandemic got a relatively slow start in South Dakota, the state, as shown by the statistics cited above, had made up for lost time by late fall 2020.³⁶ Beyond Governor Noem’s aversion to public health directives, the explosion of cases in the state³⁷ was also undoubtedly attributable to her encouragement of large-scale public events, such as the Sturgis motorcycle rally,³⁸ the fireworks display at Mount Rushmore over the Fourth of July,³⁹ and a large country music concert

³² Stephen Groves, *South Dakota’s Noem Defends Forgoing Masks as Virus Surges*, BILLINGS GAZETTE (Nov. 18, 2020), https://billingsgazette.com/news/state-and-regional/govt-and-politics/south-dakotas-noem-defends-forgoing-masks-as-virus-surges/article_beaa2929-7041-5281-acec-c6bdd01171d2.html [<https://perma.cc/6Y39-3S5K>] [hereinafter Groves, *South Dakota’s Noem Defends*].

³³ Elflein, April 8, 2021, *supra* note 27.

³⁴ Stephen Rodrick, *The Covid Queen of South Dakota*, ROLLING STONE (Mar. 16, 2021), <https://www.rollingstone.com/politics/politics-features/south-dakota-kristi-noem-covid-1142068/> [<https://perma.cc/SSH4-VPZ7>]; *accord Bay Area COVID-19 Death Rates*, ABC 7 NEWS (Apr. 10, 2021), <https://flo.uri.sh/visualisation/5118310/embed> [<https://perma.cc/4HND-ANGD>] (reporting 57 deaths per 100,000 people due to COVID-19 in San Francisco County as of April 10, 2021).

³⁵ Groves, *South Dakota’s Noem Defends*, *supra* note 32.

³⁶ *See, e.g.*, Editorial Board, *Our View: Maine Needs No Advice about COVID from South Dakota*, PORTLAND PRESS HERALD (Oct. 29, 2020), <https://pressherald.com/2020/10/29/our-view-maine-needs-no-advice-from-south-dakota/> [<https://perma.cc/ESJ6-L38V>].

³⁷ *See id.* (reporting that cases had “exploded” in South Dakota by fall 2020).

³⁸ *See, e.g.*, Rodrick, *supra* note 34.

³⁹ *See, e.g.*, Betsy Klein, *Trump Uses Mount Rushmore Address to Rail Against Removal of Monuments*, CNN POLITICS (July 4, 2020), <https://www.cnn.com/2020/07/03/politics/trump-mount-rushmore-fireworks/index.html> [<https://perma.cc/8AWM-N6VW>]. The fireworks display was particularly disrespectful to the tribes whose reservations are located within the boundaries of South Dakota because of the sacredness of the Black Hills. Juliet Eilperin et al., *Rocket’s Red Glare and Protests: Trump’s Mount Rushmore Fireworks Anger Tribes*, WASH. POST (July 2, 2020), <https://www.washingtonpost.com/climate-environment/2020/07/02/mount-rushmore-protest-sioux-trump/> [<https://perma.cc/DGR7-VUYV>]; *see also* Ann E. Tweedy, *How Allotment-Era Literature Can Inform Current Controversies about Tribal Jurisdiction and Reservation Diminishment*, 82 U. TORONTO Q. 924, 936 (2013) (citing John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RES. 40 (2001) (describing the sacredness of the Black Hills)). Moreover, the state appeared to retaliate against Native protesters—one activist was charged with four felonies for writing on a police shield, and nineteen other protesters were also charged. Rodrick, *supra* note 34; Darren Thompson, *All Charges Dropped Against Mt. Rushmore Protesters Except NDN Collective’s Nick Tilsen Who Must Fulfill Diversion Program*, NATIVE NEWS ONLINE (Mar. 24, 2021), <https://nativenewsonline.net/currents/all-charges-dropped-against-mt-rushmore-protesters-except-ndn-collective-s-nick-tilsen-who-must-fulfill-diversion-program>

that served as the centerpiece to an annual hunting trade show, which Governor Noem organized and hosted in October 2020.⁴⁰ In addition to serving as vehicles for Noem to project her trademark defiant attitude, these events—held at a time when much of the rest of the country was following stay-at-home orders and adhering to other protective measures—indisputably had far-ranging public health consequences. For instance, scientists from the Centers for Disease Control and Prevention (CDC) and other public health organizations definitively traced 649 cases—including one that resulted in death—to the 2020 Sturgis motorcycle rally.⁴¹ And at least 118 South Dakota residents who attended the rally tested positive in the weeks following it.⁴² More dramatically, a group of economists estimated, using cell phone and other data, that the Sturgis motorcycle rally may have resulted in total public health costs in the range of \$3.8 to \$8.7 billion, with cases rising between 100 and 200 percent in Meade County (the site of the event) as a result of the rally.⁴³ Dr. William A. Haseltine, a former professor at Harvard Medical School and Harvard School of Public Health and chair and president of the non-profit ACCESS Health International, suggested that Governor Noem’s actions in “encouraging large-scale events in a pandemic . . . [were] equivalent to manslaughter.”⁴⁴

[<https://perma.cc/Z295-NERD>]. The vast majority of the charges were later dropped. Thompson, *supra*. The saga continued in 2021, with Noem suing the National Park Service to permit the fireworks display to go forward after her permit request was denied due to potential dangers to the park and staff, concerns about COVID-19, and tribal opposition. *See, e.g.*, Tommy Beer, *S. Dakota Gov. Noem Sues Biden Administration for Canceling Mount Rushmore Fireworks*, FORBES (Apr. 30, 2021), <https://www.forbes.com/sites/tommybeer/2021/04/30/s-dakota-gov-noem-sues-biden-administration-for-canceling-mount-rushmore-fireworks/> [<https://perma.cc/BJ4J-D7DF>].

⁴⁰ *See, e.g.*, Cory Allen Heidelberger, *Noem Show Goes on in Sioux Falls Today with New Singers, No Masks Required*, DAKOTA FREE PRESS (Oct. 24, 2020), <https://dakotafreepress.com/2020/10/24/noem-show-goes-on-in-sioux-falls-today-with-new-singers-no-masks-required/> [<https://perma.cc/U4KG-6UM5>]; *Governor Noem’s Sportmen’s Showcase*, S.D. DEP’T OF TOURISM <https://southdakotashowcase.com/media/> [<https://perma.cc/5VFJ-RWXF>] (last accessed Aug. 30, 2021); Joel Shannon, *South Dakota Dismisses ‘Elite Class of So-Called Experts,’ Carries on with State Fair After Sturgis Rally Fueled COVID-19 Surge*, USA TODAY (Sept. 4, 2020), <https://www.usatoday.com/story/news/nation/2020/09/03/south-dakota-covid-19-sturgis-rally-state-fair-kristi-noem/5709042002/> [<https://perma.cc/7477-6P5F>] (noting that Governor Noem also permitted the State Fair to go forward in early September 2020).

⁴¹ Rosalind J. Carter et al., *Widespread SARS-CoV-2 Transmission among Attendees at a Large Motorcycle Rally and their Contacts, 30 US Jurisdictions, August–September, 2020*, 73 *CLINICAL INFECTIOUS DISEASES* S106, S106, S109 (2021). The cases identified in the Carter et al. study that were linked to the rally included secondary and tertiary cases (i.e., those affecting close contacts of attendees and such contacts’ own close contacts). *Id.* Fifty-six percent of the cases identified arose in South Dakota or neighboring states. *Id.* at S107.

⁴² Shannon, *supra* note 40.

⁴³ Dave et al., *supra* note 23, at 772, 787.

⁴⁴ Shannon, *supra* note 25.

B. The State's Response to Tribal Public Health Measures

Understandably, the tribes whose reservations are located within the boundaries of South Dakota have tended to adopt a much more cautious approach.⁴⁵ Tribes have numerous reasons to appreciate the grave risks posed by the pandemic,⁴⁶ and, as further explained below, Native individuals are significantly more at risk of catching and dying from COVID-19 than are white individuals.⁴⁷ Some Tribes located within the borders of South Dakota have issued curfews and have prohibited non-essential travel.⁴⁸ A few Tribes have also utilized highway checkpoints

⁴⁵ See Kalen Goodluck, *Tribes Defend Themselves Against a Pandemic and South Dakota's State Government*, HIGH COUNTRY NEWS (Oct. 2, 2020), <https://www.hcn.org/articles/indigenous-affairs-covid19-tribes-defend-themselves-against-a-pandemic-and-south-dakotas-state-government> [<https://perma.cc/Q4WA-G826>] (“Tribal nations, whose citizens have been disproportionately impacted by the pandemic, have often maintained strict COVID-19 measures, including lockdowns, for protection, while non-Native governments in the U.S. and beyond have been loosening their public health orders.”).

⁴⁶ See, e.g., WITT, *supra* note 10, at 38 (“Government authorities left Native Americans to suffer infectious disease without help on countless occasions. Military officials deliberately spread disease among Native Americans by sending them infected materials.”); *id.* at 6 (noting that diseases brought by Europeans “killed as many as 90 percent of the 70 million or more people living in the Americas in 1492”); Matthew L.M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 STAN. L. REV. ONLINE 38, 42–43 (2020) (detailing the effects on Tribes and Native individuals caused by the influenza pandemic of 1918 and 1919 and the federal government’s “abysmally inadequate” response); Talha Burki, *COVID-19 among American Indians and Alaska Natives*, 21 LANCET NEWSDESK 325, 325 (2021), <https://www.thelancet.com/action/showPdf?pii=S1473-3099%2821%2900083-9> [<https://perma.cc/9A2U-ZJNM>] (noting that “pandemics tend to be particularly hard on American Indians and Alaska Natives” and that “[t]heir mortality rate from the 2009 H1N1 influenza was four times greater than the general population”); Alfred J. Sciarrino, *The Grapes of Wrath, Part II*, 8 J. MED. & L. 1, 5–6 (2004) (describing the outbreaks among Native Americans of smallpox and other diseases in the 1600s, 1700s, and 1800s).

⁴⁷ For example, a CDC report examining data from twenty-three states found that Native Americans and Alaska Natives were 3.5 times more likely to contract COVID-19 than whites and that Native Americans and Alaska Natives tended to become infected at a younger age than whites. Sarah M. Hatcher et al., *COVID-19 among American Indian & Alaska Native Persons—23 States, January 31–July 3, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1166, 1167 (2020). Data specific to South Dakota show a 67 percent higher death rate from COVID-19 among Native Americans compared to whites. S.D. DEP’T OF HEALTH, OFF. OF HEALTH STATS., PROVISIONAL MORTALITY REPORT, 2020-2021 7, <https://doh.sd.gov/documents/statistics/Mortality-Report-2020-2021.pdf> [<https://perma.cc/J5EP-VGPH>]; see also Aila Hoss, *COVID-19 & Tribes: The Structural Violence of Federal Indian Law*, 2 ARIZ. ST. L.J. ONLINE 162, 162–63, 168, 172–73 (2021) (explaining that, in May 2020, Navajo Nation had the highest per capita rate of COVID-19 infections in all of the United States and further noting that factors like the greater prevalence of diabetes among Native Americans, the prevalence of which is linked to historical trauma, and the lower prevalence of access to an adequate water supply make Native individuals at greater risk of complications from COVID-19 in the case of diabetes and at greater risk of contracting the disease in the case of lack of access to an adequate water supply).

⁴⁸ See, e.g., OGLALA SIOUX TRIBE, ORDINANCE NO. 20-26 (Mar. 31, 2020); Oglala Sioux Tribe Exec. Order 20-03 (Apr. 26, 2020) (imposing fourteen-day lockdown); see also Oglala Sioux Tribe Exec. Order 20-02 (Mar. 10, 2020) (imposing 72-hour lockdown); Cheyenne River Sioux Tribe Emergency Exec. Order No. 2.6-2020-CR (May 21, 2020); Cheyenne River Sioux Tribe, Emergency Exec. Order No. 2.5-2020-CR (undated); *Summary of CRST COVID-19 Emergency Executive Orders*, CHEYENNE RIVER SIOUX TRIBE (Apr. 20, 2020), <https://www.crstcoronavirusupdates.com/wp->

to enforce these and other requirements.⁴⁹ However, the protections these tribal governments have adopted have been hampered by the state's decision to take a minimalist approach to protecting its citizens, instead favoring economic activity and a notion of personal freedom that takes no account of harms caused to others.⁵⁰

Moreover, the governor of South Dakota, instead of simply accepting these Tribes' differing policy choices, has, as further explained below, responded aggressively and challenged tribal sovereignty to enact public health measures, particularly checkpoints on state and federal highways that run through the Tribes' reservations.⁵¹ Governor Noem's response is somewhat surprising because, at some points during the pandemic, she has voiced respect for tribal sovereignty in the context of public health regulations relating to the pandemic.⁵² However, it is possible that part of her outrage has been due to the fact that tribal checkpoints designed to keep nonmembers and non-residents from infecting tribal members constitute a role reversal of sorts. This is because, in the United States, historically, white communities have often painted Native persons and other subjugated minorities as a source of disease and have therefore enacted quarantine laws targeting such groups.⁵³ To at least some extent, this mentality that tribes are the source of disease (rather than its victims or potential victims) continues today.⁵⁴ It is possible that part of the reason that Governor Noem was determined to thwart the two Tribes' stringent public health measures was because, against this historical backdrop, the regulations may have been seen as

content/uploads/2020/04/Summary-of-COVID-19-Exec-Orders.pdf [https://perma.cc/LP2U-NLE4].

⁴⁹ See, e.g., *Summary of CRST COVID-19 Checkpoint Policies*, CHEYENNE RIVER SIOUX TRIBE (Apr. 20, 2020), <https://www.crstcoronavirusupdates.com/wp-content/uploads/2020/04/Summary-of-CRST-COVID-19-Checkpoint-Policies-F.pdf> [https://perma.cc/MV5Y-97QJ]; OGLALA ORDINANCE NO. 20-28, *supra* note 17; Telephone Interview with Lloyd Guy, Gen. Couns., Rosebud Sioux Tribe (June 16, 2020).

⁵⁰ Goodluck, *supra* note 45; Perrett, *supra* note 31; Rodrick, *supra* note 34.

⁵¹ See *infra* notes 56–63 and accompanying text.

⁵² See, e.g., S.D. Exec. Order No. 2020-20 (Apr. 28, 2020), <https://sdsos.gov/general-information/executive-actions/executive-orders/assets/2020-20.PDF> [https://perma.cc/FQJ8-ZBRL] (acknowledging that tribal nations should “make their own decisions” with respect to whether to follow Noem's “Back to Normal Plan”).

