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Cover Page Footnote

The Author would like to thank the various individuals who provided their invaluable perspectives, insight, and feedback, including Professor Adam Todd and Holly Fudge. Lastly, she would like to thank her family for their input and support throughout the development of this Comment.

COMMENT:

CAN'T LIVE WITH THEM, CAN'T LIVE WITHOUT THEM: THE IMPACT OF COVID-19 ON FUNERAL HOMES AND THE RELATIONSHIP OF PRIVACY INTERESTS BETWEEN THE LIVING AND DECEASED

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I. INTRODUCTION

"[E]very crisis has both its dangers and its opportunities. [Each] can spell either salvation or doom."[1]

The COVID-19 pandemic single-handedly turned life as we knew it upside down. This crisis, and its myriad of rippling effects, is likely to change our society permanently.[2] As the world attempts to adapt to the societal changes brought on by this new virus, one of the few constants appears to be the presence, need, and importance of funeral homes. Historically, these businesses have played a vital and intricate role in the grieving process.[3] Due to the serious risks posed by COVID-19 early on in the pandemic, many hospitals and health facilities did not permit family members into the building to be with their loved ones as their health declines, which made funeral services all that more central to gaining closure.[4]

Because of the nature of funerals becoming more and more fundamental for closure in the midst of a pandemic, issues quickly multiply. According to the Centers for Disease Control and Prevention ("CDC"), individuals particularly susceptible to contracting COVID-19 include the elderly and those with underlying medical conditions.[5] Funerals bring together all types of people, from near and far, to join in mourning the loss of their loved one.[6] Additionally, funerals inevitably evoke strong emotions resulting in physical forms of reassurance and consoling, such as hugging.[7]

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[1] Martin Luther King, Jr., Nobel Lecture: The Quest for Peace and Justice (Dec. 11, 1964). This quote was referenced by Ohio Gov. Mike DeWine at one of his press conferences during a pivotal point in the pandemic. C-SPAN, *Ohio Governor DeWine Address on the Coronavirus Pandemic* (Nov. 11, 2020), https://www.c-span.org/video/?478044-1/ohio-governor-de-wine-coronavirus-surge-more-intense-widespread-dangerous.

[2] *See* POLITICO, *Coronavirus Will Change the World Permanently. Here's How.,* (Mar. 19, 2020, 7:30 PM), https://www.politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579; Daniel Telvock, *Doctors concerned about potential long-term effects of COVID-19* (Nov. 25, 2020, 5:16 PM), https://www.wivb.com/health/coronavirus/doctors-concerned-about-potential-long-term-effects-of-covid-19/; Andrew E. Budson, MD, *The hidden long-term cognitive effects of COVID-19*, HARVARD HEALTH BLOG (Mar. 4, 2021), https://www.health.harvard.edu/blog/the-hidden-long-term-cognitive-effects-of-covid-2020100821133; UT NEWS, *Coronavirus Mutation May Have Made it More Contagious,* (Oct. 30, 2020), https://news.utexas.edu/2020/10/30/coronavirus-mutation-may-have-made-it-more-contagious/; Sue Gleiter, *Dauphin and York county coroners on COVID-19: 'This is not like anything we have ever had*,*'* PENN LIVE PATRIOT-NEWS, https://www.pennlive.com/coronavirus/2020/04/dauphin-and-york-county-coroners-on-covid-19-this-is-not-like-anything-we-have-ever-had.html (Apr. 27, 2020, 6:09 PM).

[3] GARY LADERMAN, REST IN PEACE: A CULTURAL HISTORY OF DEATH AND THE FUNERAL HOME IN TWENTIETH-CENTURY AMERICA (2005); *see generally* JESSICA MITFORD, THE AMERICAN WAY OF DEATH (1963).

[4] *See* Edgar Sandoval, *'Not Sparing Anyone': Texas Funeral Home Can't Escape Virus*, N.Y. TIMES, https://www.nytimes.com/2020/07/28/us/coronavirus-texas-funeral-homes.html (Dec. 22, 2020); *Hopital Visitation – Phase II Visitation for Patients who are Covid-19 Negative*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, https://www.cms.gov/files/document/covid-hospital-visitation-phase-ii-visitation-covid-negative-patients.pdf (last visited Jan. 10, 2022).

[5] *People with Certain Medical Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (Dec 14, 2021).

[6] *See generally* LADERMAN, *supra* note 3*;* MITFORD, *supra* note 3.

[7] *See generally* LADERMAN, *supra* note 3; MITFORD, *supra* note 3.

Therefore, it is no surprise that funerals across the country have become COVID-19 hotspots.[8]

While the retention of a deceased individual's privacy is a sensitive issue, in light of the impact that COVID-19 has had on society, it may be beneficial to require more thorough medical disclosures to entities, such as funeral homes, to better combat the spread of infectious diseases. The protocol addressing the COVID-19 pandemic as of February 2021 was seemingly inadequate in combatting the sheer magnitude of this virus. While COVID-19 is not the first pandemic the world has experienced, this pandemic has presented unique challenges that inherently invite a unique response.[9] Even with various state-wide precautions put into place, individuals who experience a loved one dying in the midst of a pandemic may often view their personal conduct as not bound by the rules and protocols that apply to other everyday activities, likely due to the significant meaning and closure associated with funerals.

Currently, there appears to be a significant disconnect between the decedent's next of kin, hospitals, nursing homes, and funeral homes. For example, many issues may arise when funeral homes are not told that prior to death, the decedent had been tested for COVID-19 with the results still pending and that the family members were present with their loved one when they passed. Additionally, without sufficient formal channels in place for nursing homes, hospitals, or other associated entities to notify funeral homes that someone's loved one contracted COVID-19, funeral homes can be placed in a difficult position as they attempt to unveil this information in their own limited capacity. Thus, encouraging the disclosure of this information would likely not only directly protect those working for funeral homes but also potentially protect the individuals who plan to attend the visitation and/or funeral. These disclosures could prove beneficial not only during the age of COVID-19 but also if and when society may encounter similar infectious diseases.

Part II of this Comment will describe how regulations regarding medical disclosures of infectious diseases have historically been handled, the unique threats that COVID-19 poses, and the role that funeral homes play in the midst of it all. Part III will analyze why the response to COVID-19 should be different from those of its infectious virus predecessors. It will also recommend various responses that would significantly help curb the spread of COVID-19; these recommendations could also apply to society's response to similar infectious diseases. Lastly, Part IV will conclude that while an individual's postmortem privacy is unequivocally important, COVID-19's

[8] *See* Nicole Chavez et al., *How two funerals helped turn one small Georgia city into a hotspot for coronavirus,* CNN, https://www.cnn.com/2020/04/02/us/albany-georgia-coronavirus/index.html (Apr. 3, 2020, 2:49 AM).

[9] *See infra* Part II.A, III.A.

unique impact may require a more robust approach in disclosing information to entities like funeral homes.

II. BACKGROUND

To better understand the impact of COVID-19 on the funeral home industry, it is beneficial to look at past infectious diseases. The following section examines the Spanish Flu, Ebola, and HIV/AIDS, along with the responses these widespread epidemics elicited from society. Additionally, the current responsibilities funeral homes and other associated health care entities face when presented with infectious diseases and viruses is further explained.

A. *Medical Disclosures of Deceased in Regard to Past Infectious Diseases and/or Viruses*

i. *Spanish Flu*

The 1918 Spanish Flu has been known as one of the deadliest pandemics that the world has ever witnessed.[10] Due to the many similarities between COVID-19 and the Spanish Flu, scientists and health experts compare the 1918 pandemic in an attempt to learn from the past and gain a clearer insight on how to best move forward.[11] Within the United States, the deaths caused by COVID-19, unfortunately, rose at an alarming rate over a significant amount of time.[12] Hopefully, the impact of the approximately 40 million deaths caused by the Spanish Flu will help shape the response to the current COVID-19 pandemic and future pandemics to ensure this type of impact does not become a reality the world must relive.[13]

The virus at the core of both the Spanish Flu and COVID-19 "were new to human populations which means that there was no natural immunity to them. This partially explains why the fatality rates of both diseases were significantly higher than seasonal influenza and coronavirus outbreaks."[14] The high fatality rate caused by the Spanish Flu directly

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[10] *Spanish Flu*, HISTORY, https://www.history.com/topics/world-war-i/1918-flu-pandemic (May. 19, 2020).

[11] Robert Moghim, *COVID-19 vs Spanish Flu*, COLORADO PAIN CARE, https://coloradopaincare.com/covid-19-vs-spanish-flu/ (last visited Oct. 3, 2021).

