

**TESTIMONY OF PROFESSOR DAVID C. VLADECK
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BEFORE THE SENATE JUDICIARY COMMITTEE
EXAMINING LIABILITY DURING THE COVID-19 PANDEMIC**

INTRODUCTION

Like all Americans, I am anxious to re-open the economy and to get America back on its feet. I applaud the Committee for dedicating its time and energy to explore ways to facilitate that process. And I can only imagine how heavily that burden weighs on your shoulders.

But as my testimony today makes clear, businesses that act responsibly are already protected from liability. We do not need legislation to protect them. On the other hand, immunizing companies from liability when they act unreasonably or irresponsibly would be counterproductive and would impede the ability of states to reopen their economies. After all, workers and consumers, not government mandates, will reopen our economy. Until workers feel safe, they will stay away from their workplaces, except for those workers who are forced to return to work as a result of economic coercion. Until consumers feel safe, they too will be reluctant to return to restaurants, retail stores, gyms, and even places of worship. And let's not forget that, so long as the virus continues to sicken Americans, our first responders are especially vulnerable. Unreasonable or irresponsible actions by employers or businesses risks the spread of Covid-19, thus adding to the crushing burden that first responders face. They too will be the losers if Congress immunizes risky or unreasonable behavior.

The states, not the federal government, are taking the lead on reopening; Congress should not take action that might impede state efforts by insulating from sanction unreasonable or irresponsible conduct that might spread the virus. And Congress should refrain from undermining how states choose to protect their citizens, as states have done since our nation's founding.

As far as I can tell, for Congress to bestow broad immunity from liability would be unprecedented. It is also far from clear that the Constitution permits Congress to simply wipe away state liability rules without enacting substantive legislation imposing federal regulatory oversight or an alternative compensation system, or both. As a matter of history, from our nation's founding, liability rules are the realm of the states, based on the common law. The touchstone of common law torts has always been reasonableness: There is no liability so long as the entity acts reasonably. On the other hand, when an entity acts unreasonably or irresponsibly and causes harm that is foreseeable, the entity may be held liable. In cases involving gross misconduct—*e.g.*, speeding in an area with many pedestrians; shooting a gun in the direction of a crowd—many states authorize punitive damages on top of compensatory damages. It is important to understand, however, that the line between unreasonable conduct and gross misconduct is murky, context-based, and fact-dependent—differentiating between the two forms of liability is almost invariably a question for a jury, and is not resolved prior to trial. And, of course, the difference is utterly meaningless in terms of propagating the spread of the virus; unreasonable acts spread the virus just as easily as reckless acts.

Our liability system thus defends the reasonable and punishes the unreasonable and irresponsible. It does so to ensure that wrongdoers bear the costs they impose on others, and to deter others from engaging in similarly risky conduct. Immunity does the opposite: Immunity rewards the unreasonable and irresponsible at the expense of others, and immunity could punish reasonable businesses by giving the unreasonable and irresponsible ones an advantage in the marketplace.

Positive law—by which I mean statutes and regulations—may also impose liability. Throughout our history, however, the tort and regulatory systems have operated in tandem. They place separate, albeit reinforcing, disciplines on the market. When functioning well, a regulatory system prevents injury and ensures that products on the market are safe for their intended uses. At the same time, the tort system is vital because there are often gaps that our regulatory agencies cannot fill, because of statutory limitations, scarce resources, or lack of expertise. In most states, violations of statutory and regulatory requirements constitute negligence *per se*—a basis for imposing liability. On the other hand, already under state law, compliance with regulatory requirements is a defense to liability, and at times is even an affirmative defense.

I lay out these basics as background to a number of points:

* Immunity is counterproductive. It licenses unreasonable and irresponsible conduct that can spawn new cases of Covid-19, and thus signals to workers and consumers that their safety is at risk. Reopening our economy requires that we make clear that employers and businesses are taking reasonable safety precautions

to stop the virus's spread, and are following the guidance of expert public health agencies to do so. Liability rules help ensure employers and businesses do just that.

* Providing employers and businesses the guidance they need to safely reopen will do more to forestall litigation and to open up our economy than anything else the federal government can do, short of finding a vaccine. Adhering to specific and expert guidance on how to avoid propagation of the virus gives businesses a strong regulatory compliance defense, and it signals to workers and consumers that their employers and businesses are taking reasonable precautions to safeguard their health.