⁵³ WITT, *supra* note 10, at 38–40.

⁵⁴ The continued salience of this race-biased conception is exemplified by the comments of the mayor of Grants, New Mexico, as reported by the *New York Times*:

[Mayor Martin Hicks] asserted that Navajos were to blame for spreading the virus, openly expressing an unsubstantiated position that seems to be gaining traction in towns near Native American reservations.

“We didn't take it to them, they brought it to us,” Mr. Hicks said in a telephone interview, without offering any proof. “So how are we going to spread it amongst them when they're the ones that brought it to us?”

Romero, *supra* note 17.

a power grab by the Tribes, under which they were wrongfully appropriating white racialized power to exclude undesirables. Understood in this vein, the Tribes' actions, through a white colonialist lens, could be viewed as twistedly painting whites as the dirty outsiders who put others at risk of disease.⁵⁵

In May 2020, the state ordered the Tribes to remove the checkpoints and threatened suit if they did not.⁵⁶ In tweets, the Governor claimed to have sent the letters to the Oglala Sioux Tribe (also known as the Oglala Lakota Nation) and the Cheyenne River Sioux Tribe, but, in fact, it appears that she sent them only to news outlets.⁵⁷ While the threatened suit did not materialize, the Governor did enlist the Trump Administration's help in her attempt to cajole the Cheyenne River Sioux Tribe into closing its checkpoints.⁵⁸ When threats and persuasion did not work, the Trump Administration ultimately sought to do the state's bidding by suspending the Cheyenne River Sioux Tribe's 638 contract⁵⁹ to provide its own law enforcement services in lieu of the federal government's provision of such services.⁶⁰ Before the Bureau of Indian Affairs actually moved to suspend the contract, Mark Meadows, then-President Trump's Chief of Staff, was brought in to try to intimidate the Cheyenne River Sioux Tribe into closing its checkpoints.⁶¹ In addressing Cheyenne River Sioux Tribal Chairman Harold Frazier, Mark Meadows stated, without legal authority, that he couldn't "have checkpoints' on

⁵⁵ *Accord id.* (describing the comments of Mayor Martin Hicks).

⁵⁶ Madeleine Carlisle, *South Dakota Governor Demands Tribe Leaders Remove Checkpoints Set Up to Prevent the Spread of COVID-19*, TIME (May 9, 2020), <https://time.com/5834749/south-dakota-governor-native-american-tribes-coronavirus/> [<https://perma.cc/LQ4E-DKN4>]; Nina Lakhani, *South Dakota Governor Threatens to Sue over Sioux's Coronavirus Roadblocks*, GUARDIAN (May 14, 2020), <https://www.theguardian.com/us-news/2020/may/14/sioux-coronavirus-roadblocks-south-dakota-governor> [<https://perma.cc/VTC8-2ZYP>].

⁵⁷ Lakhani, *supra* note 56 (reproducing tweet); Nikki Ducheneaux, Panelist Remarks on Tribal Checkpoints & the Pandemic, at U.S.D. Knudson School of Law NALSA Symposium Program: Recent Indian Law Developments: In the Courts and on the Ground (Apr. 2, 2021); Compl. for Injunctive and Declaratory Relief at 17–18 ¶ 55 & n.28, *Cheyenne River Sioux Tribe v. Trump*, No. 1:20-cv-01709 (D.D.C. June 23, 2020).

⁵⁸ Arielle Zionts, *Noem Asks President Trump to Help Resolve Checkpoint Dispute with Tribes*, RAPID CITY J. (June 25, 2020), https://rapidcityjournal.com/news/local/noem-asks-president-trump-to-help-resolve-checkpoint-dispute-with-tribes/article_3b5c4154-9b61-5091-a8df-78ea8409bb73.html [<https://perma.cc/8J4B-QR5G>]; Letter from Kristi Noem, Governor of South Dakota, to Donald Trump, President of the United States (May 20, 2020) (on file with journal).

⁵⁹ The term "638 contract" refers to a contract between a tribe and the federal government pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5321. As explained in AMERICAN INDIAN LAW IN A NUTSHELL, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301–5423, "directed the Secretaries of Interior and of Health, Education, and Welfare, when presented with tribal proposals meeting certain requirements, to enter contracts under which the tribes themselves would assume responsibility for the administration of federal Indian programs." WILLIAM CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 34 (7th ed. 2020) (citing 25 U.S.C. § 5321(a)(1)).

⁶⁰ Compl. for Injunctive & Declaratory Relief, *supra* note 57, at 19 ¶¶ 62–63.

⁶¹ *Id.* at 21 ¶ 65.

a federal road” and proceeded to threaten the withholding of the Tribe’s COVID-19 relief money, which Congress had set aside by statute.⁶² The conversations between White House staff members and tribal officials at times got even uglier. During a later phone conversation, Douglas Hoelscher, then Deputy Assistant to the President and Director of Intergovernmental Affairs, told Chairman Frazier that, by not conducting proper background checks of tribal law enforcement officers, he was “endanger[ing] . . . the people that [he was] elected to serve.”⁶³ One has to wonder if the irony of making such an accusation against Chairman Frazier in an attempt to get him to abandon badly needed public health measures designed to curb the spread of a deadly pandemic was lost on Mr. Hoelscher.

The logic of the federal government’s attempt to suspend the Tribe’s law enforcement contract was apparently that the Tribe could not operate the checkpoints if it no longer had law enforcement power.⁶⁴ The Tribe brought a declaratory judgment action in an attempt to preclude the suspension of the law enforcement contract and to prevent other unlawful actions against the Tribe.⁶⁵ This declaratory judgment case was stayed pending administrative proceedings regarding the legality of the contract suspension, which, as of this writing, are ongoing.⁶⁶ In March 2021, the Cheyenne River Sioux Tribe ceased operation of its checkpoints, citing low infection rates and widespread availability of the vaccine.⁶⁷ As of this writing, the Oglala Lakota Nation continues to operate its checkpoints.⁶⁸

⁶² *Id.* at 21 ¶¶ 65–66; 42 U.S.C. § 801.

⁶³ Transcript of Teleconference between Tara Sweeney, Assistant Secretary of Indian Affairs, United States Dept. of Interior, Harold Frazier, Chairman, Cheyenne River Sioux Tribe, and others, 9 (June 17, 2020) (on file with journal).

⁶⁴ See Compl. for Injunctive & Declaratory Relief, *supra* note 57, at 20 ¶ 64.

⁶⁵ See generally *id.*

⁶⁶ Minute Ord. Entering Stay, *Cheyenne River Sioux Tribe v. Trump*, No. 1:20-cv-01709 (D.D.C. Dec. 6, 2020); Minute Ord. Continuing Stay, *Cheyenne River Sioux Tribe v. Trump*, No. 1:20-cv-01709 (D.D.C. Mar. 3, 2021); E-mail from Sarah Kammer, Head of Public, Faculty and Student Services at University of South Dakota Law Library to author (Apr. 20, 2021 9:50 am CST) (on file with journal) (describing information obtained from phone call to the Interior Board of Indian Appeals).

⁶⁷ *Tribe Removes Disputed Coronavirus Reservation Checkpoints*, ASSOCIATED PRESS (Mar. 26, 2021), <https://apnews.com/article/joe-biden-police-south-dakota-coronavirus-pandemic-kristi-noem-dd5ee196986decd0c504a21a55255bbb> [<https://perma.cc/C2U7-QPEC>].

⁶⁸ Personal communication with Josey Johnson (Mar. 27, 2021) (on file with journal); *COVID-19 Travel Delays on Tribal Lands in South Dakota*, S.D. DEPT OF TOURISM (Mar. 31, 2021), <https://dot.sd.gov/media/Tribal%20Checkpoints.pdf> [<https://perma.cc/WE8T-R2T7>].

III. MEASURES ENACTED BY THE OGLALA LAKOTA NATION AND THE CHEYENNE RIVER SIOUX TRIBE

Two tribes whose reservations are located within the borders of South Dakota, the Oglala Lakota Nation⁶⁹ and the Cheyenne River Sioux Tribe, have adopted numerous measures to protect their peoples and territories from COVID-19, the most controversial of which appear to be checkpoints on state and federal highways running through their reservations. Such checkpoints have met with widespread approval in public health circles,⁷⁰ and their primary function, at least for the Cheyenne River Sioux Tribe, was contact tracing.⁷¹ As explained above, the Cheyenne River Sioux Tribe closed its checkpoints in late March 2021, after having operated them for nearly an entire year,⁷² whereas, as of late March 2021, the Oglala Lakota Nation continued to operate its checkpoints.⁷³ The Rosebud Sioux Tribe has implemented protective measures and initially operated checkpoints as well, but Rosebud elected to take them down after operating them for a few weeks.⁷⁴ The decision to take them down was largely based on the expense of operating them, although the Tribe did experience non-Native resistance to checkpoints in some locations, which drew the attention of the State Attorney General.⁷⁵

As explained above, in Part II.B, the South Dakota governor ordered the Cheyenne River Sioux Tribe and the Oglala Lakota Nation to

⁶⁹ The official name of the Oglala is the Oglala Sioux Tribe, but, since the Tribe on its website refers to itself as the Oglala Lakota Nation, the latter term will be used in the text of this essay.

⁷⁰ Frank Pommersheim, Panelist Remarks on Tribal Checkpoints & the Pandemic, at U.S.D. Knudson School of Law NALSA Symposium Program: Recent Indian Law Developments: In the Courts and on the Ground (Apr. 2, 2021); *accord Considerations for Health Screening for COVID-19 at Points of Entry*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 24, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/migration-border-health/considerations-border-health-screening.html> [<https://perma.cc/6LJ3-UMAH>].

⁷¹ Nicole Ducheneaux, Panelist Remarks on the Impact of COVID on Indian Country from Indian Country, at Federal Bar Association's D.C. Indian Law Conference (Nov. 5, 2020).

⁷² Press Release, Cheyenne River Sioux Tribe, Cheyenne River Sioux Tribe to Begin Checkpoints to Protect Tribal Members & Residents from COVID-19 Pandemic (Apr. 1, 2020) <https://turtletalk.files.wordpress.com/2020/04/crst-to-begin-checkpoints-to-protect-tribal-members-and-residents-from-covid-19-pandemic-04-01-2020.pdf> [<https://perma.cc/9XMK-AUQ6>] (noting that the checkpoints would begin to be implemented on April 2, 2020).

⁷³ Personal communication with Josey Johnson, *supra* note 68.

⁷⁴ Telephone Interview with Lloyd Guy, *supra* note 49. The Rosebud Sioux Tribe's checkpoints were only operated during the evenings. *Id.*

⁷⁵ *Id.*

close the checkpoints, threatened suit, and deployed the Trump Administration's help in her efforts.⁷⁶ Her confrontational response is emblematic of the "difficult and checkered history" of the State's approach to tribes.⁷⁷

The measures the Oglala Lakota Nation has adopted to protect its citizens from the pandemic include closing the Reservation "to all non-residents for non-essential travel, except for all state highway entrances for pass-through vehicles."⁷⁸ The Tribe has further imposed a daily curfew on "all individuals and businesses" within the Reservation.⁷⁹ Additionally, it has imposed temporary lockdowns via executive order that apply to Reservation residents and that limit travel off-reservation except for essential purposes, including work (with a permit), procurement of essential supplies, and medical appointments.⁸⁰

Similarly, the Cheyenne River Sioux Tribe has imposed curfews, stay-at-home orders, and mandatory quarantine requirements for residents who have traveled out of state or visited hotspot areas, and, as noted above, it also operated checkpoints.⁸¹ The Cheyenne River Sioux Tribe allowed business travelers to pass through its checkpoints once they filled out a health questionnaire. Similarly, essential workers coming from non-hotspot counties were required to fill out a health questionnaire at the checkpoints unless they had procured a travel permit. Essential workers coming from out-of-state or hotspot counties were required to have travel permits to come onto the reservation. Persons leaving the Reservation to go to medical appointments in non-hotspot counties had to fill out health questionnaires upon leaving and upon returning. Those residents traveling to medical appointments out-of-state or in hotspot counties were required to quarantine themselves for fourteen days upon their return. Similarly, residents were able to travel to non-hotspots for goods and services, as long as they filled out a health questionnaire upon their return. Travelers to hotspot areas and out-of-state for essential goods and services that could not be purchased on the reservation were required to quarantine for fourteen days upon their

⁷⁶ Carlisle, *supra* note 56; Letter from Kristi Noem, *supra* note 58.

⁷⁷ Lori Walsh, *Prof Pommersheim Talks Checkpoints*, S.D. PUB. BROAD. (June 3, 2020), <https://listen.sdpb.org/post/prof-pommersheim-talks-checkpoints> [<https://perma.cc/8K5V-SJBA>].

⁷⁸ OGLALA SIOUX TRIBE, ORDINANCE OF THE OGLALA SIOUX TRIBAL COUNCIL OF THE OGLALA SIOUX TRIBE ADOPTING A COVID-19 PINE RIDGE RESERVATION BORDER MONITORING HEALTH ORDER & COORDINATED BORDER MONITORING PROGRAM, No. 20-28 (Apr. 1, 2020).

⁷⁹ OGLALA SIOUX TRIBE, ORDINANCE NO. 20-26 (Mar. 31, 2020).

⁸⁰ *See, e.g.*, Oglala Sioux Tribe Exec. Order No. 20-03 (Apr. 26, 2020) (imposing fourteen-day lockdown); *see also* Oglala Sioux Tribe Exec. Order No. 20-02 (Mar. 10, 2020) (imposing 72-hour lockdown).

⁸¹ Cheyenne River Sioux Tribe Emergency Exec. Order No. 2.6-2020-CR (May 21, 2020); Cheyenne River Sioux Tribe Emergency Exec. Order No. 2.5-2020-CR (undated); *see also Summary of CRST COVID-19 Emergency Executive Orders*, *supra* note 48.

return unless they had a travel permit. Travel permits lasted for thirty, sixty, or ninety days. Finally, those nonresidents traveling from hotspots or from out-of-state were asked to take an alternate route around the reservation.⁸²

Both Tribes' measures were initially quite successful. The nearly 3,500 square mile Pine Ridge Reservation, which is home to the Oglala Lakota Nation, had only seen a small handful of COVID-19 cases by June 2020, and the first cases among tribal citizens did not begin to appear until well into May.⁸³ The nearly 4,300 square mile Cheyenne River Sioux Reservation had had only one case by June 2020, involving a woman who is now recovered.⁸⁴ These Tribes' initial successes appear to be due to the strictness of the measures adopted and, especially in the case of the Cheyenne River Sioux Tribe, the fact that the measures were adopted early.⁸⁵ However, as the pandemic wore on, the number of cases on both reservations escalated, a change that may be partly reflective of state trends and partly the result of tribal members' greater likelihood of contracting the virus.⁸⁶ As of April 17, 2021, the Cheyenne River Sioux Tribe had had 1,791 cases among its roughly 8,600 reservation residents, resulting in thirty-six deaths.⁸⁷ The larger Oglala Lakota Nation had experienced roughly 2,500 cases among its members who lived on-reservation and sixty deaths.⁸⁸ The infection rates per capita for both reservations appear to be higher than that for South Dakota, with the infection rate for those living on the Cheyenne River Sioux reservation being about 50 percent higher.⁸⁹ The fact that

⁸² *Summary of CRST COVID-19 Checkpoint Policies*, *supra* note 49.