[12] *See* Adriana Diaz, *CDC predicts U.S. coronavirus death toll could reach 321,000 by mid-December*, CBS NEWS (Nov. 26, 2020, 9:05 PM), https://www.cbsnews.com/news/u-s-coronavirus-death-toll-could-reach-321000-by-mid-december-cdc-predicts/; Campbell Robertson et al., *Virus Deaths Approach Spring Record Amid Changing U.S. Crisis*, N.Y. TIMES, https://www.nytimes.com/2020/11/28/us/covid-deaths-united-states.html (Feb. 21, 2021); *COVID Live Updates: Global Deaths Inch Toward 1.5 Million as U.S. Cities Increase Restrictions*, NBC NEWS (Nov. 29, 2020, 6:14 PM), https://www.nbcnews.com/meet-the-press/video/covid-deaths-in-u-s-represent-19-percent-of-worldwide-total-96815173659.

[13] *See* Moghim, *supra* note 11.

[14] *Id.*

impacted funeral homes.[15] Recently, an Ohio-based funeral home discovered old ledgers and records dating back to the Spanish Flu indicating that the funeral home was working at nearly two to three times its normal rate.[16] This disturbing increase in the number of cases and deaths, in conjunction with the United States being in the midst of World War I, provided reasonable grounds for the government to downplay the effects of the Spanish Flu to the public.[17]

During the Spanish Flu, honest communication about the pandemic's severity, including communication to funeral homes, was not a priority in the eyes of public health and government officials.[18] "The 1918–1919 influenza pandemic swept across the [United States] during a time when patriotism was more important than truth. Thus, intimidation and propaganda were part of the communication culture."[19] Even after public health officials closed "all public gatherings and public funerals, the newspaper said, 'This is not a public health measure.'"[20] Additionally, the name attributed to this pandemic, the "Spanish Flu," was not given due to its origination in Spain; rather, this was because Spain was one of the few countries that remained neutral in World War I.[21] This allowed Spain to report on the pandemic in graphic detail in its newspapers during the midst of wartime without "affecting morale"; however, by being the only country to provide even somewhat accurate information, it allowed other nations to use Spain as a scapegoat and deflection tactic to prove that this pandemic was an issue not affecting the United States.[22] Ultimately, the Spanish Flu provided an example of the horrifying reality that can occur when denial and deflection are at the root of deciding how to deal with a pandemic.

ii. *Ebola*

The Ebola pandemic in 2014 was one of the more recent infectious disease outbreaks to affect the world.[23] This outbreak primarily affected Guinea, Liberia, and Sierra Leone, where nearly 99.9% of worldwide deaths

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[15] *See* Jordan Vandenberge, *Local funeral home's century-old records show similarities between COVID*, *Spanish Flu*, https://www.news5cleveland.com/news/originals/local-funeral-homes-century-old-records-show-similarities-between-covid-spanish-flu (Jun. 5, 2020, 7:32 PM).

[16] *Id.*

[17] *See generally* Betty Little, *As the 1918 Flu Emerged, Cover-up and Denial Helped It* Spread, HISTORY (May 26, 2020), https://www.history.com/news/1918-pandemic-spanish-flu-censorship.

[18] *See id.*; *Pandemic Influenza–Past, Present, Future Workshop Proceedings*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 17, 2006), https://www.cdc.gov/flu/pandemic-resources/pdf/workshop.pdf.

[19] *Id.* at 7.

[20] *Id.*

[21] Evan Andrews, *Why Was It Called the 'Spanish Flu?'*, HISTORY, https://www.history.com/news/why-was-it-called-the-spanish-flu (Mar. 27, 2020).

[22] *See id.*

[23] *See* Nicholas LePan, *Visualizing the History of Pandemics*, VISUAL CAPITALIST (Mar. 14, 2020), https://www.visualcapitalist.com/history-of-pandemics-deadliest/.

occurred.[24] According to the CDC, eleven individuals were treated for Ebola within the United States, with only one of those individuals dying as a result.[25] While the outbreak did not continue to spread within the United States, health experts prepared for the worst and provided protocols for handling human remains infected with Ebola.[26]

The particular Ebola strain from the 2014–2016 pandemic was still contagious after death; thus, it required fairly stringent postmortem care.[27] The mortality rate of the Zaire Ebola strain is between 40%–90%, averaging closer to 60%.[28] This mortality rate is unusually high for a virus, which helps to explain health experts' and the public's fear of a potentially large outbreak.[29] But, because the virus did not spread as rampantly in the United States as initially expected, the precautions in place were only sparingly used.[30] Some of the more stringent measures surrounding postmortem care involved encasing the decedent in three separate body bags, hospitals placing "infectious substance labels" on the decedent prior to the funeral home transporting, and not embalming the body.[31]

Although the CDC recommended "close collaboration with public health officials in the state or local jurisdiction, as well as with the licensed funeral director," it seems there were minimal formal protocols put in place to disclose to a funeral home that the decedent had Ebola.[32] This lack of explicit guidelines did not pose any serious concerns or immediately raise any red flags since the United States only had one recorded death, resulting in no need for extensive implementation of the plans that had been created.[33]

iii. *HIV/AIDS*

Beginning primarily in the early 1980s, the HIV/AIDS epidemic in the United States became a devastating phenomenon, claiming 25–35 million lives.[34] Due to the harsh stereotypes surrounding those infected with

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[24] *See 2014–2016 Ebola Outbreak in West Africa*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html (Mar. 8, 2019) [hereinafter *Ebola Outbreak*].

[25] *Id.*

[26] *Guidance for Safe Handling of Human Remains of Ebola Patients in U.S. Hospitals and Mortuaries*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/vhf/ebola/clinicians/evd/handling-human-remains.html (Feb. 11, 2015) [hereinafter *Handling Remains of Ebola Patients*].

[27] *See id.*

[28] Mark Kortepeter, *Why Is COVID-19 More Deadly Than Ebola? An Infectious Disease Doctor Explains*, FORBES (Jul. 31, 2020, 10:00 AM), https://www.forbes.com/sites/coronavirusfrontlines/2020/07/31/why-is-covid-19-more-deadly-than-ebola-an-infectious-disease-doctor-explains/?sh=71cd2290f734.

[29] *Id.* (comparing Ebola's mortality rate as similar to that of rabies, pneumonic plague, and inhalational anthrax).

[30] *Handling Remains of Ebola Patients*, *supra* note 26; *see Ebola Outbreak*, *supra* note 24.

[31] *Id.*

[32] *See id.*

[33] *See Ebola Outbreak*, *supra* note 24.

[34] *See* LePan, *supra* note 23.

HIV/AIDS, discrimination against those who died from HIV complications and their ability to access funeral services arose as a prominent issue.[35] For many years, incorrect rhetoric was spread in regard to the transmission of HIV after death, leading many funeral homes to refuse services to such individuals.[36]

This unfounded fear of contracting AIDS has led to various lawsuits against funeral homes.[37] While contracting AIDS is a rational fear, it is wholly *irrational* within this context due to the complete lack of data that would affirmatively support this fear since "there are no documented cases of such employees contracting HIV from their work."[38] In addition, there have been issues of privacy, especially when a funeral home feels as though it has a right to be alerted by the hospital that the decedent did, in fact, have HIV/AIDS.[39] Although this particular virus is transmittable via blood and bodily fluids, embalmers should nonetheless be equipped in the same protective gear regardless of whether or not the decedent had HIV/AIDS, which presents funeral homes with a "less perceived need to know results of individual cases when persons die of illnesses related to HIV."[40]

> When the hospital does not inform the funeral home that a person died of an illness related to HIV, the funeral home should not assume that the person does not have HIV or that the use of mandatory protective clothing is unwarranted. The hospital may itself not know that the person had HIV. The person may have been only recently infected and may not yet have developed antibodies against the virus. Funeral home workers should always use the universal precautions recommended for procedures involving any potential exposure to HIV (or another bloodborne pathogen).
>
> The only reported court decision to date has found that a hospital was not liable to a funeral home for failing to disclose that a person died of an HIV-related illness. . . . Although this particular claim was unsuccessful, it will not

[35] *See* Mark E. Wojcik, *AIDS and Funeral Homes: Common Legal Issues Facing Funeral Directors*, 27 J. MARSHALL L. REV. 411, 411–12 (1995).

[36] *Id.* at 419.

[37] *See id.* at 418–22.

[38] *What Risks Does AIDS Pose to Funeral Home?: Director's Policy Only Spreads Ignorance of the Disease*, L.A. TIMES (Nov. 21, 1993, 12:00 AM), https://www.latimes.com/archives/la-xpm-1993-11-21-me-59410-story.html#:~:text=To%20date%2C%20there%20are%20no,the%20virus%20through%20his%20work.

[39] Wojcik, *supra* note 35, at 412 n.6.

[40] *Id.* at 412 nn.2 & 6.