⁸³ Kevin Abourezk, *It's Really Scary for Us: Oglala Sioux Tribe Orders Lockdown After COVID-19 Hits Reservation*, INDIANZ (May 12, 2020), <https://www.indianz.com/News/2020/05/12/pine-ridge-reservation-coronavirus-lockdown.asp> [<https://perma.cc/KGZ4-4393>]; Oglala Sioux Tribe (@OSTOfficial1), TWITTER (May 28, 2020, 10:45 AM), <https://twitter.com/OSTOfficial1/status/1266395165511606272/photo/1> [<https://perma.cc/M8DT-8LPU>].

⁸⁴ Bart Pfankuch, *How a S.D. Native American Tribe Is Protecting Its People from COVID-19*, ARGUS LEADER (May 20, 2020), <https://www.argusleader.com/story/news/2020/05/20/how-s-d-native-american-tribe-protecting-its-people-covid-19/5232458002/> [<https://perma.cc/SXZ7-VWKH>].

⁸⁵ *Id.*

⁸⁶ *See, e.g.*, Hatcher, *supra* note 47; *see generally* Part II.A.

⁸⁷ *CRST COVID-19 Statistics—Saturday, April 17, 2021*, CHEYENNE RIVER SIOUX TRIBE CORONAVIRUS UPDATES (Apr. 17, 2021), <https://www.crstcoronavirusupdates.com/> [<https://perma.cc/ZFW2-LKF5>]; *Cheyenne River Reservation and Off-Reservation Trust Land*, MY TRIBAL AREA, U.S. CENSUS BUREAU, <https://www.census.gov/tribal/?aianihh=0605> [<https://perma.cc/Q4UW-YRGT>] (last accessed June 17, 2021). The Cheyenne River COVID-19 statistics cover all residents (i.e., Native members and nonmembers, as well as non-Natives) of the reservation. *See CRST COVID Statistics—Saturday, April 17, 2021, supra* (table with the heading “Cases in Communities on Cheyenne River”); E-mail from Tracy Zephier, Attorney General for Cheyenne River Sioux Tribe, to Josey Johnson (Apr. 21, 2021 3:42 pm CST) (on file with journal).

⁸⁸ Oglala Sioux Tribe (@OSTOfficial1), TWITTER (Apr. 14, 2021, 1:21 PM CST), <https://twitter.com/OSTOfficial1/status/1382398560818266118> [<https://perma.cc/4W7T-PESZ>] (hereinafter “April 14 Tweet”).

⁸⁹ As noted above, the Cheyenne River Sioux Tribe had 1,791 total cases of COVID-19 on its

the on-reservation infection rates are higher is not surprising given that a CDC study found that Native Americans are 3.5 times more likely to contract COVID-19 than are whites.⁹⁰ While the reasons that tribal members are more likely to contract the virus are not definitively known, poverty, lack of access to a reliable water supply, lack of indoor plumbing, and intergenerational and sometimes overcrowded housing on reservations all may play a role.⁹¹ The fact that the rates on these two reservations are nowhere near 3.5 times higher than the infection rate for whites in South Dakota tends to suggest that the protective measures that these two Tribes adopted were effective.⁹²

IV. THE SUPREME COURT'S COMMON LAW TEST FOR TRIBAL CIVIL REGULATORY JURISDICTION

The tribal checkpoints at issue here affect (and, in the case of the Cheyenne River Sioux Tribe, affected) both nonmembers and members of the Cheyenne River Sioux Tribe and the Oglala Lakota Nation, and

reservation as of April 17, 2021, see *CRST COVID Statistics—Saturday, April 17, 2021*, *supra* note 87, and the reservation has a total population of 8,594. See *Cheyenne River Reservation and Off-Reservation Trust Land*, *supra* note 87. This amounts to an infection rate of 0.208. About 78 percent of the residents of the Cheyenne River Sioux Reservation are Native American. *Id.*

As of April 17, 2021, South Dakota had a total of 121,056 total cases. *April 17th: 200 New COVID-19 Cases in South Dakota*, SIOUXLAND NEWS (Apr. 17, 2020), <https://siouxlandnews.com/news/coronavirus/april-17th-covid-19-in-south-dakota> [<https://perma.cc/XT7D-MSBB>]. Based on a population of 884,659, *Quick Facts: South Dakota*, *supra* note 28, this amounts to an infection rate of 0.137. It is worth noting that South Dakota has been accused of undercounting other metrics in the COVID-19 context. See, e.g., Rodrick, *supra* note 345 (accusing Governor Noem of deliberately undercounting COVID-19 deaths for PR purposes). As of April 13, 2021, the Oglala Lakota Nation reported 2,547 on-reservation cases among its members and others who were tested by the Indian Health Service (IHS) on the reservation. April 14 Tweet, *supra* note 88. A tribal employee explained that the April 14, 2021 report on the number of cases primarily represented infections contracted by tribal members who lived on the reservation but that a small number of nonmembers who had tested at IHS were also included (probably no more than fifty). Phone call between author and Oglala Sioux Tribe Public Health Administration (May 3, 2021, 3:30 pm CST). The United States Census Bureau reports that there are 17,179 Native Americans and Alaska Natives living on the Tribe's reservation. *Pine Ridge Reservation*, MY TRIBAL AREA, U.S. CENSUS BUREAU, <https://www.census.gov/tribal/?aianihh=2810> [<https://perma.cc/XC93-FGXK>] (last accessed June 17, 2021). If we use that number as a rough proxy for the population represented by the April 13, 2021 case report (Oglala tribal members living on the reservation plus a small number of other individuals who tested at IHS), the infection rate among such persons would be 0.148, which is higher than that of the State of South Dakota.

⁹⁰ Sarah M. Hatcher et al., *supra* note 47.

⁹¹ See, e.g., Burki, *supra* note 46; Hoss, *supra* note 47, at 170; see generally Part V.

⁹² The infection rate for whites in South Dakota appears to be 0.121. According to the U.S. Census Bureau, whites are 84.6 percent of the population in South Dakota, which has a total population of 884,659. *Quick Facts: South Dakota*, *supra* note 28. This means there are approximately 748,422 white people who live in South Dakota. South Dakota Department of Health reports that, as of April 17, 2021, 90,920 whites had been infected with COVID-19 (although it is unclear if this data includes probable infections as well as confirmed infections). *South Dakota COVID-19 Dashboard*, S.D. DEPT OF HEALTH (Apr. 18, 2021), <https://doh.sd.gov/COVID/Dashboard.aspx> [<https://perma.cc/J4Q5-67HC>]. Dividing 90,920 by 748,422 yields an infection rate of 0.12 for whites in South Dakota.

they appear to be an exercise of tribal civil (rather than criminal) regulatory authority.⁹³ Tribal civil jurisdiction over tribal citizens is generally upheld, so the only serious question concerns tribal civil jurisdiction over nonmembers. Moreover, in the context of tribal civil jurisdiction, the relevant question is whether one is a member of the tribe at issue, rather than, as in the criminal jurisdiction context, whether one is considered an Indian under federal law.⁹⁴

A. Tribal Civil Jurisdiction over Tribal Citizens

Tribes are recognized as having civil jurisdiction over their members for activities occurring on the reservation.⁹⁵ The contours of this jurisdiction are defined by tribal law.⁹⁶ In some subject areas, tribal civil jurisdiction over tribal citizens extends to off-reservation activities as well.⁹⁷ Thus, the authority of the Oglala Lakota Nation and the Cheyenne River Sioux Tribe to stop their own citizens at checkpoints pursuant to tribal law is not in question.

⁹³ See, e.g., OGLALA SIOUX TRIBE, OGLALA ORDINANCE No. 20-28 (Apr. 1, 2020) (closing the reservation to non-residents for non-essential travel with exceptions and imposing a \$1,000 civil fine for violation); Cheyenne River Sioux Tribe, Emergency Exec. Order No. 2.5-2020-CR (undated) (defining violation of the curfew and stay-at-home orders as a civil infraction). At any rate, it is clear that the tribes would not have criminal jurisdiction over non-Indians in this context, although they would presumably have criminal jurisdiction over nonmember Indians, i.e., Indians from other tribes. See, e.g., Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALB. L. REV. 885, 893–896 (2015) (explaining the contours of tribal criminal jurisdiction). Nonetheless, tribes could presumably still utilize checkpoints on state and federal highways for valid purposes relating to criminal jurisdiction, as long as non-Indians were only detained as long as necessary to determine that they were not subject to tribal criminal jurisdiction. See, e.g., *Bressi v. Ford*, 575 F.3d 891, 896–97 (9th Cir. 2009); cf. *United States v. Cooley*, 141 S. Ct. 1638 (2021) (allowing for longer detention of potentially dangerous criminal suspects outside of the checkpoint context, but rejecting a requirement that the tribal office first determine whether or not the suspect qualifies as an Indian for criminal jurisdiction purposes). Indeed, as to state jurisdiction, the Eighth Circuit has determined that South Dakota generally lacks criminal jurisdiction pertaining to crimes arising on state highways within reservations in the state. See generally *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990) (invalidating South Dakota’s retroactive attempt to undertake jurisdiction over crimes occurring on state highways running through reservations under P.L. 280). While *Rosebud Sioux Tribe* refers to civil jurisdiction as well, P.L. 280 has been held not to afford states civil regulatory jurisdiction over tribes and tribal members within Indian country, so the *Rosebud Tribe* court’s references to civil jurisdiction are not strictly relevant to the questions of tribal civil regulatory jurisdiction we are examining here. See, e.g., *Bryan v. Itasca County*, 426 U.S. 373 (1976).

⁹⁴ See *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1132–33 (9th Cir. 2006); Tweedy, *supra* note 93, at 898; accord *Washington v. Confederated Tribes of the Colville Rsr.*, 447 U.S. 134, 160–61 (1980).

⁹⁵ See generally *Fisher v. District Court*, 424 U.S. 382 (1976).

⁹⁶ 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 7.02[1][a] (2020) [hereinafter COHEN].

⁹⁷ *Id.* at 7.02[1][c].

B. Jurisdiction over Nonmembers on State and Federal Highways within the Reservation

1. The framework for tribal civil jurisdiction over nonmembers

In *Montana v. United States*,⁹⁸ the Court's path-marking case on tribal civil jurisdiction, the Supreme Court established, based on federal common law, that tribes generally lack civil regulatory and adjudicatory jurisdiction over nonmembers' on-reservation activities that occur on nonmember-owned fee lands unless one of two exceptions is met:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.⁹⁹

The decision was based primarily on the judicially-created implicit divestiture doctrine, which maintains that some powers—particularly concerning nonmembers—are now inconsistent with the tribes' sovereign status, but the Court in *Montana* also alluded to fairness concerns rooted in the state's augmentation of the reservation's natural resources, which the Crow Tribe was seeking to regulate.¹⁰⁰ Later cases have often included fairness to nonmembers as part of the justification for denying jurisdiction.¹⁰¹

⁹⁸ 450 U.S. 544 (1981).

⁹⁹ *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (internal citations omitted); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 676 (2009). The Supreme Court has held that “a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.” *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). While it is conceivable that the Court could ultimately hold that tribes’ legislative (or regulatory) jurisdiction exceeds their adjudicative jurisdiction, see Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the COVID-19 Pandemic*, 63 ARIZ. L. REV. 399, 426 (2021), such a result would be surprising because, with other sovereigns such as states, adjudicatory authority generally exceeds regulatory authority. See Alexander Tallchief Skibine, *Incorporation Without Assimilation: Legislating Tribal Jurisdiction over Nonmembers*, 67 UCLA L. REV. DISCOURSE 166, 190 (2019); Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts’ Jurisdiction*, 101 CAL. L. REV. 1499, 1536 (2013).

¹⁰⁰ *Montana*, 450 U.S. at 548, 564–65.

¹⁰¹ See, e.g., *Strate*, 520 U.S. at 459 (expressing concern about requiring nonmembers to defend against plaintiff’s claims in “an unfamiliar court”); Ann Tweedy, *The Liberal Forces Driving the Supreme Court’s Divestment & Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 164–65 (2000).

It is *Montana's* second exception that is most obviously likely to be applicable here because COVID-19 plainly presents a public health issue, and infected nonmembers could unquestionably directly affect the health of the Tribes and their members.¹⁰² By its terms, *Montana* itself applies to nonmember activities on nonmember-owned fee lands within the reservation, so roads through tribal trust lands would not appear to be within its purview. However, a Supreme Court case called *Strate v. A-1 Contractors*¹⁰³ extended the applicability of *Montana's* limitations on tribal jurisdiction and its exceptions to those limitations to rights-of-way for state highways within reservations.¹⁰⁴ Lower court cases have applied the same analysis to on-reservation rights-of-way for federal highways.¹⁰⁵ Significantly, the Eighth Circuit has recognized that the tribes located within the borders of South Dakota have a “vested interest in self-government” that extends to *all* highways within their reservations.¹⁰⁶

Additionally, while the Oglala Lakota also operates checkpoints on Bureau of Indian Affairs (BIA) roads,¹⁰⁷ South Dakota Governor Kristi Noem's objections have focused on the checkpoints located on state and federal highways.¹⁰⁸ Moreover, consistent with *Montana's* applicability solely to nonmember-owned fee lands and state and federal rights-of-way, courts have upheld tribal jurisdiction on BIA roads without analyzing whether either *Montana* exception is met.¹⁰⁹ Thus, generally speaking, for tribal civil jurisdiction over nonmembers on state and federal highways running through a reservation to obtain, one of the *Montana* exceptions must be met.

As other scholars and I have explained, the Court has narrowed the *Montana* exceptions over time to such an extent that, in the vast majority of cases, it is difficult to predict whether they will be viewed to apply in any given case.¹¹⁰ This unpredictability is due in large part to the

¹⁰² It is conceivable that the consensual relationship exception could be applicable in some instances, but, for the purposes of this essay, I focus on the second exception.

¹⁰³ 520 U.S. 438 (1997).

¹⁰⁴ *Id.* at 454; Tweedy, *supra* note 101, at 171.

¹⁰⁵ *See, e.g.*, *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).

¹⁰⁶ *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1174 (8th Cir. 1990) (invalidating the state's attempt to assume jurisdiction over the highways on reservations under P.L. 280); *see also* S.D. CODIFIED LAWS § 31-1-1 (2010) (defining “highway” for purposes of state law).

¹⁰⁷ Letter from Julian Bear Runner, President, Oglala Sioux Tribe, to Kristi Noem, Governor, State of S.D., 1 (May 8, 2020) (on file with journal).

¹⁰⁸ Kaczke, *supra* note 18; Letter from Kristi Noem, *supra* note 58.

¹⁰⁹ *See, e.g.*, *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002). While the Court did suggest in *Nevada v. Hicks* that the ownership status of land was merely a factor to consider in the *Montana* test (rather than the test's applicability actually turning on land ownership status, as the Court had previously held), that statement in *Hicks* is best viewed as dicta that was tied to the unique facts of that case. *See, e.g.*, COHEN, *supra* note 96, at § 4.02[3][c][i]; *Means*, 309 F.3d at 540.

¹¹⁰ Tweedy, *supra* note 99, at 677–83; Tweedy, *supra* note 93, at 897; Leah Jurss, *Halting the*

Court's practice of coming up with new ad hoc exceptions to the *Montana* exceptions, apparently in order to foreclose tribal jurisdiction over nonmembers.¹¹¹ In the years since *Montana*, the Court has increasingly moved from a territorially based conception of tribal sovereignty—under which tribes would have expansive jurisdiction over their entire territories—to a consent-based conception—under which tribal membership is seen as evidencing the consent that is generally understood as a prerequisite to jurisdiction.¹¹² Nonmember activities that affect tribal health or welfare in a general sense, such as reckless driving or hotel occupancy that will undoubtedly sometimes trigger the need for tribal police, fire, and ambulance services, are rejected as insufficient to establish the threat or direct effect necessary to validly invoke *Montana's* second exception, with the Court sometimes noting that applying the exception in such circumstances would allow it to “severely shrink the rule.”¹¹³ On the other hand, however, the Court very recently approved the use of the exception to allow tribes to detain drunk drivers, transporters of contraband, and others who pose egregious threats to a tribe's health or welfare.¹¹⁴

The narrowness of the exceptions as generally conceived is exemplified in *Long Family Land and Cattle v. Plains Commerce Bank*.¹¹⁵ In *Long Family Land and Cattle*, after rejecting the applicability of the first exception, the Court described the high bar that a tribe would have to meet to satisfy *Montana's* second exception: “The [nonmember's] conduct must do more than injure the tribe, it must ‘imperil the subsistence’ of the tribal community.”¹¹⁶ The Court further suggested that a tribe (or other proponent of tribal jurisdiction) may need to show that the tribe's exercise of jurisdiction is “necessary to avert catastrophic consequences.”¹¹⁷ Importantly, however, the Court in *Long Family Land and Cattle* did recognize that a tribe could legitimately regulate “noxious uses” under *Montana's* second exception;¹¹⁸ the noxious nature of COVID-19 creates an analogous problem requiring the regulation of

“Slide down the Sovereignty Slope”: *Creative Remedies for Tribes Extending Civil Infraction Systems over Non-Indians*, 16 RUTGERS RACE & L. REV. 39, 49–54 (2015).

¹¹¹ Tweedy, *supra* note 99, at 677–83; Tweedy, *supra* note 93, at 897; Jurss, *supra* note 110, at 51–54.

¹¹² Tweedy, *supra* note 99, at 675.

¹¹³ *Strate v. A-1 Contractors*, 520 U.S. 438, 457–58 (1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 (2001).

¹¹⁴ *United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021).

¹¹⁵ 554 U.S. 316 (2008).

¹¹⁶ *Id.* at 341 (internal citations omitted).

¹¹⁷ *Id.* (internal citations omitted); see also *Fletcher*, *supra* note 46, at 42 (discussing *Long Family Land & Cattle's* catastrophic consequences language and lower court decisions holding the standard to be met).

¹¹⁸ *Plains Com. Bank v. Long Family Land & Cattle*, 554 U.S. 316, 336 (2008).

nonmember interaction and movement to protect tribal health and welfare.

Although I have argued previously that a tribe's ability to meet the *Montana* exceptions would necessarily be extremely uncertain under any given set of facts,¹¹⁹ I did not anticipate the COVID-19 pandemic or the lamentable circumstances that it, combined with many other factors, would create for tribes. Sadly, given the inadequacy of their healthcare resources, the delayed provision of relief monies, the tenuousness of tribal finances, and the underlying health conditions of many tribal members that increase their vulnerability to COVID-19, there is little doubt that the Cheyenne River Sioux Tribe's and the Oglala Lakota Nation's subsistence have been imperiled by COVID-19 and the constellation of factors that heightens their vulnerability to it.¹²⁰ Moreover, in light of South Dakota's grossly inadequate response to COVID-19, the tribal checkpoints were and are necessary to avert catastrophic consequences. A large-scale outbreak on either reservation would be catastrophic, not only because of the lethality of COVID-19, which is exacerbated among Natives due the prevalence of preexisting conditions that increase their risk of serious illness and death from the disease, but also because the healthcare systems for each Tribe lack the capacity and equipment to handle such an outbreak.¹²¹ The remoteness of the two reservations only adds to these difficulties. In short, there should be little doubt that the two Tribes' checkpoints meet the requirements of the second *Montana* exception.¹²²

¹¹⁹ Tweedy, *supra* note 93, at 898.

¹²⁰ *Accord Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 850 (9th Cir. 2009) (holding, in the alternative, that a tribe had a colorable claim to jurisdiction under *Montana*'s second exception where a nonmember had inadvertently started a forest fire on the reservation that resulted in the destruction of "millions of dollars of the tribe's natural resources").

¹²¹ For a discussion of the prevalence of preexisting conditions and other factors that exacerbate health risks to Native Americans from COVID-19, see *supra* note 47 and *infra* notes 151–163 and accompanying text. For a discussion of the inadequacy of tribal on-reservation healthcare systems, see *infra* notes 191–193 and accompanying text.

¹²² While the Supreme Court has recently expressed a willingness to cabin the extremely broad public health authority of states set forth in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in the context of religion, *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), this approach seems to be of a piece with the current Court's deference to religion, see generally Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, SUP. CT. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825759 [<https://perma.cc/ZG48-YYWC>], rather than an indication that it is inclined to limit state public health authority more broadly. Although some courts have suggested that the limitations on state public health authority imposed in *South Bay United Pentecostal Church* may be extended to select contexts beyond religion, such as racial discrimination and content-based suppression of speech, see, e.g., *Cnty. of Los Angeles Dep't of Pub. Health v. Super. Ct. of Los Angeles Cnty.*, 61 Cal. App. 5th 478, 489–490 (2021), such extensions, even if eventually made by the Supreme Court, would likely be quite narrow.

It is true that there is no Supreme Court equivalent to *Jacobson* in the context of tribal jurisdiction. Florey, *Toward Tribal Regulatory Authority*, *supra* note 99, at 407. However, given tribes' heightened vulnerabilities in the face of the pandemic, it would be extremely egregious for

This conclusion is fortified by the Supreme Court's June 2021 decision in *United States v. Cooley*.¹²³ While the Court's opinion in *Cooley* is puzzling in that, without explanation, it takes the unprecedented step of applying *Montana* in the criminal context,¹²⁴ the opinion nonetheless conclusively demonstrates that *Montana*'s second exception does important work.¹²⁵ In *Cooley*, the Court applied the exception to uphold a tribal police officer's authority to detain and search a non-Native motorist who appeared to be impaired, had a loaded, semiautomatic weapon in close proximity, had drug paraphernalia, and had been traveling with his young child.¹²⁶ In upholding tribal jurisdiction under *Montana*, the Court recognized tribes' need "to protect themselves against ongoing threats."¹²⁷ It elaborated that such threats "may be posed by . . . non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation."¹²⁸ As a result of the extreme vulnerability of Native individuals and tribal communities to the harms posed by the pandemic,¹²⁹ potentially infected individuals attempting to enter a reservation appear to pose a greater threat to tribes and Native individuals than would a single criminal suspect.

In most cases, the intrusion posed by the checkpoints is also similar in its temporary nature to the tribal officer's detention of the suspect in *Cooley*. In *Cooley*, the Court placed importance on the fact that the criminal suspect was only detained by the tribal officer while awaiting arrival of federal and state law enforcement.¹³⁰ The checkpoints similarly merely created a delay for many travelers, while most others faced the relatively minor inconvenience of having to travel around a reservation rather than pass through it.¹³¹ In both the checkpoint situation and that

a court to hold that the requirements of *Montana*'s direct-effects exception were not met.

¹²³ 141 S. Ct. 1638 (2021).

¹²⁴ See, e.g., Ann E. Tweedy, *Has Federal Indian Law Finally Arrived at "The Far End of the Trail of Tears"?*, 37 GA. ST. U. L. REV. 739, 774 (2021).

¹²⁵ *Cooley*, 141 S. Ct. at 1643.

¹²⁶ *Id.* at 1642, 1646; Tweedy, *supra* note 124, at 35–36 (citing *United States v. Cooley*, 919 F.2d 1135, 1139–40 (9th Cir. 2019) (reciting the facts of the case), *rev'd* 141 S. Ct. 1638 (2021)).

¹²⁷ *Cooley*, 141 S. Ct. at 1643.

¹²⁸ *Id.*

¹²⁹ See *supra* note 47 and *infra* notes 147–154 and accompanying text (addressing greater vulnerability of Native Americans to COVID-19), 191–193 and accompanying text (addressing the inadequacy of tribal healthcare systems, particularly those of the Cheyenne River Sioux and the Oglala Lakota Nation, to deal with COVID-19).

¹³⁰ *Cooley*, 141 S. Ct. at 1644–1645.

¹³¹ See *supra* notes 78–82 and accompanying text. This similarity would not exist for nonmember reservation residents who lacked a travel permit and who had traveled to hotspot areas or out of state and who then had to quarantine for fourteen days. See *Summary of CRST COVID-19 Checkpoint Policies*, *supra* note 49. However, as residents of the reservation, such persons would also appear to pose a greater risk to the reservation community than someone who simply wanted

of detention of the criminal suspect in *Cooley*, then, the length of time the nonmember had to spend under tribal jurisdiction was relatively brief. Thus, *Cooley* strengthens the conclusion that, under *Montana* and its progeny, tribes are empowered to operate checkpoints to avert or at least minimize pandemic-related threats.

2. Given the fact-based quality of the *Montana* test, some travelers may argue that they do not pose the necessary risk to trigger *Montana*'s second exception

Akin to an as-applied constitutional challenge, the *Montana* test has been described as exceedingly fact-based to such an extent that civil jurisdiction in any given instance depends on the particular activities of the individual nonmember whose activities a tribe is seeking to regulate.¹³² Thus, it is conceivable that travelers who intended to simply pass through either reservation without stopping would not have posed a substantial risk to the applicable Tribe, particularly—especially in the early months of the pandemic—if they were not coming from a hotspot area or from out of state, and such travelers could therefore have argued that the second *Montana* exception did not apply.

One problem with such an argument is that humans can never be sure they will be able to follow through with their own intentions. A driver could have car trouble or experience a medical emergency while passing through a reservation and in such a circumstance could well pose a risk of infection to those who stopped to help. Less dramatically, a driver who intended to simply pass through Pine Ridge Reservation could unexpectedly experience a hunger pang and decide to stop on U.S. Highway 18 at Taco John's or Pizza Hut. Such a stop could also pose a risk of infection to the restaurant workers that the driver interacted with. Finally, Tribes in South Dakota and elsewhere have experienced open resistance to their checkpoints, particularly by non-Native motorists,¹³³ and those who are angry about the checkpoints may well hide their true intentions.¹³⁴ Indeed, these concerns have been borne out. The Cheyenne River Sioux Tribal Chairman, Harold Frazier, has stated that he has observed—and photographed—commercial trucks whose

to pass through.

¹³² See, e.g., Tweedy, *supra* note 93, at 898; Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713, 765–66 (2017).

¹³³ See, e.g., Telephone Interview with Lloyd Guy, *supra* note 49 (recounting that one individual “blew through” a Rosebud checkpoint); Florey, *supra* note 99, at 407–08, 420.

¹³⁴ *Accord Considerations for Health Screening for COVID-19 at Points of Entry*, *supra* note 70 (recognizing that travelers stopped at checkpoints may be dishonest).

drivers claimed to intend to drive straight through the reservation without stopping instead buying fuel from an on-reservation gas station and purchasing items from a store on the reservation.¹³⁵

Therefore, the risks posed by a pass-through driver may be diminished (if we assume that a good percentage of such drivers will in fact adhere to their stated intentions) but not nonexistent. Such a driver could argue that the risks he or she poses are not sufficient to meet the second *Montana* exception. Even if we accept that contention for the sake of argument, it does not follow that these drivers cannot be stopped and inconvenienced by a tribal checkpoint. Rather, the Ninth Circuit has acknowledged in the context of a tribal checkpoint to apprehend intoxicated drivers and to verify drivers' licenses and registrations that tribal officers can stop non-Indian drivers at such a checkpoint long enough to determine whether they are Indian and therefore subject to tribal criminal jurisdiction.¹³⁶ Tribal jurisdiction over nonmembers is generally broader in the civil context than in the criminal context,¹³⁷ so this rule should apply in the civil context as well, thus affording tribal checkpoint operators the authority to stop all drivers long enough, in the case of those who are not tribal members, to determine whether they have jurisdiction. Unlike in the criminal context, where the determination of jurisdiction is based on Indian status, in the civil context, with respect to nonmembers, it is based on the degree of potential threat the nonmember poses to reservation residents based on their intended activities. Indeed, the Supreme Court has approved the placement of administrative burdens on tribal members to facilitate collection of state taxes, a type of civil regulation, from their nonmember customers, even though the state would generally lack jurisdiction over the tribal member or tribe on whom the burden was imposed.¹³⁸ Being stopped briefly at a checkpoint is simply another type of administrative burden, and, because it is necessary to ensure enforcement of valid tribal regulatory authority, it should not be viewed as problematic.

¹³⁵ Transcript of Teleconference between Douglas L. Hoelscher, Deputy Assistant to the President and Director of Intergovernmental Affairs, Harold Frazier, Chairman, Cheyenne River Sioux Tribe, and others 33–34 (June 15, 2020) (on file with journal).