> preclude timely claims against hospitals for failing to disclose that a person died of an illness related to HIV.[41]

These types of lawsuits primarily center around the funeral home seeking recourse for an entity's failure to disclose that the decedent had HIV/AIDS. In *Funeral Services by Gregory v. Bluefield Community Hospital*, the court held "that exposing a mortician to physical contact with an AIDS infected corpse without his knowledge or consent was not an 'offensive touching' sufficient to support a claim of battery."[42] Some courts have found that "fear of contracting HIV," in and of itself, "may sometimes justify recovery, even without proof of HIV transmission."[43] However, due to "the mandate to use universal precautions in all instances, there is less likelihood that a funeral home director could recover for a hospital's failure to provide notice that a person died of causes related to HIV."[44]

B. Current Rights and Responsibilities of Funeral Homes and Associated Entities when Dealing with Infectious Diseases and Viruses

When dealing with human remains, the industry standard for funeral homes is to treat every body as though it does have an infectious disease, which includes using "universal precautions."[45] This expectation is in place in order to provide "standardized procedures for postmortem services," which include various requirements regarding personal protective equipment, proper disposal of hazardous materials, sanitizing measures, and the like.[46] These precautions are sufficient under the majority of circumstances; however, an additional layer of protection is provided through covered entities being allowed to notify funeral homes of decedents with infectious diseases.[47]

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") "gives you rights over your health information, including the right to get a copy of your information, make sure it is correct, and know who has seen it."[48] However, there are exceptions to who can disclose an individual's health information.[49] Hospitals and nursing homes are both considered

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[41] *Id.* at 428 (footnotes omitted) (referring to Funeral Servs. by Gregory v. Bluefield Cmty. Hosp., 413 S.E.2d 79 (W. Va. 1991)).

[42] *Id.* at 428 n.84.

[43] *Id.* at 427.

[44] *Id.* at 429.

[45] 29 C.F.R. § 1910.1030(d)(1) (2020); Erin L. Wilcox, *Communicable Disease and Funeral Professional,* FUNERAL SERVICE ACADEMY, https://funeralcourse.com/wp-content/uploads/2014/08/FSA-Com-Dis-1-WEB.pdf (last visited Jan. 11, 2022).

[46] *See generally* Wilcox, *supra* note 45.

[47] 45 C.F.R. § 164.512(2)(g) (2020).

[48] *Your Health Information Privacy Rights*, U.S. DEP'T OF HEALTH AND HUM. SERVS., https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf (last visited Jan. 11, 2022).

[49] *See* 45 C.F.R. § 164.512 (2020).

"covered entities," allowing them to disclose protected health information without an individual's authorization.[50]

> (2) *Funeral directors*. A covered entity *may disclose* protected health information to funeral directors, consistent with applicable law, as necessary to carry out their duties with respect to the decedent. If necessary for funeral directors to carry out their duties, the covered entity may disclose the protected health information prior to, and in reasonable anticipation of, the individual's death.[51]

Additionally, protected health information can also be disclosed by covered entities for public health reasons.[52] This includes disclosures that pertain to:

> (iv) A person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition, if the covered entity or public health authority is authorized by law to notify such person as necessary in the conduct of a public health intervention or investigation . . . .[53]

Scenarios that would implicate this provision and allow disclosure of protected health information ("PHI") for the sake of public health may include but are not limited to: the collection and reporting of disease surveillance information; a health department's investigation and necessary intervention in a local outbreak; or notification to individuals who were exposed to a communicable disease.[54]

Most states create "classes" of infectious diseases, which dictate the urgency and timeframe for an entity, like a hospital, to report said infectious disease to a local or state department of health.[55] Infectious diseases that are identified as "Class A" require immediate reporting due to that disease's potential impact of spreading.[56] COVID-19 has widely been classified as "Class A," meaning that confirmed or probable cases should be reported

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[50] 45 C.F.R. § 160.103 (2020).
[51] 45 C.F.R. § 164.512(g)(2) (2020) (emphasis added).
[52] 45 C.F.R. § 164.512(b)(1) (2020).
[53] 45 C.F.R. § 164.512(b)(1)(iv) (2020).
[54] *Permitted Uses and Disclosures: Exchange for Public Health Activities*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (Dec. 2016), https://www.healthit.gov/sites/default/files/12072016_hipaa_and_public_health_fact_sheet.pdf.
[55] *See Know Your ABCs: A Quick Guide to Reportable Infectious Diseases in Ohio*, OHIO DEP'T OF HEALTH (Aug. 1, 2019), https://odh.ohio.gov/wps/wcm/connect/gov/81628d9a-fe78-4b95-bcb7-be7f59e96f66/abcs-guide-to-reportable-infectious-diseases-in-ohio.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-81628d9a-fe78-4b95-bcb7-be7f59e96f66-mNy8IhR.
[56] *Id.*

within 24 hours to a health department.[57] While this system appears facially efficient, it nonetheless presents issues when entities, like hospitals and nursing homes, are required only to alert their health department of an infectious disease within their jurisdiction.

III. ANALYSIS

A. Threats Pertaining Specifically to COVID-19

COVID-19 has presented a multitude of challenges that have never been experienced before, which complicates what an appropriate response entails.[58] Humans tend to be creatures of comparison for the sake of better understanding, but, under the current world circumstances, inaccurate or incomplete comparisons to well-known infectious diseases or illnesses can have potentially harmful consequences.[59] Thus, even as the COVID-19 pandemic comes under control, the lessons of this pandemic are valuable for potential use in the future.

One of the most common comparisons, meant to undermine the true effects of COVID, has been to the seasonal flu.[60] This comparison is harmful for a variety of reasons. The flu is something that most individuals have encountered and dealt with at some point during their life, and when it is compared to COVID-19, it creates a false sense of security.[61] Individuals who attempt to find reassurance in their comparison of the flu and COVID-19 often say things like, "[t]he flu kills tens of thousands of people each year, and no one is shutting down borders because of that."[62] However, in reality, between December 2019 and October 2020, "COVID-19 ha[d] killed more people in the [United States] than [the flu] ha[d] in the last five years."[63] In addition, the deaths that were reported the week of January 10, 2021, "exceed[ed] the CDC's current estimate for flu-related deaths during the *entire* 2019–20 season."[64]

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[57] *Coronavirus Disease 2019 (COVID-19),* OHIO DEP'T OF HEALTH – INFECTIOUS DISEASE CONTROL MANUAL, https://odh.ohio.gov/wps/wcm/connect/gov/49c54aa2-6d58-45e1-9434-72ca8b4ea635/section-3-covid19.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-49c54aa2-6d58-45e1-9434-72ca8b4ea635-no.k7Jq (Jan. 5, 2022).

[58] *See generally* Eric E. Johnson & Theodore C. Bailey, Essay, *Legal Lessons from a Very Fast Problem: COVID-19*, 73 STAN. L. REV. (2020).

[59] *See* Art Markman, *Comparison Is Crucial for Explanation*, PSYCH. TODAY (Jan. 24, 2019), https://www.psychologytoday.com/us/blog/ulterior-motives/201901/comparison-is-crucial-explanation.

[60] *See generally* Cristina Guarino, *No, COVID-19 Is Not Like the Flu–And We Have to Stop Comparing Them*, THE WELL (Apr. 30, 2020), https://thewell.northwell.edu/well-informed/coronavirus-flu; Andrew Pekosz, *No, COVID-19 Is Not the Flu*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Oct. 20, 2020), https://www.jhsph.edu/covid-19/articles/no-covid-19-is-not-the-flu.html.

[61] *See* Guarino, *supra* note 60; *see generally* Pekosz, *supra* note 60.

[62] Guarino, *supra* note 60.

[63] Pekosz, *supra* note 60.

[64] The COVID Tracking Project, *COVID-19 Deaths Are 25 Percent Higher Than in Any Previous Week*, ATL., https://www.theatlantic.com/health/archive/2021/01/covid-19-deaths-are-25-percent-higher-any-other-week/617686/ (Jan. 15, 2021, 10:00 AM).

Even with the emergence of effective vaccinations, epidemiologists have warned that this pathogen could likely circulate for decades, "leaving society to coexist with Covid-19 much as it does with other endemic diseases like flu, measles, and HIV."[65] An endemic disease is one that "remain[s] persistently present but manageable" among society.[66] What distinguishes COVID-19 in its current form from other endemic diseases is that these diseases are by their very definition manageable—implying some legitimate, tangible control of said disease—which arguably is a category COVID-19 does not fit within neatly.[67] Even with a positive trajectory exhibiting legitimate control over a disease like COVID-19, "[r]abies, malaria, HIV and Zika all are endemic infectious diseases, [and yet] their prevalence and human toll vary globally," meaning that the label of "endemic disease" should not be interpreted as being inherently consoling since these diseases still pose significant health risks.[68]

Another cause for concern results from a CDC statistic demonstrating that 59% of cases are traced back to those without any symptoms.[69] This is problematic because when people do not feel ill, they are not inclined to remain at home, quarantine, isolate, etc., furthering the spread. This situation widely differs from the Ebola outbreak, where the virus only spread once the patient exhibited symptoms, simplifying the isolation process.[70]

> Ultimately, though, a disease like Covid-19 that has a lower fatality rate, on average, in a single patient, can actually kill more people based on simple math. More people infected translates to more deaths. This is where Covid-19 wins hands down, and the reason that the recent surge in

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[65] Daniela Hernandez & Drew Hinshaw, *As Covid-19 Vaccines Raise Hope, Cold Reality Dawns That Illness is Likely Here to Stay*, WALL ST. J. (Feb. 7, 2021, 5:30 AM), https://www.wsj.com/articles/as-vaccines-raise-hope-cold-reality-dawns-covid-19-is-likely-here-to-stay-11612693803; *see also supra* Part II.A.