¹³⁶ *Bressi v. Ford*, 575 F.3d 891, 896–97 (9th Cir. 2009); *cf.* *United States v. Cooley*, 141 S. Ct. 1638 (2021) (allowing for longer detention of potentially dangerous criminal suspects outside of the checkpoint context, but rejecting a requirement that the tribal officer first determine whether or not the suspect qualifies as an Indian for criminal jurisdiction purposes).

¹³⁷ *Tweedy*, *supra* note 93, at 898–899.

¹³⁸ *Washington v. Confederated Tribes of the Colville Rsrv.*, 447 U.S. 134, 159–160 (1980); COHEN, *supra* note 96, at § 6.03[1][a] (“A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.”). Some of the tribes in *Confederated Tribes* retained ownership of the cigarettes at issue until their ultimate sale to the consumer, so the administrative burden for those particular tribes appears to have fallen on the tribes themselves. *Confederated Tribes of the Colville Rsrv.*, 447 U.S. at 144.

3. Where nonmember activities are intended to occur may be determinative of whether *Montana* applies in an individual case

While the checkpoints are located on state and federal highways and (less controversially) on other roads, these roads are not necessarily the loci of the activities that each Tribe is seeking to regulate. For example, imagine a young woman who is not a tribal member traveling from Sioux Falls (once the primary hotspot location in the state and an area that has continued to see high numbers of cases off and on throughout the pandemic)¹³⁹ to the Cheyenne River Sioux Reservation to visit her grandmother, who is a tribal member and who lives on tribal trust land. If the Tribe turned her away at a state highway checkpoint, it does not follow that it was regulating her activity on the highway—rather the Tribe would be more properly seen as regulating her access to on-reservation trust land for purposes of a family visit. In such a case, the tribal regulation is valid irrespective of any *Montana* analysis. This is because the challenged activities are intended to occur on on-reservation trust land, and the *Montana* analysis solely applies to nonmember owned fee lands (and possibly tribal lands in unique circumstances involving heightened state interests, which are not present here).¹⁴⁰ Additionally, tribes generally maintain a sovereign right to exclude individuals from tribal trust lands,¹⁴¹ as well as from reservations and portions of reservations that are mostly comprised of trust lands and other tribal lands.¹⁴² Thus, even where a stop of a motorist occurs on a state right-of-way, courts have recognized that, when the motorist's activities that the tribe seeks to regulate occurred on tribal trust lands, *Montana* may not apply.¹⁴³ Therefore, just as some individual motorists who are passing through the reservations may be able to argue that their activities do not result in a risk of sufficient magnitude to trigger *Montana* (although this would not exempt them from the minimal burden of stopping at the checkpoint, as discussed above), the Tribes may be able to argue that some nonmembers can be excluded irrespective of *Montana*.

¹³⁹ Lisa Kaczke, *Smithfield Foods Now Largest Coronavirus Hot Spot in US, CDC in Sioux Falls to Investigate*, ARGUS LEADER (Apr. 15, 2020), <https://www.argusleader.com/story/news/politics/2020/04/15/cdc-sioux-falls-smithfield-foods-becomes-largest-coronavirus-hotspot-us/5138372002/> [<https://perma.cc/F6LT-QKDM>]; *Sioux Falls Considered COVID-19 Hotspot in Latest White House Report*, KELOLAND MEDIA GRP. (Mar. 21, 2021), <https://www.keloland.com/news/healthbeat/coronavirus/sioux-falls-considered-covid-19-hotspot-in-latest-white-house-report> [<https://perma.cc/RU5S-XFWP>].

¹⁴⁰ See *supra* note 109.

¹⁴¹ See, e.g., *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 899–903 (9th Cir. 2017).

¹⁴² See, e.g., *Brendale v. Confederated Tribes of the Yakima Rsr.*, 492 U.S. 408, 434–435, 441 (plurality opinion).

¹⁴³ See, e.g., *Wilson v. Horton's Towing*, 906 F.3d 773, 780 (9th Cir. 2018).

V. THE VULNERABILITY OF TRIBAL MEMBERS TO COVID-19

Ideally, tribes should be able to adopt policies and regulations for their peoples and their territories that match their societal values, regardless of whether their citizens are more or less vulnerable to a particular threat than the rest of the population.¹⁴⁴ As I have argued elsewhere, this is part of their governmental prerogative.¹⁴⁵ Unfortunately, as explained above, the limitations on tribal jurisdiction adopted by the Supreme Court have seriously undermined tribes' capacity to effectuate governmental policies and to protect their citizens from societal ills generally.¹⁴⁶ It therefore behooves tribes to be able to justify the need for regulations, particularly those that will affect noncitizens.

In the case of COVID-19, tribal governments (as well as other sovereigns) indisputably have a strong need to protect their citizens. Coronavirus is "significantly more lethal than the seasonal flu," with the Case Fatality Rate in the United States being 1.8 percent as of April 17, 2021.¹⁴⁷ Because it is a new virus, there was no preexisting immunity

¹⁴⁴ See, e.g., Florey, *supra* note 132, at 748 (noting that "[m]any distinct features of tribes in the United States support their potential as policy laboratories" and further noting that "[t]he combination of tribal diversity and responsive government means that tribal regulation can be closely targeted to specific populations and their particular challenges").

¹⁴⁵ Tweedy, *supra* note 93, at 886 (discussing this principle in the context of tribal gun regulation).

¹⁴⁶ See, e.g., Tweedy, *supra* note 99, at 687–692.

¹⁴⁷ Joel Achenbach, *Antibody Tests Support What's Been Obvious: Covid-19 is Much More Lethal Than the Flu*, WASH. POST (Apr. 28, 2020), https://www.washingtonpost.com/health/antibody-tests-support-whats-been-obvious-covid-19-is-much-more-lethal-than-flu/2020/04/28/2fc215d8-87f7-11ea-ac8a-fe9b8088e101_story.html [<https://perma.cc/YL99-52EN>]; *Case Fatality Rate of the Ongoing COVID-19 Pandemic*, OUR WORLD IN DATA (Apr. 18, 2021), https://ourworldindata.org/explorers/coronavirus-data-explorer?zoomToSelection=true&time=2020-03-14..latest&pickerSort=asc&pickerMetric=location&hideControls=true&Metric=Case+fatality+rate&Interval=Cumulative&Relative+to+Population=false&Align+outbreaks=true&country=USA~OWID_WRL [<https://perma.cc/HB8Y-43SB>] (reflecting a United States fatality rate of 1.79 percent as of April 17, 2021 and a world fatality rate of 2.21 percent). Compared to the current COVID-19 Case Fatality Rate in the United States of 1.79 percent (as of April 17, 2021), the flu has a fatality rate of only 0.1 to 0.2 percent. *Case Fatality Rate of COVID-19 Compared to Other Diseases*, OUR WORLD IN DATA, <https://ourworldindata.org/mortality-risk-covid?country=~USA#how-does-the-case-fatality-rate-cfr-of-covid-19-compare-to-other-virus-outbreaks-and-diseases> [<https://perma.cc/U8KD-K9J8>] (last accessed Aug. 30, 2021).

Case Fatality Rate Data varies over time and by location. *The CFR of COVID-19 Differs by Location, and Has Changed During the Early Period of the Outbreak*, OUR WORLD IN DATA (Apr. 18, 2021), <https://ourworldindata.org/mortality-risk-covid?country=~USA#the-cfr-of-covid-19-differs-by-location-and-has-changed-during-the-early-period-of-the-outbreak> [<https://perma.cc/CQZ5-M6MF>]. Additionally, the Case Fatality Rate is imprecise in that it both underestimates and overestimates the risk of death from COVID-19. *There Are Two Reasons Why the Case Fatality Rate Does Not Reflect the Risk of Death*, COVID-19 DATA EXPLORER, OUR WORLD IN DATA (Apr. 18, 2021), <https://ourworldindata.org/mortality-risk-covid?country=~USA#there-are-two-reasons-why-the-case-fatality-rate-does-not-reflect-the-risk-of-death> [<https://perma.cc/5BVT-CEJX>]. It overestimates the risk because there are likely to be many people who have COVID-19 but do not realize it, and it underestimates the risk of death because there are people who currently have the disease and who will eventually die from it but have not died

to COVID-19 when it first hit in winter 2020, and it was generally expected early in the pandemic that 40 to 70 percent of the general population would become infected unless aggressive social distancing measures were undertaken or a vaccine was found and widely implemented.¹⁴⁸ Thankfully, as this Article goes to press, independently developed types of vaccines have been approved and are now being administered.¹⁴⁹

The statistics regarding COVID-19 outlined above are general statistics, and, as alluded to earlier, the vulnerability of Native Americans is much greater.¹⁵⁰ This greater vulnerability is due in large part to the higher prevalence of underlying health conditions, including, among a host of others, diabetes and coronary heart disease, in the Native American population that exacerbate the risk of death from COVID-19.¹⁵¹ The death rate of Native Americans in the United States from COVID-19 is nearly twice that of whites.¹⁵² And, in addition to the higher risk of death, Native Americans have been found to be 3.5 times more likely to contract the disease than are whites and also to be more likely to contract the illness at a younger age than whites.¹⁵³ The fact that Native Americans tend to contract COVID-19 at younger ages than do whites becomes even more problematic when one takes into account the fact that the Native population tends to be younger than the general

yet. *Id.*

¹⁴⁸ Achenbach, *supra* note 147; *Why Is COVID-19 So Dangerous?*, UCI HEALTH (Apr. 29, 2020), <https://www.ucihealth.org/blog/2020/04/why-is-covid19-so-dangerous> [https://perma.cc/37ET-YSEM].

¹⁴⁹ See, e.g., Amy McKeever & Nat'l Geographic Staff, *Here's the Latest on COVID-19 Vaccines: These Are the COVID-19 Vaccine Prospects That Have Made It to Phase Three Trials and Beyond.*, NAT'L GEOGRAPHIC (Apr. 16, 2021), <https://www.nationalgeographic.com/science/article/coronavirus-vaccine-tracker-how-they-work-latest-developments-cvd> [https://perma.cc/VJ7M-8AVF]; FDA News Release, *FDA Approves First COVID-19 Vaccine: Approval Signifies Key Achievement for Public Health* (Aug 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> [https://perma.cc/N3J3-XK4M].

¹⁵⁰ See *supra* note 47 and accompanying text.

¹⁵¹ See, e.g., Hoss, *supra* note 47, at 168; IDSA & HIVMA, *COVID-19 POLICY BRIEF: DISPARITIES AMONG NATIVE AMERICAN COMMUNITIES IN THE UNITED STATES* (July 7, 2020), <https://www.idsociety.org/globalassets/idsa/public-health/covid-19/covid19-health-disparities-in-native-american-communities-final.pdf> [https://perma.cc/93MT-UFTL]; Soo Kim, *Native Americans Are More Vulnerable to Coronavirus—Less Than 3 Percent Have Been Tested*, NEWSWEEK (May 21, 2020), <https://www.newsweek.com/native-americans-are-more-vulnerable-coronavirus-less-3-percent-have-been-tested-1505688> [https://perma.cc/WU7C-V3QL]; see also *Early Data from China Suggests that Those with Underlying Health Conditions Are at a Higher Risk*, OUR WORLD IN DATA (Apr. 18, 2021), <https://ourworldindata.org/mortality-risk-covid?country=~USA#early-data-from-china-suggests-that-those-with-underlying-health-conditions-are-at-a-higher-risk> [https://perma.cc/A6FN-VR7B] (chart showing how various underlying conditions exacerbated the risk of dying from COVID-19 based on early data from China).

¹⁵² Burki, *supra* note 46; Nina Lakhani, *Exclusive: Indigenous Americans Dying from Covid at Twice the Rate of White Americans*, GUARDIAN (Feb. 4, 2021), <https://www.theguardian.com/us-news/2021/feb/04/native-americans-coronavirus-covid-death-rate> [https://perma.cc/RX4C-SEEX].

¹⁵³ Hatcher et al., *supra* note 47.

population. For example, the median age on reservations is twenty-nine, whereas the median age in the United States population as a whole is thirty-eight.¹⁵⁴ Data from nearly a dozen states, including Alaska, Arizona, Idaho, Mississippi, Montana, New Mexico, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin, show a disproportionately high percentage of Natives in those states being afflicted with and/or dying from the disease.¹⁵⁵ For example, although the population of New Mexico is only 9 percent Native American, a full 60 percent of those infected in New Mexico as of May 2020 were tribal members.¹⁵⁶ While the disparity in infections has since shrunk to 19 percent, Native Americans accounted for nearly one-third of the deaths in the state as of April 18, 2021.¹⁵⁷ Although the disparity in COVID-19 deaths between Native Americans and other races is somewhat less stark in South Dakota than in New Mexico, it remains very troubling: those identifying solely as Native American make up 8 percent of the population of South Dakota and yet account for 15 percent of the COVID-19-related deaths in the state.¹⁵⁸

Concerningly, however, it is widely acknowledged that the current COVID-19 data are incomplete, with many states choosing not to collect data on infection rates among Native Americans and even some on-reservation healthcare providers failing to “consistently collect or submit data on outcomes.”¹⁵⁹ Even with these data gaps, the news is extremely alarming. In May and June 2020, Navajo Nation was reported to have the highest per capita rate of infection in the United States,¹⁶⁰ with the Nation’s per capita rate as of June 28, 2020 surpassing even “that of Wuhan at the peak of the outbreak in China.”¹⁶¹ Moreover, the Navajo Nation’s total death toll in February 2021 was 1,038 persons, “the equivalent of losing one in every 160 people on the reservation.”¹⁶²

¹⁵⁴ *Indian Country Demographics*, NAT’L CONG. OF AM. INDIANS, <https://www.ncai.org/about-tribes/demographics> [<https://perma.cc/UFB6-JRB4>] (last accessed June 17, 2021).

¹⁵⁵ *Racial Data Dashboard*, COVID TRACKING PROJECT (Apr. 18, 2021), <https://covidtracking.com/race/dashboard> [<https://perma.cc/GU7J-YZQD>].

¹⁵⁶ *Id.* (describing the percentage of the population of New Mexico that identifies as solely Native American or Alaska Native); Marjorie Childress, *COVID-19 Has Spread to Most New Mexico Tribes*, N.M. IN DEPTH (May 13, 2020), <http://nmindepth.com/2020/05/13/covid-19-has-spread-to-most-new-mexico-tribes/> [<https://perma.cc/Z6VW-Q4JE>].

¹⁵⁷ *Racial Data Dashboard*, *supra* note 155.

¹⁵⁸ *Id.*

¹⁵⁹ IDSA & HIVMA, *supra* note 151, at 4; Burki, *supra* note 46, at 325; Kim, *supra* note 151; *see also* Rebecca Nagle, *Native Americans Being Left out of US Coronavirus Data and Labelled as ‘Other’*, GUARDIAN (Apr. 24, 2020), <https://www.theguardian.com/us-news/2020/apr/24/us-native-americans-left-out-coronavirus-data> [<https://perma.cc/6LB6-BMD6>].

¹⁶⁰ IDSA & HIVMA, *supra* note 151, at 1; Burki, *supra* note 46, at 325; Kim, *supra* note 151.

¹⁶¹ IDSA & HIVMA, *supra* note 151, at 1.

¹⁶² Lakhani, *supra* note 152. White Americans generally suffer 121 deaths per 100,000 people. *Id.* Other Southwest tribes experienced devastating per capita infection rates as well. Childress,

For Indigenous Americans as a whole, the four weeks leading up to February 2, 2021 “saw 958 deaths among Indigenous Americans, making it the deadliest stretch of the pandemic for them so far.”¹⁶³ To make matters worse, another layer of grief overlays tribes and Native individuals as a result of the many grave losses caused by the pandemic; this is because “scores of elders, custodians of the language, history, and tradition of Native Americans” have been lost to COVID-19.¹⁶⁴ Thus, the pandemic is causing a loss of both beloved family members and parts of Native cultures themselves.

The disproportionately devastating effects of COVID-19 for Native individuals and tribes are further compounded by the long history of devastation caused to Native cultures by disease. In the 1600s, 1700s, and 1800s, Native peoples survived the decimation resulting from multiple outbreaks of smallpox and other diseases.¹⁶⁵ Later outbreaks of disease in the United States have also disproportionately affected Native Americans. The influenza pandemic in 1918 and 1919 caused the loss of 2 percent of the entire Native population in the United States, with losses of Native populations in the West and Southwest in the range of 4 to 6 percent.¹⁶⁶ Even as recently as 2009, the mortality rate of Native Americans and Alaska Natives from H1N1 influenza was four times higher than that of the general population.¹⁶⁷

Native peoples’ and Native individuals’ past experiences with disease and their cultural history of devastation from disease outbreaks undoubtedly increase the trauma they experience in the face of the current pandemic.¹⁶⁸ Moreover, there is developing evidence, as further

supra note 156. For example, the Zia Pueblo had a per capita infection rate of eleven percent in May 2020, an extremely high rate for that very early stage of the pandemic. *Id.* One member of the Zuni Tribe even voiced concern in April 2020 that COVID-19 could cause that tribe to “go extinct,” Acee Agoyo, *‘At This Rate, the Entire Tribe Will Be Extinct’: Zuni Pueblo Sees COVID-19 Cases Double as First Death Is Confirmed*, INDIANZ (Apr. 8, 2020), <https://www.indianz.com/News/2020/04/08/at-this-rate-the-entire-tribe-will-be-ex.asp> [<https://perma.cc/6NKY-Q5HL>], and the lieutenant governor of the Picuris Pueblo expressed similar concerns. Florey, *supra* note 99, at 406.

¹⁶³ Burki, *supra* note 46, at 325.

¹⁶⁴ *Id.*; Christine Fernando, *Tribes Try to Shield Elders and Their Knowledge from Virus*, ASSOCIATED PRESS NEWS (Dec. 27, 2020), <https://apnews.com/article/us-news-arizona-coronavirus-pandemic-native-americans-5b2ede2eccb469881a2a68cb5b1b65e1> [<https://perma.cc/8VXN-XURV>]; Andy Yamashita, *As Tulalip Elders Die from COVID-19, Tribes Lose More Than Family*, CROSSCUT (Oct. 23, 2020), <https://crosscut.com/environment/2020/10/tulalip-elders-die-covid-19-tribes-lose-more-family> [<https://perma.cc/WC7R-FGA7>].

¹⁶⁵ See, e.g., Sciarrino, *supra* note 46, at 5–6.

¹⁶⁶ Fletcher, *supra* note 46, at 42.

¹⁶⁷ Burki, *supra* note 46, at 325.

¹⁶⁸ Accord Neha A. John-Henderson & Annie T. Ginty, *Historical Trauma and Social Support as Predictors of Psychological Stress Responses in American Indian Adults During the COVID-19 Pandemic*, 139 J. OF PSYCHOSOMATIC RSCH. 1, 4 (2020) (finding “that [American Indian] adults who think more frequently about historical loss associated with the colonization and genocide of their people, experienced greater increases in psychological stress from before the declaration of

discussed below, that past traumatic experiences like devastation of one's culture from disease may be passed down through generations biologically via a process called epigenetics in such a way that vulnerability to future disease may be increased as a result of these past traumas.¹⁶⁹ This increased trauma in the face of disease and increased vulnerability to disease exacerbates the threat that the pandemic poses to the health and welfare of the Cheyenne River Sioux Tribe and the Oglala Lakota Nation (and other tribes) under the *Montana* test. This is so because, not only is there mounting evidence, described below, that both personally experiencing trauma and exposure to historical trauma harms one's health, but experiencing trauma also effects a direct detriment to a person's welfare or wellbeing in its own right.

Disease outbreaks and federal indifference to or complicity in exacerbating such outbreaks¹⁷⁰ are, of course, not the only type of historical trauma experienced by Native peoples within the United States. Land loss, suppression and attempted eradication of culture, forced relocation, and termination of the federal-tribal relationship are a few examples of the many others.¹⁷¹

The reverberations of these unparalleled traumas undoubtedly continue today, and the reverberations of traumas stemming from past disease outbreaks in particular are likely amplified by the fear, anxiety, grief, and physical suffering that COVID-19 is visiting upon these communities.¹⁷² This is true not only because of cultural memory of the devastation resulting from these outbreaks being passed down through oral history and other mechanisms of cultural transmission¹⁷³ but also because historical traumas like large-scale disease outbreaks are thought to cause changes in gene expression by affecting processes such as methylation of DNA and by modifying histones, which are water soluble

COVID-19 as a pandemic to one month following the declaration of the pandemic"); *see also* Emily Esterwood & Sy Atezaz Saeed, *Past Epidemics, Natural Disasters, COVID19, and Mental Health: Learning from History as we Deal with the Present and Prepare for the Future*, 91 PSYCHIATRIC Q. 1121, 1121 (2020) (predicting, based on studies relating to past pandemics as well as COVID-19, that COVID-19 is likely to lead to greater incidence of PTSD and anxiety, among other psychological problems).

¹⁶⁹ John-Henderson & Ginty, *supra* note 168, at 2.

¹⁷⁰ WITT, *supra* note 10, at 38; Fletcher, *supra* note 46, at 43.

¹⁷¹ Hoss, *supra* note 47, at 165; Monika Batra Kashyap, *U.S. Settler Colonialism, White Supremacy, & the Racially Disparate Impacts of COVID-19*, 11 CAL. L. REV. ONLINE 517, 521 (2020); Teresa N. Brockie et al., *A Framework to Examine the Role of Epigenetics in Health Disparities among Native Americans*, 2013 NURSING RSCH. & PRACTICE 2; John-Henderson & Ginty, *supra* note 168, at 1.

¹⁷² *See* John-Henderson & Ginty, *supra* note 168, at 4 (tying thoughts of historical trauma among Native Americans to greater stress responses to the COVID-19 pandemic).

¹⁷³ *Accord* Burki, *supra* note 46, at 326 (quoting Professor Melissa Begay's statement that "[o]ur grandparents still talk about smallpox and tuberculosis, these diseases are very real to us").

proteins that form a complex with DNA.¹⁷⁴ It is believed that these changes (which can cause genes that would be normally be switched on and off intermittently to adapt to changing circumstances to become permanently switched off) can be passed down through generations.¹⁷⁵ Thus, epigenetic changes, which are caused by both historical trauma and personally experienced childhood trauma, can create a feedback loop whereby individuals (or in the case of Native Americans, peoples) become more susceptible to certain ailments, including various diseases and mental health problems.¹⁷⁶ Moreover, Native Americans, including members of tribes located within the boundaries of South Dakota, have a much higher incidence of experience of childhood trauma, also referred to as Adverse Childhood Experiences (ACEs).¹⁷⁷ And, significantly for our purposes in evaluating Native Americans' risks with respect to the coronavirus, several of the diseases and psychiatric disorders that are linked to epigenetic changes commonly arising from

¹⁷⁴ Marco Trerotola et al., *Epigenetic Inheritance and the Missing Heritability*, 9:17 HUM. GENOMICS 1, 1 (2015); Brockie, et al., *supra* note 171, at 2, 4; John-Henderson & Ginty, *supra* note 168, at 1; *Histone*, MERRIAM-WEBSTER'S MED. DICTIONARY, (Apr. 19, 2021), <https://unabridged.merriam-webster.com/medical/histone> [<https://perma.cc/5FS6-NB9Z>] ("DNA methylation occurs when a methyl group is added to the fifth carbon of cytosine residues that are linked by a phosphate to a guanine nucleotide (a CpG dinucleotide) by DNA methyltransferases (DNMT1, DNMT3A and DNMT3B)."); Cristina M. Lanata et al., *DNA Methylation 101: What is Important to Know About DNA Methylation and Its Role in SLE Risk and Disease Heterogeneity*, 5 LUPUS SCI. & MED. 1, 2–3 (2018).

In addition to epigenetic changes resulting from historical trauma, which may be passed down through generations, *see infra* notes 175–176 and accompanying text, knowledge of historical trauma also cases distress to Native Americans whose ancestors experienced historical trauma. Brockie et al., *supra* note 171, at 2 ("Over 50% of Native Americans indicate that they think about loss related to historical trauma, such as loss of language, loss of culture, and loss of land, at least occasionally, and which caused [sic] them psychological distress.").

¹⁷⁵ Theresa Phillips, *The Role of Methylation in Gene Expression*, 116 NATURE EDUC. 1, 2 (2008); Trerotola et al., *supra* note 174, at 3–4, 10.

¹⁷⁶ Trerotola et al., *supra* note 174, at 5–7; Brockie et al., *supra* note 171, at 3–5; *accord* Hoss, *supra* note 47, at 165–66; Brockie et al., *supra* note 171, at 1 ("Epigenetic modifications are considered to be an individual's molecular response to the environment and occur in an effort to preserve the health of the individual by increasing the accessibility of genes for transcription and translation that relate to immediate survival.").

¹⁷⁷ *See generally* Brockie et al., *supra* note 171; Donald Warne et al., *Adverse Childhood Experiences (ACE) Among American Indians in South Dakota and Associations with Mental Health Conditions, Alcohol Use, and Smoking*, 28 J. OF HEALTHCARE FOR POOR & UNDERSERVED 1559 (2017).

historical and childhood traumas create risks of experiencing complications from COVID-19.¹⁷⁸ These include cancer, nicotine dependence, and obesity, among others.¹⁷⁹

An example of an ACE that has been linked to epigenetic consequences is observing one's mother be physically abused.¹⁸⁰ Native women are much more likely to experience domestic violence, with over 50 percent of Native women experiencing physical abuse at the hands of a spouse or intimate partner in their lifetimes and over 80 percent of Native women experiencing some form of violence in their lifetimes.¹⁸¹ This victimization of Native women suggests that Native children are more likely to witness the physical abuse of their mothers. And, in fact, a study of the ACEs experienced by Native Americans located within the boundaries of South Dakota found that nearly a quarter of Native respondents had, as children, witnessed their mothers being treated violently, compared to just over five percent of the non-Native respondents in the state.¹⁸²

Additionally, childhood poverty is a traumatic experience that has been linked to changes in the methylation of genes related to metabolism and inflammation,¹⁸³ and chronic inflammation in turn has been linked to such COVID-19 risk factors as heart disease, diabetes, and cancer.¹⁸⁴ Moreover, in the South Dakota study, nearly 40 percent of the

¹⁷⁸ See, e.g., Brockie et al., *supra* note 171, at 4 (adverse childhood experiences (ACEs), specifically removal of a child from their parents due to abuse or neglect, linked to cancer); *id.* at 2 (exposure to childhood trauma linked to substance use disorder); *id.* at 3 (ACEs linked to obesity); *id.* at 5 (methylation differences linked to drug use and, in females, nicotine dependence); see also *id.* at 2 fig.1, (showing a link between trauma, epigenetic changes, and cardiovascular disease, diabetes, and obesity); Warne et al., *supra* note 177, at 1566 (over a third of Native Americans in South Dakota surveyed were current smokers, compared to 15 percent of non-Native American persons surveyed); Trerotola et al., *supra* note 174, at 5–6 (suggesting a possible connection between DNA methylation patterns that are transmitted intergenerationally and diabetes); Hoss, *supra* note 47, at 165–66; *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 21, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/SV43-MBDG>] (stating that cancer, heart disease, diabetes, current smoking and a history of smoking, substance abuse disorders, and obesity create risks of complications from COVID-19).

¹⁷⁹ Brockie et al., *supra* note 171, at 4 (adverse childhood experiences (ACEs), specifically removal of a child from their parents due to abuse or neglect, linked to cancer); *id.* at 2 (exposure to childhood trauma linked to substance use disorder); *id.* at 3 (ACEs linked to obesity); *id.* at 5 (methylation differences linked to drug use and, in females, nicotine dependence); see also *People with Certain Medical Conditions*, *supra* note 178.

¹⁸⁰ Brockie, *supra* note 171, at 4.

¹⁸¹ See, e.g., Nat'l Inst. of Just., *Five Things about Violence Against American Indian and Alaska Native Women and Men*, OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST. (May 2016), <https://www.ojp.gov/pdffiles1/nij/249815.pdf> [<https://perma.cc/N2RY-6MX8>].

¹⁸² Warne et al., *supra* note 177, at 1565.

¹⁸³ Brockie, *supra* note 171, at 4.

¹⁸⁴ *Understanding Acute and Chronic Inflammation*, HARV. HEALTH PUBL'G, HARV. MED. SCH. (June 17, 2020), <https://www.health.harvard.edu/staying-healthy/understanding-acute-and-chronic-inflammation#:~:text=Research%20has%20shown%20that%20chronic,to%20know>

Native American respondents had incomes at or below 50 percent of the federal poverty level, which would indicate that their children would be experiencing poverty; this compared with roughly 13 percent of non-Native respondents being afflicted with that level of poverty.¹⁸⁵ The poverty rate on the Pine Ridge reservation is over 50 percent, and the life expectancy of individuals living there is the lowest in the United States.¹⁸⁶

Furthermore, removal of a child from his or her home due to abuse or neglect has been tied to epigenetic changes linked to susceptibility to cancer,¹⁸⁷ which, as noted above, increases one's risk of developing complications from COVID-19, and Native children generally are currently four times more likely to be removed from their homes than are non-Native children.¹⁸⁸ Thus, for Native Americans, the continued intergenerational effects of the historical trauma caused by colonialism combined with the higher prevalence of ACEs in Native communities create unique vulnerabilities and lead to greater susceptibility to complications from COVID-19.