[66] Hernandez & Hinshaw, *supra* note 65.

[67] *See id.*

[68] *See id.*

[69] Ben Guarino, *People without symptoms spread virus in more than half of cases, CDC model finds*, WASH. POST (Jan. 7, 2021, 11:03 AM), https://www.washingtonpost.com/science/2021/01/07/covid-asymptomatic-spread/. "Super spreader events" have become more and more prevalent due to the majority of those who contract COVID-19 presenting as asymptomatic. *See How to recognize superspreader events*, NEB. MED. (Nov. 9, 2020), https://www.nebraskamed.com/COVID/what-do-covid-19-super-spreader-events-have-in-common. News outlets have covered a plethora of events, such as weddings and funerals, that have led to a spike in positive COVID-19 cases due to the attendees not knowing they had COVID-19, since they exhibited no symptoms. *See, e.g.*, Joni Sweet, *Why Weddings Are Becoming Superspreader Events*, HEALTHLINE (Nov. 25, 2020), https://www.healthline.com/health-news/why-weddings-are-becoming-superspreader-events; Meredith Deliso, *Washington state wedding may have caused deadly outbreak in 2 long-term care facilities: Officials*, ABC NEWS (Dec. 4, 2020, 10:48 PM), https://abcnews.go.com/Health/washinton-state-wedding-caused-deadly-outbreak-long-term/story?id=74549901; Alexandria Hein, *Texas funeral became coronavirus superspreader event after 42 were sickened, family claims*, FOX NEWS (Nov. 27, 2020), https://www.foxnews.com/health/texas-funeral-became-coronavirus-super-spreader-event-after-42-were-sickened-family-claims.

[70] Mark Kortepeter, *Why Is Covid-19 More Deadly Than Ebola? An Infectious Disease Doctor Explains*, FORBES (July 31, 2020, 10:00 AM), https://www.forbes.com/sites/coronavirusfrontlines/2020/07/31/why-is-covid-19-more-deadly-than-ebola-an-infectious-disease-doctor-explains/?sh=71cd2290f734.

> cases across parts of the United States is so dangerous. The more people are infected and contagious, the more people will die.[71]

The viruses that are the most efficient beasts, in their own respect, live longer and have a wider impact if they do not immediately kill their host but instead are able to spread slowly throughout the community.[72]

The world's initial lack of immunity against COVID-19 has caused more severe disease and spread among communities.[73] Immunity is typically gained from either previous infection or through vaccination.[74] While it is encouraging that the vaccination effort is well underway, only 63% of the United States population had been fully vaccinated at the time of writing.[75] Obtaining "herd immunity" makes it much more difficult for a virus to spread; thus, it is extremely beneficial to those unable to receive vaccines themselves.[76] The difficult issue with herd immunity in a new virus is determining what percent of the population needs to be immune in order to achieve it; this percentage is still an unknown figure regarding COVID-19 vaccinations.[77] However, the current estimated threshold proportion of the population that must be vaccinated in order to initiate a substantial change within communities is 70%–85% of the country.[78]

Vaccines, while a fantastic start due to their capability of preventing symptomatic illness, may still not be the end-all answer to overcoming the pandemic.[79] The trials that tested the innovative mRNA vaccines, to be used to combat COVID-19, did not initially conclude whether the people vaccinated with it would nonetheless be capable of spreading the illness.[80] Being vaccinated in attempt to bring this pandemic to an end could appear to be in vain if vaccinated individuals are still able to transmit COVID-19 to those vaccinated or unvaccinated, with the possibility of the virus being

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[71] *Id.*

[72] *Id.*

[73] Guarino, *supra* note 60.

[74] *See Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19*, WORLD HEALTH ORG. (Dec. 31, 2020), https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19 [hereinafter *Coronavirus Herd Immunity and Lockdowns*].

[75] Audrey Carlsen et al., *How Is The COVID-19 Vaccination Campaign Going In Your State?*, NPR, https://www.npr.org/sections/health-shots/2021/01/28/960901166/how-is-the-covid-19-vaccination-campaign-going-in-your-state (Jan. 24, 2022, 11:09 AM).

[76] *See Coronavirus Herd Immunity and Lockdowns*, *supra* note 74.

[77] *Id.* Prior to the Omnicron variant, public health experts were optimistic that high percentages of vaccination or infection against COVID-19 would allow society to achieve herd immunity; however, "[t]hose hopes dimmed as the coronavirus mutated into new variants in quick succession over the past year, enabling it to reinfect people who were vaccinated or had previously contracted COVID-19." Julie Steenhuysen, *Analysis: How Omicron highlights fading hope of herd immunity from COVID*, REUTERS (Jan. 20 2022, 12:17 PM), https://www.reuters.com/business/healthcare-pharmaceuticals/how-omicron-highlights-fading-hope-herd-immunity-covid-2022-01-20/.

[78] Carlsen et al., *supra* note 75.

[79] *See* Guarino, *supra* note 69.

[80] *Id.*

equally contagious.[81] Due to the possibility that those vaccinated would be protected from contracting COVID-19 but still may transmit the virus and its variants, extra diligence is required within health departments or other applicable entities to adamantly test to know how effective this current vaccine will be long-term.[82] It is also important to note that vaccines are only effective if enough of the population partakes in receiving one, meaning that those in the United States should be willing to embrace vaccinations due to it being one of the only viable hopes of returning to normalcy.[83]

Unfortunately, new strains of COVID-19 have been found across the world, including within the United States.[84] Preliminary data in the United Kingdom revealed that some of these new mutant strains are potentially capable of increasing COVID-19's fatality by 30%–40%.[85] A physician from the U.K. stated:

> "We're living in a world where coronavirus is so prevalent and rapidly mutating that there are going to be new variants that pop up . . . . We may well be in a situation where we end up having to have an annual coronavirus vaccine" to cope with emerging strains.[86]

As of now, current vaccines are being shown to remain effective; however, these new variants still pose a significant delay in returning to "normal."[87] Even with an increasing number of individuals getting vaccinated, "variants likely delay the day when life can get back closer to normal," and "suggest[] that international travel restrictions—where governments impose bans on people coming from places where more troubling versions of the virus are prevalent—could be in place intermittently for years."[88]

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[81] *See id.*

[82] *Id.*

[83] *See* Adrianna Rodriguez, *In Dr. Fauci's words: Why Americans shouldn't fear a COVID-19 vaccine authorized by the FDA*, U.S.A. TODAY, https://www.usatoday.com/in-depth/news/health/2020/11/22/faucis-words-why-you-should-not-fear-covid-vaccine/6353614002/ (Nov. 23, 2020, 9:00 AM). "If 30% to 50% of the population don't get vaccinated, [Dr.] Fauci [director of the National Institute of Allergies and Infectious Diseases] says the efficacious vaccine has no chance of becoming effective in the community." *Id.*

[84] Michael Nedelman, *South Carolina detects first US cases of coronavirus strain first seen in South Africa*, CNN, https://www.cnn.com/2021/01/28/health/south-carolina-variant-south-africa/index.html (Jan. 2, 2021, 3:10 PM).

[85] Max Colchester & Joanna Sugden, *U.K. Covid-19 Variant Could Be More Deadly, British Officials Say*, WALL ST. J., https://www.wsj.com/articles/new-u-k-covid-19-variant-could-be-more-deadly-british-officials-say-11611338370?mod=article_inline (Jan. 22, 2021, 7:19 PM). Other health authorities have made more morbid conclusions, stating that there is a "'realistic possibility'—a 40% to 50% chance—that the variant is more deadly than past versions." *Id.*

[86] Stephen Fidler, *New Coronavirus Variants Complicate the Battle Against the Pandemic*, WALL ST. J., https://www.wsj.com/articles/new-coronavirus-variants-complicate-the-battle-against-the-pandemic-11611518097 (Jan. 24, 2021, 4:55 PM) (internal citations omitted).