While the evidence as to intergenerational transmission of epigenetic changes is still developing,¹⁸⁹ mounting evidence, as described above, appears to support the intergenerational effects of trauma on health outcomes resulting from epigenetic changes to gene expression. And even putting epigenetic pathways to one side, historical trauma continues to affect Native Americans through cultural transmission and because “[p]opulations that have experienced higher levels of historical trauma are more likely to be exposed to trauma throughout the life course.”¹⁹⁰ These vulnerabilities exacerbate the detrimental effects that COVID-19 is likely to have on the health and welfare of tribes, including those within the borders of South Dakota. Combined with the state's hands-off approach to the pandemic, these experiences with trauma leave tribal members in an extremely precarious position in the face of the COVID-19 pandemic. This precariousness in turn increases the threat that, absent effective tribal regulation, infected non-Natives pose to tribal health and welfare.

¹⁸⁵ Warne et al., *supra* note 177, at 1564.

¹⁸⁶ *Pine Ridge Indian Reservation*, RE-MEMBER, <https://www.re-member.org/pine-ridge-reservation.aspx> [<https://perma.cc/P8BV-RQU4>] (last accessed June 20, 2021).

¹⁸⁷ Brockie, *supra* note 171, at 4.

¹⁸⁸ NAT'L INDIAN CHILD WELFARE ASSOC., SETTING THE RECORD STRAIGHT: THE INDIAN CHILD WELFARE ACT FACT SHEET (2018), <https://www.nicwa.org/wp-content/uploads/2018/10/Setting-the-Record-Straight-2018.pdf> [<https://perma.cc/Q8KS-3HV5>].

¹⁸⁹ See generally Bernhard Horsthemke, *A Critical View on Transgenerational Epigenetic Inheritance in Humans*, 9 NATURE COMM'NS 2973 (2018).

¹⁹⁰ John-Henderson & Ginty, *supra* note 168, at 2.

Adding to these severe difficulties, the vulnerabilities of Native individuals and indigenous peoples within the United States to COVID-19 are exacerbated by other dire problems, such as the gross inadequacy of healthcare facilities on many reservations, including a lack of bed space and shortage of qualified doctors and other medical personnel, conditions which only add to the trauma Native Americans experience in the face of COVID-19.¹⁹¹ One stark example of the inadequacy of healthcare resources available to tribes is the fact that the Oglala Lakota were only allocated four ventilators for their Reservation to serve the Tribe's nearly 47,000 members.¹⁹² The Cheyenne River Sioux Tribe similarly has grossly inadequate healthcare resources to deal with the virus, given that its hospital has only eight beds, six respirators, and no intensive care capacity and that the next nearest hospital is 170 miles away.¹⁹³

Other problems include the disproportionate lack of water availability and indoor plumbing on reservations and the prevalence of overcrowded housing, both of which are known to lead to greater transmission rates of COVID-19.¹⁹⁴ The Tribes within the borders of South Dakota are no strangers to these problems. For example, most of the communities on the Cheyenne River Sioux Reservation “do not have water and sewer systems making it difficult to live in sanitary conditions.”¹⁹⁵ And on the Pine Ridge Reservation, home to the Oglala Lakota Nation, “[a] severe housing shortage forces hundreds into homelessness while thousands of others live in overcrowded, substandard accommodations.”¹⁹⁶ Indeed, as Matthew Fletcher points out, “[p]ublic health

¹⁹¹ See, e.g., ELAYNE J. HEISLER, CONG. RSCH. SERV., IN11333, COVID-19 AND THE INDIAN HEALTH SERVICE (2020), <https://crsreports.congress.gov/product/pdf/IN/IN11333> [<https://perma.cc/5MJL-C37T>]; Mary Smith, *Native Americans: A Crisis in Health Equity*, ABA, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/native-american-crisis-in-health-equity/ [<https://perma.cc/B2G7-9Z5M>] (last accessed June 17, 2021); Mark Walker, *Fed Up With Deaths, Native Americans Want to Run Their Own Health Care*, N.Y. TIMES (Jan. 3, 2021), <https://www.nytimes.com/2019/10/15/us/politics/native-americans-health-care.html> [<https://perma.cc/5M46-9GZJ>]; Dana Hedgpeth et al., *Indian Country, Where Residents Suffer Disproportionately from Disease, Is Bracing for Coronavirus*, WASH. POST (Apr. 4, 2020), <https://www.washingtonpost.com/climate-environment/2020/04/04/native-american-coronavirus/> [<https://perma.cc/TAV4-YDQG>]; Pfankuch, *supra* note 84; accord Hoss, *supra* note 47, at 171–73.

¹⁹² Letter from Julian Bear Runner, *supra* note 107, at 3.

¹⁹³ Pfankuch, *supra* note 84.

¹⁹⁴ Hoss, *supra* note 47, at 170; Aliyah Chavez, *Two Pueblos Have Some of the Highest Infection Rates in US*, INDIAN COUNTRY TODAY (Apr. 7, 2020), <https://indiancountrytoday.com/news/two-pueblos-have-one-of-the-highest-infection-rates-in-us> [<https://perma.cc/CL7N-C5NE>].

¹⁹⁵ *South Dakota: Cheyenne River Reservation*, P'SHIP WITH NATIVE AMS., http://www.nativepartnership.org/site/PageServer?pagename=PWNA_Native_Reservations_CheyenneRiver [<https://perma.cc/E7QG-VFAR>] (last accessed June 17, 2021).

¹⁹⁶ *South Dakota: Pine Ridge Reservation*, P'SHIP WITH NATIVE AMS., http://www.nativepartnership.org/site/PageServer?pagename=PWNA_Native_Reservations_PineRidge [<https://perma.cc/H928-PH7A>] (last accessed June 17, 2021).

scholars have long warned that a pandemic reaching Indian country could be more disastrous for Indian country than for the American population overall.”¹⁹⁷

Finally, tribal funding sources tend to be much more limited than those of other governments.¹⁹⁸ This is due, in substantial part, to the Supreme Court’s restrictions on tribal taxing authority pertaining to nonmembers, particularly those occupying or engaged in activities on nonmember-owned fee land within a reservation, and to its concomitant willingness to allow state taxation of nonmembers in some circumstances.¹⁹⁹ Under this framework, tribes generally have to meet the *Montana* test to tax nonmember activities on fee lands.²⁰⁰ Tribes are more likely to be able to tax nonmember activities on trust lands,²⁰¹ but the feasibility of their actually imposing a tax may be undercut by the Supreme Court’s willingness to also allow state taxes in some cases based on a specialized preemption analysis.²⁰² Because the Court has not to date required tax revenue to be apportioned between a state and a tribe, allowing both entities to tax tends to effectively result in double taxation, a circumstance that may well lead the tribe to forego its tax to avoid driving business away from the reservation.²⁰³ One situation in which state taxes and other regulations are likely to be foreclosed is that in which a tribe adds value to goods or services provided on a reservation.²⁰⁴ Largely because of these tax-related limitations, tribal casinos (rather than tribal taxes) often serve as major sources of revenue for the funding of health and social services.²⁰⁵ But most tribes have

¹⁹⁷ Fletcher, *supra* note 46, at 46.

¹⁹⁸ See, e.g., Adam Crepelle & Illia Murtazashvili, *COVID-19, Indian Reservations, & Self-Determination*, MERCATUS CTR. GEO. MASON UNIV. 4 (2020).

¹⁹⁹ See, e.g., Tweedy, *supra* note 146, at 677–78, 688; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Washington v. Confederated Tribes of the Colville Rsrv.*, 447 U.S. 134 (1980).

²⁰⁰ See generally *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

²⁰¹ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136–152 (1982).

²⁰² See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 164 (1989); *Washington*, 447 U.S. at 158–59 (1980). *But see* *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980) (disallowing state tax of a nonmember contractor utilized by the Tribe).

²⁰³ See COHEN, *supra* note 96, at §§ 8.03[1][d], 8.05; see also Tweedy, *supra* note 99, at 704 n.63. It is important to note that this problem of double taxation has been ameliorated in some states through compacts with tribes and state authorizing legislation. See COHEN, *supra*, at § 8.05; Act of June 11, 2020, ch. 132, 2020 Wash. Laws (allowing for state governor to enter compacts with tribes regarding sharing of state sales and use tax revenues and some business and occupation tax revenues).

²⁰⁴ COHEN, *supra* note 96, at § 6.03[2][a] (quoting the Court’s statement in *Confederated Tribes of the Colville Rsrv.* “that a tribe’s interest in raising revenues ‘is strongest when the revenues are derived from value generated on the reservation by activities involving the [tribe] and when the taxpayer is the recipient of tribal services’ and that a state’s interest ‘is . . . strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services’”).

²⁰⁵ Crepelle & Murtazashvili, *supra* note 198, at 4.

shuttered their casinos due to COVID-19.²⁰⁶ Although the temporary closures were necessary to protect the tribes and others from the spreading of disease, at the same time, because of the Court's substantive and practical limitations on tribes' taxing ability, the closures further compromised tribes' already tenuous ability to effectively treat citizens who became infected with COVID-19 and to fund measures to prevent the spread of the disease within their territories.²⁰⁷ Moreover, the federal government's monetary aid to tribes to address the COVID-19 pandemic was sorely delayed, a problem that compounded tribes' already very strained financial situation.²⁰⁸ This combination of factors has created a perfect storm of vulnerability among tribes. This vulnerability limits tribes' ability to protect the health and welfare of their citizens from COVID-19.

Because of Native Americans' extreme vulnerability to the disease and the lethality of COVID-19 generally, tribes' continued existence and vitality have been literally at stake in the fight against COVID-19 (although the danger is slowly dissipating as more people become vaccinated).²⁰⁹ This is particularly true in South Dakota in light of the governor's prioritization of business interests over public health and her disdain for mandatory restrictions in furtherance of public health.²¹⁰ The potential for individuals residing off-reservation who are not subject to any mandatory state or even local public health restrictions²¹¹ to

²⁰⁶ Fletcher, *supra* note 46, at 44; Liz Mineo, *For Native Americans, COVID-19 is 'the Worst of Both Worlds at the Same Time'*, HARV. GAZETTE (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/the-impact-of-covid-19-on-native-american-communities/> [<https://perma.cc/6M22-WPP3>]; Simon Romero & Jack Healy, *Tribal Nations Face Most Severe Crisis in Decades as the Coronavirus Closes Casinos*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/11/us/coronavirus-native-americans-indian-country.html> [<https://perma.cc/6UAK-9STG>]; Burki, *supra* note 46, at 325.

²⁰⁷ Fletcher, *supra* note 46, at 44; Mineo, *supra* note 206; Romero & Healy, *supra* note 206; Burki, *supra* note 46, at 325.

²⁰⁸ See, e.g., Kim, *supra* note 151; Carlson, *supra* note 16.

²⁰⁹ See, e.g., Agoyo, *supra* note 162; *Native Communities Have Been Hit Hard by COVID-19—and Fear for Their Survival*, PBS NEWS HOUR (May 25, 2020), <https://www.pbs.org/newshour/show/native-communities-have-been-hit-hard-by-covid-19-and-fear-for-their-survival> [<https://perma.cc/5XBA-CCXY>]; *Tribes Removes Disputed Coronavirus Reservation Checkpoints*, *supra* note 67 (citing the “arrival of coronavirus vaccines” as one of the reasons that the Cheyenne River Sioux Tribe removed its checkpoints in March 2021).

²¹⁰ Goodluck, *supra* note 45; see also Witte, *supra* note 26 (quoting Gov. Noem describing other states' stay-at-home orders as “reflect[ing] a ‘herd mentality’”).

²¹¹ A few of the larger cities in South Dakota have or have had mask mandates, but such mandates remain uncommon. See, e.g., BROOKINGS, S.D., ORDINANCE 21-013 (Mar. 23, 2021) (ordinance in place through Apr. 30, 2021); Joe Sneve, *South Dakota Lawmakers Aim to Kill Cities' Ability to Order Mask Mandates, Business Restrictions*, ARGUS LEADER (Feb. 4, 2021), <https://www.argusleader.com/story/news/2021/02/04/sd-lawmakers-aim-kill-cities-ability-order-mask-mandates-business-restrictions/4392038001/> [<https://perma.cc/7J9M-HC6T>]; Kevin Gonzalez, *Sioux Falls City Council Votes to Allow Mask Mandate to Expire*, DAKOTA NEWS NOW (Mar. 10, 2021), <https://www.dakotaneWSnow.com/2021/03/10/sioux-falls-city-council-votes-allow-mask-mandate->

spread COVID-19 generally and to infect tribal members and others who reside on reservations located inside the state's borders has been extremely high throughout the pandemic.²¹² While the availability of vaccines certainly lessens the danger, children under twelve cannot yet be vaccinated and remain at risk, with the proportion of total infections attributable to children rising rapidly nationwide as of early May 2021.²¹³ Moreover, the dangerous P.1 COVID-19 variant, which is resistant to vaccines, has been discovered in South Dakota's Pennington County, which abuts the Pine Ridge Reservation, and the highly contagious Delta variant has become very prevalent in the state.²¹⁴ To make matters worse, ideological distrust of the COVID-19 vaccines appears to be stronger in South Dakota than elsewhere, with demand for the shot waning as the vaccine was opened up to the general population more broadly.²¹⁵ Some rural counties in northwest and central South Dakota in particular have alarmingly low rates of vaccination.²¹⁶ While specific data as to vaccination rates among tribes whose reservations are located within the boundaries of South Dakota does not appear to

to-expire/ [https://perma.cc/ZKS4-B3ZX]. Moreover, a bill has been introduced in the state legislature to prohibit local mask mandates that affect businesses. H.B. 1093, 2021 Leg., 96th Sess. (S.D. 2021); Sneve, *supra*.

²¹² For example, the first case on the Pine Ridge reservation resulted from a nonmember's travel to Denver and her subsequent return to the reservation. *See, e.g.*, Abourezk, *supra* note 83.