[87] *Id.*

[88] *Id.*

Additionally, these new strains have been found to incubate best within those with compromised immune systems, "which could [adversely] change the trajectory of the pandemic."[89] These immunocompromised individuals, who fall within a group often referred to as "long haulers"—due to the difficulty and length of time associated with their bodies attempting to clear such a viral infection—provide "the worst possible scenario for developing mutations . . . ."[90] The extended length of time it takes these individuals to recover creates a dangerous space for this illness to grow and mutate.[91] "As weeks of illness turn into months, a virus copies itself millions of times. Each copy is an opportunity to make random mistakes. As it spins off new mutations, the virus may happen upon ones that help it resist medications, evade the immune system and come back stronger."[92] At the end of the day, there is no avoiding the fact that COVID-19, or any variant, is a force to be reckoned with and should be treated as such. Although this Comment is particularly aimed at addressing the health crisis precipitated by COVID-19, it could nonetheless be applicable to comparable future pandemics.

B. Why COVID-19's Unique Characteristics Should Generate a More Aggressive Response

i. *Transparency with Funeral Homes is Vital*

Mortuary services is an industry where a virus like COVID-19 presents particularly deadly concerns—not only to those that work there but also those gathering to mourn. Throughout this pandemic, as people pass away, their loved ones continue to meet to mourn their loss. Because funerals are so instrumental to the important process of closure, even individuals who have been rigid in their adherence to state guidelines, mandates, and requirements during this season of COVID-19 may ease up and make an exception in order to support friends or family during this deeply important and emotionally fraught time. This particular mindset is a difficult one to grapple with and unpack in the midst of a pandemic. It feels entirely against our human nature to refuse an embrace or hug at a funeral, and yet interactions just like that are inevitably contributing to ever-increasing cases of COVID-19.[93]

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[89] Melissa Healy, *Dangerous new coronavirus strains may incubate in COVID-19's sickest*, L.A. TIMES, https://www.latimes.com/science/story/2021-01-30/long-term-covid-19-patients-are-incubating-dangerous-new-coronavirus-strains (Jan. 30, 2021, 11:25 AM).

[90] *Id.* (citation omitted).

[91] *Id.*

[92] *Id.*

[93] *See, e.g.*, Haisten Willis & Vanessa Williams, *A funeral is thought to have sparked a covid-19 outbreak in Albany, Ga.–and led to many more funerals*, WASH. POST (Apr. 4, 2020), https://www.washingtonpost.com/politics/a-funeral-sparked-a-covid-19-outbreak—and-led-to-many-more-funerals/2020/04/03/546fa0cc-74e6-11ea-87da-77a8136c1a6d_story.html.

It can be extremely difficult to wrap our minds around the numbers surrounding deaths and their impact during a pandemic, and why we should care about them.[94] As of January 15, 2021, the world reached the tragic milestone of losing approximately two million lives to COVID-19.[95] In an article for *The Atlantic*, Joe Pinsker further quantifies this number in four ways:

> (1) On average, each person in the [United States] who has died from COVID-19 was deprived of about 13 years of life.
>
> (2) For the first time since World War II, [United States] life expectancy at birth could drop by a full year.
>
> (3) About one in 800 Black Americans has died from COVID-19, while one in 1,325 white Americans has.
>
> (4) Roughly 3.1 million Americans have lost a close relative to COVID-19.[96]

In light of these numbers, funeral homes present an excellent platform to enact a major structural change regarding communication and transparency, not only in the funeral industry, but across industries that provide similar essential services to avoid mirroring these statistics during future pandemics. A model called a "bereavement multiplier" is used to approximate the number of individuals that have been impacted by the deaths of COVID-19, which has concluded that "the number of mourners is roughly nine times the cumulative number of people who have died."[97] However, this multiplier "doesn't include extended family members, stepparents and stepchildren, long-term cohabiting partners, adopted family members, or friends. This means that the number of people who have lost someone close to them is larger still."[98]

Funeral homes are inundated with the myriad of impacted individuals mourning, creating situations in which the virus could further spread. It is unwise for society to believe it can wash its hands of the situation and

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[94] Sarah Elizabeth Richards, *Why our minds can't make sense of COVID-19's enormous death toll*, NAT'L. GEOGRAPHIC (Sept. 29, 2020), https://www.nationalgeographic.com/science/article/why-minds-brains-cannot-make-sense-coronavirus-enormous-death-toll.

[95] Ivana Kottasová, *The world marks 2 million coronavirus deaths. The real toll is likely much higher*, CNN, https://www.cnn.com/2021/01/15/world/two-million-coronavirus-deaths-intl/index.html (Jan. 19, 2021, 6:05 PM).

[96] Joe Pinsker, *4 Numbers That Make the Pandemic's Massive Death Toll Sink In*, THE ATL. (Jan. 5, 2021), https://www.theatlantic.com/family/archive/2021/01/us-covid-19-death-toll/617544/. The final point in Pinsker's article, quantifying those impacted by the death of a close loved one, was based on the current deaths in the United States at the time it was written, which was 350,000. *Id.* As of January 25, 2022, the death toll in the United States had surpassed 860,000. *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATS) by State, Territory, and Jurisdiction,* CENTERS FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Jan. 25, 2022).

[97] Pinsker, *supra* note 96.

[98] *Id.*

move onward through the presumption that the issues surrounding COVID-19 end at death. In the midst of the COVID-19 pandemic, failing to recognize both the role that funeral homes play and the need for them to be fully protected so that they may continue to safely serve their communities, is increasingly becoming an issue.[99] The number of deaths associated with this pandemic is staggering, and the risks for those working in frontline industries like funeral homes are intolerable, which is why this Comment proposes more robust transparency and protection in regard to funeral homes in hopes of avoiding this reality in the future.

ii. *Current Issues Regarding Transparency to Funeral Homes*

The reporting procedures involving infectious diseases are not adequate in their current form. A covered entity, such as a hospital or nursing home, is permitted to disclose to funeral homes whether a decedent had COVID-19 when they passed away; however, this information is more likely gained only after the funeral home prompts the entity for it.[100] Such entities are only required to alert their local health department of confirmed or probable cases of COVID-19.[101] In the event that an individual dies from COVID-19 in a hospital or nursing home, there are no formal channels to affirmatively alert funeral homes of the decedent's status.[102]

As of March 2, 2021, Ohio determined that a new method of reporting COVID-19 related deaths needed to be implemented due to the discovery of a failure to disclose over 4,000 deaths to the Ohio Department of Health.[103] This large discrepancy in reporting COVID-19 deaths has led Ohio to rely solely on death certificate filings to more accurately determine and detect the true number of deaths caused by COVID-19.[104]

> The disease reporting system used by hospitals, health districts and others provides more prompt information, [the Ohio Department of Health Director] said, but is not as ultimately accurate as the "gold standard" death certificate system.

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[99] *See* Corky Siemaszko, *Funeral workers provide critical service but are at high risk of exposure to the coronavirus*, NBC NEWS (Mar. 25, 2020, 6:01 AM), https://www.nbcnews.com/news/us-news/funeral-workers-provide-critical-service-are-high-risk-exposure-coronavirus-n1167771.

[100] *See* 45 C.F.R. § 164.512(g)(2).

[101] *See Coronavirus Disease 2019 (COVID-19)*, *supra* note 57.

[102] *See, e.g., Collection and Submission of Postmortem Specimens from Deceased Persons with Confirmed or Suspected COVID-19,* CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-postmortem-specimens.html (Dec. 2, 2020); *Infection prevention and control for the safe management of a dead body in the context of COVID-19,* WORLD HEALTH ORGANIZATION (Sept. 4, 2020).

[103] Randy Ludlow, *Ohio changes COVID-19 death reporting, will result in delayed but more accurate death count*, THE COLUMBUS DISPATCH, https://www.dispatch.com/story/news/2021/03/02/coronavirus-ohio-officials-change-how-covid-19-deaths-publicly-reported/6883616002/ (Mar. 2, 2021, 3:05 PM).

[104] *Id.*

> Probable deaths no longer will be included in totals with the change in reporting. [The Ohio Department of Health Director] said the removal of a manual reconciliation process between the disease and death certificate reporting systems will improve accuracy.[105]

While this new system arguably may provide more accuracy in totaling COVID-19 deaths, along with the long-term benefits of seeing the true effects of COVID-19 within the state of Ohio, this reporting method relies on an electronic death registration system ("EDRS") that contains various flaws.[106] The main beneficiaries of this system would be the Ohio Department of Health and the CDC, as it would ideally allow the most accurate tallying of COVID-19 deaths possible to report to not only the public but for use in future research.[107] By adhering to this system, funeral homes are still unable to reap the benefits of having a more accurate death count due to the early role they play in this timeframe. This reporting method does not take into account that death certificates are typically filed after the decedent's body has been transported from the place of death, and the funeral home has likely already had direct contact with the family to make arrangements. While this new method of determining the deaths associated with COVID-19 is not inherently bad for compiling long-term data, it nonetheless does not address the issues that funeral homes are faced with regarding the direct contact they have with not only decedents that had COVID but also their family members.