²¹³ *See, e.g.*, Ashly Welch, *I'm Vaccinated. My Kids Aren't. What's Safe for Us to Do?*, HEALTHLINE (Apr. 8, 2021), <https://www.healthline.com/health-news/im-vaccinated-my-kids-arent-whats-safe-for-us-to-do> [https://perma.cc/BVV6-MJYM]; Bill Chappell, *Children Now Account for 22% of New U.S. COVID Cases. Why Is That?*, NPR (May 3, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/05/03/993141036/children-now-account-for-22-of-new-u-s-covid-cases-why-is-that> [https://perma.cc/9XZF-DFVB]; *Coronavirus (COVID-19) Update: FDA Authorizes Pfizer-BioNTech COVID-19 Vaccine for Emergency Use in Adolescents in Another Important Action in Fight Against Pandemic*, U.S. FOOD & DRUG ADMIN. (May 10, 2021), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-pfizer-biontech-covid-19-vaccine-emergency-use> [https://perma.cc/3A8W-38KF].

²¹⁴ *South Dakota State Epidemiologist Says P.1 Variant of COVID-19 Is 'Concerning'*, KELOLAND MEDIA GRP. (Apr. 22, 2021), <https://www.keloland.com/news/healthbeat/coronavirus/south-dakota-state-epidemiologist-says-p-1-variant-of-covid-19-is-concerning/> [https://perma.cc/9E88-UMR5]; Jacob Newton, *'Delta Is the Predominant Strain of COVID in the State': DOH Secretary Talks COVID, Vaccination and Masking*, KELOLAND MEDIA GRP. (Aug. 20, 2021), <https://www.keloland.com/news/healthbeat/coronavirus/delta-is-the-predominant-strain-of-covid-in-the-state-doh-secretary-talks-covid-vaccination-and-masking/> [https://perma.cc/A2GG-ELR3].

²¹⁵ Bart Pfankuch, *Vaccine Hesitancy in South Dakota Could Prolong Pandemic and Delay a Return to Normal*, KELOLAND MEDIA GRP. (Apr. 17, 2021), <https://www.keloland.com/news/healthbeat/coronavirus/vaccine-hesitancy-in-south-dakota-could-prolong-pandemic-and-delay-a-return-to-normal/> [https://perma.cc/2UR6-TCQ3].

²¹⁶ Abby Wargo, *COVID-19 Vaccination Rates Slowing in South Dakota*, RAPID CITY J. (June 16, 2021), https://rapidcityjournal.com/news/state-and-regional/covid-19-vaccination-rates-slowing-in-south-dakota/article_0cc148bd-da0c-57db-991c-6b6cac70e3dd.html [https://perma.cc/57W9-JZ4Z]; Angela Kennecke, *State's Data on Native American Vaccinations Incomplete*, KELOLAND MEDIA GRP. (Apr. 14, 2021), <https://www.keloland.com/news/investigates/states-data-on-native-american-vaccinations-incomplete/> [https://perma.cc/4GWD-URGR].

be available, as of July 2021, Native Americans in general had the highest vaccination rate in the United States.²¹⁷

Transmission from those traveling to, from, or through the Oglala Lakota or Cheyenne River Sioux reservations could occur in any of myriad ways. For example, such transmission could occur as a result of reservation residents leaving the reservation to shop or attend medical appointments or through those who live outside the reservation entering it for personal visits or for employment. Thus, the state's lax approach to fighting COVID-19 is a classic example of a case where a state permits "conduct that causes negative externalities in other jurisdictions."²¹⁸ The Oglala Lakota and the Cheyenne River Sioux have taken action, including the establishment of checkpoints, to minimize those negative externalities and to diminish the de facto lowest common denominator effect that South Dakota's laissez faire approach would otherwise have.²¹⁹ Thankfully, as shown above, this situation is one of the rare cases in which one of the predicate conditions for tribal civil regulatory jurisdiction over nonmembers on non-tribal lands and within rights-of-way is almost indisputably met.

VI. THE BUREAU OF INDIAN AFFAIRS' INTERIM GUIDANCE

On April 8, 2020, the Bureau of Indian Affairs (BIA) issued interim guidance on tribal checkpoints that were established due to COVID-19. The BIA stated that the checkpoints on state and federal highways would only be valid after a tribe reached an agreement with the applicable road owner.²²⁰ It cited a federal regulation pertaining to tribal roads that had no obvious applicability to the question to support its assertion.²²¹ The guidance, however, is not based on law and is not binding on tribes. Federal Indian law governing tribal jurisdiction is primarily a creature of federal common law. Because of Congress's plenary authority over tribes, only Congress can alter United States Supreme

²¹⁷ Kennecke, *supra* note 216; Sukee Bennett, *American Indians Have the Highest Covid Vaccination Rate in the US*, NOVA (July 6, 2021), <https://www.pbs.org/wgbh/nova/article/native-americans-highest-covid-vaccination-rate-us/> [<https://perma.cc/KW57-KBSH>].

²¹⁸ Florey, *supra* note 132, at 729.

²¹⁹ See Letter from Julian Bear Runner, *supra* note 107, at 1 (noting that "[t]he State of South Dakota's response to the COVID-19 crisis is ineffective as shown by the increasing number of cases in South Dakota" and explaining that the Oglala Lakota's decision to establish checkpoints was necessary because of South Dakota's "lack of judgment and planning of preventative measures in response to the current pandemic"); see also Florey, *supra* note 132, at 726–27 (discussing the lowest common denominator effect in the context of differing state regulations).

²²⁰ Memorandum from Darryl LaCounte, Director, Bureau of Indian Affairs to Regional Directors et al. Regarding Temporary Guidance – Road Closures or Restrictions on Tribal Lands, at 2 (Apr. 8, 2020), <https://www.indianz.com/covid19/wp-content/uploads/2020/05/DOI-BIA-Memo.pdf> [<https://perma.cc/J58Y-XZ4L>].

²²¹ *Id.* (citing 25 C.F.R. § 170.114).

Court holdings on tribal jurisdiction by passing an otherwise valid statute.²²² The Supreme Court has told us that *Montana* applies to questions of tribal civil jurisdiction relating to nonmember activities on state highways, and lower courts have extended this analysis to federal highways.²²³ The reason that *Montana* and its progeny apply is because rights-of-way for state and federal highways have been held to be the equivalent of nonmember-owned fee land.²²⁴ The BIA cannot overcome these holdings simply by issuing guidance citing an inapplicable regulation; unlike Congress, federal agencies lack plenary authority over tribes.

Moreover, the guidance was a surprising development given the federal government's trust relationship with tribes and the fact that, under Executive Order 13175, the federal government "recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."²²⁵ Executive Order 13175 also requires that federal agencies "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."²²⁶

Because the guidance was not rooted in law and conflicts with Supreme Court precedent, the precedent governs, rather than agency guidance.

VII. SEIZURES AND REASONABLENESS

As explained above, the checkpoints are almost certainly lawful under *Montana's* second exception. However, the Oglala Lakota, the Cheyenne River Sioux, and other Tribes that put COVID-19 checkpoints into place should still ensure that the implementation of the checkpoints is reasonable. Because they are considered seizures, state and federal checkpoints must be conducted in a reasonable manner to pass Fourth Amendment muster.²²⁷ Tribes are not subject to the Fourth Amendment of the United States Constitution because they are neither federal nor state actors and did not consent to the constitutional compact.²²⁸ However, tribes are bound by an identically worded provision of the Indian

²²² United States v. Lara, 541 U.S. 193, 200–02 (2004).

²²³ *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).

²²⁴ *Strate*, 520 U.S. at 454; *Nord v. Kelly*, 520 F.3d 848, 853 (8th Cir. 2008).

²²⁵ Exec. Order No. 13,175, 65 Fed. Reg. 67,249, at § 2 (Nov. 6, 2000).

²²⁶ *Id.* at § 5(a).

²²⁷ See, e.g., *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990).

²²⁸ See, e.g., *Florety*, *supra* note 132, at 717; *Tweedy*, *supra* note 99, at 693.

Civil Rights Act (ICRA),²²⁹ though they need not interpret it identically to the constitutional provision.²³⁰

The safest course for tribes in terms of preserving their jurisdiction in the face of a potential challenge is to take guidance from Fourth Amendment precedent²³¹ and ensure that their operation of checkpoints is reasonable and that motorists are not detained any longer than is necessary to determine how the given tribe's COVID-19 regulations apply to them and for the tribal officer to inform them as to what they must do to comply.

VIII. THE CONTINUING PROBLEMS WITH THE *MONTANA* TEST

Even while the pandemic serves as a textbook illustration of a case where the stringent requirements of *Montana's* second exception should be viewed as undeniably met, it also serves as a grave reminder of what is wrong with the *Montana* test²³² and of the life-or-death consequences that are at times attendant on a Tribe's ability to exercise regulatory jurisdiction over members and nonmembers alike. Rather than accepting tribal self-government and the Cheyenne River Sioux's and Oglala Lakota's eminently reasonable decisions to take strong protective measures to combat the spread of COVID-19, Governor Kristi Noem gave the Tribes an ultimatum, strategically delivered to news outlets rather than to the Tribes directly:²³³ take down the checkpoints within forty-eight hours or face a lawsuit.²³⁴ The lawsuit never materialized—most likely because Governor Noem realized that, even within the confines of *Montana's* problematic framework, the lawsuit was probably a

²²⁹ 25 U.S.C. § 1302(a)(2).

²³⁰ Florey, *supra* note 132, at 749–750; Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, 46 COLUM. HUM. RTS. L. REV. 104, 148–49 (2015).

²³¹ A Ninth Circuit case called *United States v. Faire*, 575 F.3d 929 (9th Cir. 2009), provides a good summary of what is required for a checkpoint to be considered reasonable under the Supreme Court's Fourth Amendment precedent:

If the checkpoint is not per se invalid as a crime control device, then the court must “judge [the checkpoint's] reasonableness, hence, its constitutionality, on the basis of the individual circumstances.” This requires consideration of “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”

Id. at 932 (internal citations omitted). Additionally, stops at a checkpoint must not be based “solely [on] the unfettered discretion of officers in the field,” *Brown v. Texas*, 443 U.S. 47, 51 (1979); in other words, stopping every vehicle is generally preferable to conducting random stops. *Sitz*, 496 U.S. at 454.

²³² See Florey, *supra* note 99, at 22–24; Ann E. Tweedy, *Congressional Restoration of Tribal Civil Jurisdiction*, REGUL. REV. (Mar. 31, 2021), <https://www.theregreview.org/2021/03/31/tweedy-congressional-restoration-tribal-civil-jurisdiction/> [<https://perma.cc/E6FP-YCHS>].

²³³ Ducheneaux, *supra* note 57; Compl. for Injunctive and Declaratory Relief, *supra* note 57, at 17–18 ¶ 55 & n.28.

²³⁴ Compl. for Injunctive and Declaratory Relief, *supra* note 57, at 17–18 ¶ 55 & n.28.

loser.²³⁵ Noem then turned her efforts to using her insider status with then-President Trump to try to bogart a solution.²³⁶

Her initial approach of threatening an almost immediate lawsuit rather than genuinely trying to negotiate a solution may well have gained more traction in less urgent circumstances. This is because, outside of the unique, dire circumstances that we currently find ourselves in, the *Montana* framework creates an additional layer of vulnerability for tribes attempting to protect their citizens and other reservation residents from ills that, although important, do not create as much urgency as the pandemic. The uncertainties posed by the framework and the Court's resistance to tribal jurisdiction incentivize non-Native governments and individuals to challenge tribal authority²³⁷ and allow courts to be conscripted into participating in these efforts to harass tribes and chill their exercises of governmental authority. This is contrary to the recognition in American jurisprudence that governmental resources should be protected "from depletion due to the need to . . . defend against suits."²³⁸ Additionally, control mechanisms like Rule 11²³⁹ sanctions that are designed to curb the temptation for parties to bring frivolous suits serve little use if the area of law is so fact-based as to be, in most cases, utterly unpredictable. Tribal public health regulations relating to the pandemic appear to comprise one of the few, exigent situations where a court could easily determine that the *Montana* test is satisfied, without the need for a lengthy and expensive trial. While the problems with the framework have less bearing in our present, unusual circumstances, the problems remain extant in other contexts and are deserving of a legislative (or judicial) solution.²⁴⁰

Justice Kagan's statement in dissent in *South Bay United Pentecostal Church v. Newsom*,²⁴¹ in which she criticizes the majority's decision to enjoin some of California's pandemic-related restrictions on churches, could, as shown below, easily be modified to critique the *Montana* test generally, outside of the pandemic context:

²³⁵ Ducheneaux, *supra* note 57.

²³⁶ See *supra* note 58 and sources cited therein; Benji Jones & Charles Davis, *The White House Reportedly Asked South Dakota's Governor How to Add Another President to Mount Rushmore, and She Later Gave Trump a 4-foot Replica with His Face on It*, BUS. INSIDER (Aug. 8, 2020), <https://www.businessinsider.com/how-gov-noem-trumps-desire-carved-into-mt-rushmore-2020-8> (<https://perma.cc/4SPY-4X6K>) (describing Noem as "a close ally of President Trump's").

²³⁷ See Fletcher, *supra* note 46, at 38–39.

²³⁸ Lauren Villa, *Public Service, Private Entity: Should the Nature of the Service or Entity Be Controlling on Issues of Sovereign Immunity?*, 78 ST. JOHN'S L. REV. 1257, 1261 (2004) (discussing the justifications for sovereign immunity).

²³⁹ Fed. R. Civ. P. 11.

²⁴⁰ See Tweedy, *supra* note 232.

²⁴¹ 141 S. Ct. 716, 720 (2021) (Kagan, J., dissenting).

The Court's decision[s] leave[] . . . [tribal] policymakers adrift It is difficult enough in a predictable legal environment to craft . . . policies that keep communities safe. That task becomes harder still when officials must guess which restrictions this Court will choose to strike down. The Court injects uncertainty into an area where uncertainty has human costs.²⁴²

The uncertainty is undoubtedly starker in the garden-variety (i.e., non-pandemic) tribal civil regulatory context under *Montana* than in the situation at issue for states in crafting public health regulations after *South Bay United Pentecostal Church*, and the resulting human costs deserve attention.

IX. CONCLUSION

The COVID-19 pandemic, combined with the host of preexisting conditions that are more prevalent among Natives, the laissez-faire approach that South Dakota has taken to the virus, the inadequacy of tribal healthcare systems, and the underfunding and delayed funding of tribal relief efforts has created a life-or-death situation for tribal governments seeking to curb the virus. Tribes appear to be well within their rights in reasonably implementing checkpoints to curb the spread of the deadly disease.

²⁴² *Id.* at 723 (with modifications to demonstrate how the same basic critiques would apply equally to the *Montana* test).