C. Recommendations

A multifaceted issue deserves a multifaceted solution. The problems facing funeral homes currently vary greatly in their range and complexity. Part of what makes finding an effective solution so challenging today stems from the case *Jacobson v. Massachusetts*.[108] This case was brought before the United States Supreme Court in 1905 after the smallpox outbreak led Massachusetts to enact a mandatory vaccination for smallpox, imposing a criminal sanction and fine for those who did not comply.[109] Although *Jacobson* was decided over 100 years ago, it continues to be the primary case

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[105] *Id.*
[106] *See infra* Part C.ii.
[107] *See* Dylan Reynolds, *Ohio Department of Health changing COVID-19 death reporting systems after underreporting incident*, THE CHRONICLE (March 3, 2020, 6:00 AM), https://chroniclet.com/news/253463/ohio-department-of-health-changing-covid-19-death-reporting-systems-after-underreporting-incident/.
[108] *See* 197 U.S. 11, 25–26 (1905).
[109] *Id.*

in regard to the framework of state police powers in the midst of a health crisis.[110]

Over the years, legal scholars and academics have grown to criticize *Jacobson* and its applicability in modern times.[111] *Jacobson* holds that:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.[112]

While it is good to establish an innate state power to determine a unified approach during a health crisis, many take issue with the breadth of power that *Jacobson* seemingly confers to the states.[113]

States have chosen to handle addressing COVID-19 and its impact in varying ways, in light of their express power to do so "under the American system of Federalism."[114] Courts have struggled with "how to reconcile the deference that *Jacobson* accords to public health authorities with the protection of fundamental constitutional rights."[115]

> COVID-19 has disrupted all industries and individuals on an unprecedented level and left states and local governments scrambling to implement Centers for Disease Control and Prevention guidelines and other measures to contain its spread. However, as with most governmental action, such orders and activities can and indeed do infringe on fundamental rights. While Supreme Court's century-long precedent clearly provides that states enjoy police powers to use in times of emergency, such as pandemics, those powers are not without limitations. Courts already are grappling with striking the right balance between these competing interests,

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[110] *See, e.g.*, *id.*; Ashley Ravid, *Jacobson v. Massachusetts: How a 1905 Court Case May Determine the Legality of Vaccine Mandates*, FINDLAW (Aug. 12, 2021, 2:16 PM), https://www.findlaw.com/legalblogs/courtside/jacobson-v-massachusetts-how-a-1905-court-case-may-determine-the/.

[111] *See, e.g.*, James R. Steiner-Dillon & Elisabeth J. Ryan, *Jacobson 2.0: Police Power in the Time of COVID-19*, ALBANY L. REV. (forthcoming 2021) (manuscript at 3, 91–92), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720083.

[112] *Jacobson*, 197 U.S. at 26.

[113] *See* Steiner-Dillon & Ryan, *supra* note 111, at 66.

[114] Tom McCarthy, *Disunited states of America: responses to coronavirus shaped by hyper-partisan politics*, GUARDIAN (Mar. 29, 2020, 6:00 AM), https://www.theguardian.com/us-news/2020/mar/29/america-states-coronavirus-red-blue-different-approaches.

[115] Wendy E. Parmet, *The COVID Cases: A Preliminary Assessment of Judicial Review of Public Health Powers During a Partisan and Polarized Pandemic*, 57 SAN. DIEGO L. REV. 999, 1002 (2020) (footnote omitted).

> and that struggle will likely continue to play out in courts across the nations in the coming months.[116]

While the issues that are raised within this Comment are prevalent throughout the country, certain aspects of this recommendation section will be targeted specifically toward the state of Ohio.

i. *Acknowledging Last Responders*[117]

Within the state of Ohio, funeral home workers were not originally classified within the priority phases of Phase 1A *or* Phase 1B to receive COVID-19 vaccinations.[118] Ohio was one of only twelve states in the country not to have included funeral directors, embalmers, and staff within *at least* Phase 1B of their state's plan to receive a vaccine.[119] Funeral home workers were officially added into Phase 1C for COVID-19 vaccines on March 1, 2021—nearly two and a half months after vaccines first became available to the public in the United States.[120] Prior to this announcement, the Ohio Funeral Directors Association ("OFDA") distributed a press release detailing the vital need for funeral directors and workers to be considered within one of these priority groups for vaccination.[121] The OFDA made clear that their request to have their status amended to be included in Ohio's Phase 1B to receive priority vaccinations was not meant to undermine the importance of doctors, nurses, and other healthcare workers but rather to

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[116] Sarah Jenkins, *COVID-19, Executive Authority and Fundamental Rights: What Do the Courts Say?*, JDSUPRA (May 27, 2020), https://www.jdsupra.com/legalnews/covid-19-executive-authority-and-59929/.

[117] Funeral directors have been colloquially called "last responders" due to the nature of their profession and unique ties to both the health and death care industries. *See, e.g.*, Micah Solomon, *The Customer Service Heroism Of Funeral Directors, The 'Last Responders' Of The Deathcare/Funeral Industry,* FORBES (May 29, 2020, 2:53 PM), https://www.forbes.com/sites/micahsolomon/2020/05/29/the-customer-service-heroism-of-funeral-directors-the-last-responders-of-the-deathcarefuneral-industry/?sh=124bff2a60cc; Jake Seiner, *The Last Responder: A day with an NYC funeral director*, AP NEWS (Apr. 6, 2020), https://apnews.com/article/a17c0c9b3f692e3031b7649908b2bbcd.

[118] *Compare COVID-19 Vaccine Fact Sheet Priority Populations and Vaccine Distribution*, OHIO DEPT. OF HEALTH, https://coronavirus.ohio.gov/static/vaccine/general_fact_sheet.pdf (Mar. 16, 2021)*, with Phase 1C, Phase 2 vaccinations begins today*, WHIO (Mar. 4, 2021, 5:04 AM), https://www.whio.com/news/local/how-watch-gov-dewine-hold-monday-press-conference/Y42WJ7DRORB4RHQUGSPJ6IOG7E/.

[119] Mike Smith, *Ohio Funeral Directors, Workers Urgently Seek Immediate Access to COVID-19 Vaccine*, LITTER MEDIA (Jan. 27, 2021), http://littermedia.com/2021/01/ohio-funeral-directors-workers-urgently-seek-immediate-access-to-covid-19-vaccine/; *see* Littler Mendelson, *Giving it Our Best Shot–Statewide Vaccination Plans*, LITTLER (May 14, 2021), https://www.littler.com/publication-press/publication/giving-it-our-best-shot-statewide-vaccination-plans.

[120] *Phase 1C, Phase 2 Vaccinations Begins Today*, *supra* note 118; Peter Loftus & Melanie Grayce West, *First Covid-19 Vaccine Given to U.S. Public*, WALL ST. J., https://www.wsj.com/articles/covid-19-vaccinations-in-the-u-s-slated-to-begin-monday-11607941806 (Dec. 14, 2020, 11:17 PM).

[121] Press Release, Ohio Funeral Directors Association, *Ohio Funeral Directors, Workers Urgently Seek Immediate Access to COVID-19 Vaccine* (Jan. 22, 2021) [hereinafter OFDA Vaccine Press Release]; Amy Steigerwald, *Ohio death care workers frustrated for not being included in COVID-19 vaccine distribution*, WTOL11, https://www.wtol.com/article/news/health/coronavirus/vaccine/ohio-death-care-workers-frustrated-for-not-being-included-in-covid-19-vaccine-distribution/512-0a4162fc-092e-494d-bfc0-fa9720ceee8c (Jan. 8, 2021, 6:28 PM).

highlight the lack of recognition that frontline healthcare workers are capable of taking the form of first responders *and last responders*.[122]

Ohio funeral home workers comprise approximately 3,600 individuals, which is a relatively low number in comparison to other groups of essential frontline workers in Ohio.[123] Vaccinating funeral home workers should have been prioritized from the onset of COVID-19 due to the relatively small size of this group of professionals, along with the significant impact they have on their communities. This lack of prioritization is unacceptable and should not be repeated in future pandemics.

> Death care workers are on the front line of the pandemic and exposed daily to positive COVID-19 individuals as they enter hospitals and nursing homes to navigate their way through hallways to patient rooms and morgues. Moreover, an ever-increasing number of removals of deceased COVID victims are taking place from private residences where family members have been exposed. Although some protection is provided through PPE, exposure continues as they prepare bodies for disposition, console surviving family members, and greet those attending services. Unlike most other public gatherings, Ohio placed no limits on attendance at funerals forcing funeral home personnel to deal with large numbers of attendees, some of which do not comply with masking or social distancing requirements. While funeral directors do comply with CDC guidelines and state orders, the potential for being a hub for the spread of this virus is very concerning. Funerals have been identified as super-spreader events in various areas of the country during the pandemic. Inclusion in the early phase of vaccine deployment would mitigate the transmission.[124]

Health care, death care, first responders, and last responders all have much more in common than most people are willing to acknowledge in this death-denying society.[125] "The [Ohio Department of Health] indicates

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[122] OFDA Vaccine Press Release, *supra* note 121; Smith, *supra* note 119; s*ee* Mendelson, *supra* note 119.

[123] Ken Gordon, *Ohio funeral-home workers among the groups lobbying to move up in COVID-19 vaccine line*, THE COLUMBUS DISPATCH, https://www.dispatch.com/story/news/local/2021/01/30/ohio-funeral-home-workers-lobby-higher-covid-19-vaccine-schedule/4260355001/ (Jan. 30, 2021, 12:37 PM). In comparison, as of 2019, there were over 200,000 registered nurses with active licenses in Ohio. *2019 Registered Nurse: Ohio Workforce Data Summary Report*, OHIO BOARD OF NURSING, 2, https://nursing.ohio.gov/wp-content/uploads/2020/02/RN-Workforce-2019-Final.pdf (last visited Jan. 14, 2022).

[124] OFDA Vaccine Press Release, *supra* note 121.

[125] *See generally*, COMMITTEE ON CARE AT THE END OF LIFE, APPROACHING DEATH: IMPROVING CARE AT THE END OF LIFE (Marilyn J. Field & Christine K. Cassel eds., 1997); *see generally* Shelby Chism & Michael G. Strawser, *Serving a Death-Denying Culture: Funeral Directors as Servant-Leaders*, 11 INT'L J. OF SERVANT-LEADERSHIP 229, 229 (2015-2017).

'vaccines are being directed to where they can save the most lives', a responsible decision, but one must consider those that are essential for caring for others, both living and dead."[126] Due to people's varying direct experience with the funeral home industry, this profession can often be categorized as "out of sight, out of mind."[127] The 2020 NFDA, "Value of a Funeral" Consumer Study, revealed that out of 889 individuals surveyed, 73% had not attended or planned a funeral or memorial service since the onset of COVID-19.[128] Of these individuals, 31.4% stated they had *never* attended or planned a funeral or memorial service prior to COVID-19; however, 63.4% stated they had.[129]

The Health and Economic Recovery Omnibus Emergency Solutions Act ("Heroes Act") was legislation proposed in May 2020, part of which aimed to establish mortuary and funeral home workers as "essential workers," in light of the COVID-19 pandemic.[130] Along with being defined as "essential," this legislation proposed to offer "workers $13 per hour premium pay on top of their regular wages"; and provide essential employers grants to cover these pay increases.[131] Additionally, part of this legislation would also have "provide[d] financial assistance to an individual or household to meet disaster-related funeral expenses . . . ."[132] Unfortunately, while the House passed this bill, it was not passed by the Senate.[133] This attempt to include funeral home workers as essential, establishing a "pandemic premium pay" and eligibility for employers to receive grants to cover this pay reflects a substantial appreciation toward the uncertain reality that this profession is faced within the midst of the COVID-19 pandemic.[134] Both national and state acknowledgment of the role the funeral home industry plays within our communities is a crucial step in reconciling how this industry has been under-prioritized during this pandemic, in light of the substantial importance placed upon funeral services.[135]

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[126] OFDA Vaccine Press Release, *supra* note 121.
[127] Deana Gillespie & Edward J. Defort, *The COVID Effect*, THE DIRECTOR, Mar. 2021, at 26, 28.
[128] *Id.* at 26.
[129] *Id.*
[130] COVID-19 Heroes Fund Act of 2020, H.R. 6800, 116th Cong. § 170101(5)(D)(xxix) (2020).
[131] Email from Nat'l Funeral Dir. Assoc., to Neeld Funeral Home, Inc. (May 13, 2020, 16:05 EST) (on file with author) [hereinafter NFDA Heroes Act Email].
[132] H.R. 6800 § 200006(c).
[133] *H.R. 6800 (116th): The Heroes Act*, GOVTRACK, https://www.govtrack.us/congress/bills/116/hr6800 (last visited Jan. 14, 2022).
[134] NFDA Heroes Act Email, *supra* note 131.
[135] *See generally* Chism & Strawser, *supra* note 125; Gillespie & Defort, *supra* note 127.

ii. *Updating Current EDRS Within Ohio*

Ohio utilizes an Electronic Death Registration System ("EDRS") to file and maintain death records electronically.[136]

> Ohio physicians have the ability to electronically complete and sign/certify the cause of death for Ohio records in our Electronic Death Registration System (EDRS). The funeral home electronically creates a death record, enters the personal demographic information, and selects a physician for the medical portion. At that point[,] the physician may log in to EDRS from any location and electronically enter the same information previously handwritten on the paper certificate and then electronically sign/certify the record. Physicians can also provide a notification email address to receive alerts that they have a death record awaiting their signature.[137]

Funeral directors are responsible for initiating the somewhat complex death certificate process, which has likely become more complicated during this time of COVID-19.[138] While a completely electronic death registration system seems as if it would be helpful during a time where in-person contact is discouraged, within Ohio, this system is not utilized by all medical certifiers.[139]

> The importance of being involved early in the EDRS process is shown by states in which funeral associations have been successful in alerting state agencies to one of the most serious roadblocks to successful EDRS implementation—the reluctance of medical certifiers to use it. The manual recognizes that medical certifiers, which may involve physicians, nurse practitioners, dentists and physicians' assistants, are usually very busy and reluctant to learn a new system, especially when it has no direct benefit to them.[140]

Although the role of a medical certifier comes to an end once they sign a death certificate, the role of a funeral director is just getting underway. Electronic filing is not only time efficient but also provides no in-person contact; so, when physicians or other medical certifiers are not a part of EDRS, it often

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[136] *Electronic Death Certification Information*, OHIO DEPT. OF HEALTH, https://phdmc.org/program-documents/healthy-lifestyles/gumc/program/birth-death-records/1483-electronic-death-certification-information/ (last visited Jan. 14, 2022).

[137] *Id.*

[138] *See* DEP'T OF HEALTH AND HUM. SERV., PUB. NO. 2005-1109, FUNERAL DIR.S' HANDBOOK ON DEATH REGISTRATION AND FETAL DEATH REPORTING (2004) [hereinafter FUNERAL DIRECTORS' HANDBOOK].

[139] T. Scott Gilligan, *Best Practices for Establishing an EDRS*, MEM'L BUS. J., 3 (2020).

[140] *Id.*

results in the funeral homes having to either hand-carry the death certificate to be signed or find other means.

After the funeral home has initiated the death certificate process, the medical certifier has approximately forty-eight hours to certify the cause of death.[141] However, in practical application, if the medical certifier is unavailable, a funeral director is permitted to file a provisional death certificate in order to receive a burial permit and then file the completed death certificate no later than five days after the date of death.[142] The primary issue with this current framework is the leniency in time it provides the medical certifier. In the span of five days, a funeral home has likely already removed the body from its place of death, embalmed the body, made arrangements with the decedent's family, and had a visitation and funeral. If a medical certifier takes advantage of the leniency period, a funeral home would be unable to know the decedent's cause of death until much too late. COVID-19 creates a new sense of urgency for funeral homes to know the decedent's cause of death in order to move forward in planning with the decedent's loved ones in the safest way possible. To adequately convey this aspect of urgency to the medical certifiers, Ohio should implement a more stringent time provision requiring submission of certification to take place within twenty-four hours from the time the death certificate is filed.[143]

This timing discrepancy is in large part due to vastly different work schedules and roles of medical certifiers, like physicians and funeral directors. As one can imagine, individuals do not solely pass away between the hours of nine and five, creating a uniquely uncertain work schedule for funeral directors. A physician has little to no direct benefit from quickly certifying a death certificate, since the relationship with their patient has come to an end; however, funeral directors rely heavily on the timeframe surrounding receiving a death certificate since many aspects of their role depend upon its receipt.[144] The ability to provide services at all hours is both a joy and burden for those within this profession; therefore, by requiring all medical certifiers to partake in EDRS and implementing a more time-sensitive deadline for

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[141] OHIO REV. CODE ANN. § 3705.16(C).

[142] OHIO REV.CODE ANN. § 3705.17. Provisional death certificates are only permitted when the disposition is burial, *not* cremation. OHIO DEP'T. OF HEALTH OFF. OF VITAL STAT., ELECTRONIC REGISTRATION SYSTEM (EDRS) GUIDE FOR FUNERAL DIRECTORS 5 (2006).

[143] "Funeral associations must advocate with state agencies and medical associations participating in the process about the critical need to institute education, training and enforcement to bring medical certifiers aboard in the EDRS process. States with a high degree of medical certification participation . . . are more likely to cooperate and use the EDRS if it allows staff members to complete the death certificate that is then reviewed and electronically signed by the medical certifier. Other states have found that inserting enforcement provisions requiring medical certification within 24 to 48 hours of the submission of the death certificate to the certifier may be necessary in order to compel cooperation. Failure to comply by the deadlines may lead to complaints filed with the state medical board, which could enforce discipline against the medical certifier." Gilligan, *supra* note 139, at 3–4.

[144] *See generally* FUNERAL DIRECTORS' HANDBOOK, *supra* note 138, at 1.

certification, funeral homes would be more safely situated to carry out their vital role within their communities.

iii. *Imposing Affirmative Obligation to Notify*

Creating a statutory affirmative obligation on hospitals, nursing homes, and other healthcare providing entities to report health information of the decedent to the funeral home, particularly regarding their COVID-19 status, would remove the uncertainty funeral homes currently face unveiling this information in their own limited capacities. Being alerted that a decedent had tested positive for COVID-19, or that test results were pending would assist the funeral home in how to proceed when dealing with not only the decedent but more importantly, the family in making arrangements. This proposal would not be barred under current HIPAA regulations due to the permissive language used in referring to disclosure to funeral homes.[145]

From the onset of the COVID-19 pandemic, the OFDA proposed several steps that nursing homes, long-term care, and hospice facilities could take to help expedite the transfer of decedents into the care of funeral homes.[146] One of the potentially beneficial steps listed was, "[i]f respiratory infection is the cause of death, please advise the funeral practitioner at the time of initial death notification."[147] Requiring healthcare-providing facilities to immediately disclose this information to funeral homes would result in the most practical solution because these entities can readily access electronic health records.[148]

An alternative to this solution could include testing the body of the decedent for COVID-19. However, this solution nonetheless presents drawbacks regarding potential additional lag time in receiving results, scarcity of tests, and being an overall less cost-effective measure.[149] Research states that there is a very minimal risk of contracting COVID-19 from a dead body; however, if family members were present prior to and at the time of death, there is a genuine and legitimate concern of the family members' direct exposure.[150] By relying on notification of the decedent's COVID-19 status from these heathcare-providing entities at the time of death, it creates

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[145] *See* 45 C.F.R. § 164.512(g) (2020).

[146] Email from Melissa S. Sullivan, Exec. Dir., Ohio Funeral Dir. Assoc., to Neeld Funeral Home, Inc. (Mar 25, 2020, 15:47 EST) (on file with author).

[147] *Id.*

[148] *See What is an electronic health record (EHR)?*, HEALTHIT.GOV, https://www.healthit.gov/faq/what-electronic-health-record-ehr (Sept. 10, 2019).

[149] *See* Michelle Andrews, *With Postmortem Testing, 'Last Responders' Shed Light on Pandemic's Spread*, NPR (May 19, 2020, 6:00 AM), https://www.npr.org/sections/health-shots/2020/05/19/858390822/with-postmortem-testing-last-responders-shed-light-on-pandemic-s-spread; Blake Ellis et al., *Coroners worry Covid-19 test shortages could lead to uncounted deaths*, CNN (Apr. 7, 2020, 10:33 AM), https://www.cnn.com/2020/04/06/health/coronavirus-coroners-uncounted-deaths-invs/index.html.

[150] *How are COVID-19 burials different from Ebola burials?*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/global-covid-19/COVID19vsEbola-burial-guide.pdf.

an inference or presumption as to the COVID-19 status of the living. HIPAA contains permissive language as to the disclosure of this information to funeral homes, which implicitly results in the conclusion that funeral homes should be permitted to act accordingly in light of receiving this information.[151]

This presumption of the living's COVID-19 status, based upon the status of the decedent, may result in the funeral home wishing to proceed in making arrangements with the decedent's family in a more cautious manner (e.g., postponing services, etc.).[152] While this inference could potentially be viewed as an unnecessary intrusion onto the living family members, it would make little sense for HIPAA to permit disclosure of the decedent's status to the funeral home and yet not allow it to act accordingly upon receipt of that information.[153] Families may have genuine fears of discriminatory stereotyping and treatment by funeral homes, mirroring the HIV/AIDS epidemic, where funeral homes were often desperate to know the HIV status of the decedent for no good cause; however, COVID-19 presents an entirely different set of concerns in comparison to HIV/AIDS.[154] Unlike HIV/AIDS, a bloodborne pathogen, COVID-19 is an airborne pathogen, presenting the legitimate possibility of it spreading amongst attendees of a visitation or funeral if the family members were in direct contact with the decedent at their time of death.[155] Requiring entities like hospitals and nursing homes to notify funeral homes when an individual passes away with a positive or pending COVID-19 test would allow funeral homes to better protect their workers, in addition to those potentially attending the funeral services. Not only would this proposed statutory scheme be beneficial when dealing with COVID-19, but also for controlling the spread of similar infectious viruses or diseases.

IV. CONCLUSION

In light of COVID-19, society can no longer ignore that the impact of a death goes far beyond the death itself. The consequences of not taking this pandemic seriously resulted in not only a tragic number of unnecessary deaths across the world but also an unknown future dealing with the long-term effects of COVID-19.[156] The lessons learned from infectious diseases of the

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[151] *See generally* 45 C.F.R. § 164.512(g) (2020).

[152] *See* Danielle Battaglia, *NC funeral homes cope with coronavirus restrictions by delaying or streaming services*, NEWS & OBSERVER (Mar. 22, 2020, 9:49 AM), https://www.newsobserver.com/news/coronavirus/article241342661.html.

[153] *See generally* 45 C.F.R. § 164.512(g) (2020).

[154] *See supra* Part II.A.iii, III.A.

[155] *See Bloodborne Pathogens and Needlestick Prevention*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, https://www.osha.gov/bloodborne-pathogens (last visited Jan. 14, 2022); *Scientific Brief: SARS-CoV-2 Transmission*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html (last updated May 7, 2021).

[156] *See* Cecelia Smith-Schoenwalder, *WHO Warns of Unknown Long-Term Effects From Coronavirus*, U.S. NEWS (July 30, 2020), https://www.usnews.com/news/health-news/articles/2020-07-30/who-warns-

past should indicate the severity of repercussions that are possible when responses to these types of illnesses are not adequate.[157] COVID-19's uniquely dangerous threats have impacted the funeral industry in a multitude of ways.[158] In an attempt to help alleviate the impact that this industry has felt, this Comment recommends implementing a heightened appreciation and recognition of this profession; updating Ohio's EDRS to promote transparency between funeral homes and medical death certifiers; and imposing an affirmative obligation on entities, such as hospitals and nursing homes, to notify funeral homes of a decedent's COVID-19 status at the time of death. Ultimately, in light of the immense impact COVID-19 has had on society thus far, the spread of future infectious diseases could be better combatted by requiring more robust transparency and communication to funeral homes.

Across the world, individuals have a very complicated relationship with death.[159] In the United States, particularly, various "aspects of the health care system . . . contribute[] to a culture that both *denies and defies* death."[160] This culture of simultaneously denying and defying death has seemingly resulted in a lack of appreciation for the fundamentally important role funeral homes play in each of our lives.[161]

> Funeral service is much more than the sum of a few vocational tasks . . . . Although, the term 'director,' indicates being the leader or manager, in the case of the funeral director[,] they often lead from behind. Only from behind can you lift people up and what better time to do so than when people are mourning.[162]

The onslaught of this health crisis has clearly revealed that funeral homes undoubtedly contain some of the unsung heroes of the COVID-19 pandemic, of which we surely could not live without.

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of-unknown-long-term-effects-from-coronavirus; Victoria Udalova, *Indirect Impact of COVID-19 Results in Higher Pandemic Death Toll*, U.S. CENSUS BUREAU (Feb. 16, 2021), https://www.census.gov/library/stories/2021/02/indirect-impact-of-covid-19-results-in-higher-pandemic-death-toll.html.

[157] *See supra* Part II.A.

[158] *See supra* Part III.A–B.

[159] *See* Frank J. Whittington, Book Note, *Denying and Defying Death: The Culture of Dying in 21st Century America*, 51 THE GERONTOLOGIST 571 (2011) (reviewing STEPHEN R. CONNER, HOSPICE AND PALLIATIVE CARE: THE ESSENTIAL GUIDE (2009), RUTGERS, FINAL ACTS: DEATH, DYING, AND THE CHOICES WE MAKE (Nan Bauer-Maglin & Donna Perry eds., 2010), and HELEN STANTON CHAPPLE, NO PLACE FOR DYING: HOSPITALS AND THE IDEOLOGY OF RESCUE (2010)); Alex Broom, *Before you go . . . are you in denial about death?*, THE CONVERSATION (Nov. 26, 2014, 6:55 PM), https://theconversation.com/before-you-go-are-you-in-denial-about-death-34056.

[160] Whittington, *supra* note 159, at 572 (emphasis added).

[161] *See id.*

[162] Chism & Strawser, *supra* note 125, at 245 (citation omitted).