* The preconditions that Congress has traditionally required for preemption of state liability law are all absent here. In displacing state liability law, Congress has relied on the following factors: a focus on a single industry (*e.g.*, commercial nuclear power); strict regulatory oversight by federal agencies (*e.g.*, radioactive wastes); reasonable fear of significant litigation that conflicts with or threatens to impede federal goals (*e.g.*, medical devices); and often the necessity for a substitute remedy (*e.g.*, black lung). None of these factors are present here.

* Granting immunity, and thus nullifying state law, in the absence of positive federal legislation, and in the absence of proof that mainly *intrastate* litigation related to Covid-19 has a substantial effect on *interstate* conduct, likely violates the Constitution. The unprecedented nature of this legislation guarantees that it will be subject to constitutional challenge. For that reason, the uncertainty surrounding the legislation's constitutionality means that no business can count on the

immunity nominally conferred by the legislation until the constitutional issue is resolved.

* Beware of unintended consequences in writing legislation that displaces some or all of state liability rules—rules that have a long history that is unique to each state.

Immunity is Counter-Productive and Would Send the Wrong Signal

Workers and consumers, not government mandates, will reopen the economy. But workers and consumers need to feel safe before they will be willing to venture out. Workers and consumers need to trust that employers and businesses will act reasonably to protect them from the virus, and will follow guidance on reopening provided by expert state and federal agencies. With liability rules in place, employers and business have real-world incentives to take the precautions reasonably necessary to protect workers and consumers from infection—the risk that failure to do so may lead to lawsuits, regulatory enforcement, or both. Keeping liability rules in force is essential to build the confidence that workers and consumers need to go back to work and to reopen our economy.

In contrast, immunizing employers and businesses strips away that incentive. Immunity says to workers “You must return to work no matter how unreasonable your employer is, or risk losing your job.” The message to consumers is no more reassuring. It says “You’re on your own. Go out at your peril. And hope that your grocery store, and wherever else you need to shop, is taking reasonable

precautions,” even though you have no recourse if they’re not. Authorizing employers and businesses to disregard safety norms by giving them immunity—and, make no mistake, immunity protects only the *non-compliant*—will inevitably make workers and consumers even more hesitant to go back to work or re-enter the economy so long as this pandemic grips our nation.

Consider the kind of abuse that is likely to flow from immunity: A restaurant directs its servers not to wear masks, doesn’t bother to monitor their health, and doesn’t wipe down its tables with disinfectants—actions that are plainly risky but may not be specified in the minimal or flexible guidance the restaurant has been given by local health authorities. Three servers have symptoms of the virus but keep on working; ultimately, the servers test positive for the virus. Suppose that contact tracing shows that the restaurant was the vector for ten new cases of Covid-19, including you and your spouse. But the restaurant is immune from liability. You have no recourse. The restaurant may keep operating without making changes. What would be the implications of that outcome? More new cases of the virus; placing burdens on you and your spouse, your families, and the others infected and their families; and threats to first responders who provide medical care to the sick. That is too high a price to pay for immunity.

Consider another example. An employer insists that employees work despite the employer’s failure to mitigate the risks of exposure. Employees who perceive the risk might reasonably fear that complaints to the employer or regulators might trigger job loss. As a result, infected employees might go to work, spreading the

virus in the shop, and other employees become ill at work and return home to infect their families. That scenario is not a hypothetical. Does it really make sense to give this employer immunity from liability? The answer plainly is no.

Regulatory Compliance Protects Businesses From Liability

There are positive measures that the federal government should take that would facilitate opening the economy in tandem with the retention of state liability rules. The most important measure is to provide science-based, enforceable guidelines and make sure the guidelines reach employers and businesses. Clear, specific, and directive guidance promotes regulatory compliance, which is the best way to shield employers and businesses from liability litigation, to reduce the virus's spread, and to speed the safe opening of the economy. Regulatory compliance is a strong liability shield, if, but only if, the guidelines come from expert regulatory bodies and specifies the measures that need to be taken. Adherence to federal guidelines specific to containing the spread of the virus in factories, processing plants, restaurants, retail stores, and schools would provide exactly the kind of regulatory guidance that, if followed, would effectively shield employers and businesses from liability. Every state recognizes regulatory compliance as a defense to liability. *See generally Geisfeld, Tort Law in the Age of Statutes, 99 Iowa L. Rev. 957, 1001-1005 (2014).* Give employers and businesses clear guidance about what norms are required to reopen, praise them if they follow the guidance, indeed, encourage them to advertise that they are following the guidance, but hold them

accountable if they fail to follow that guidance. Reward the compliant and punish the scofflaws.

Federal and state agencies, including the Centers for Disease Control (CDC), the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA), can and should issue detailed guidance. Fighting this pandemic is for public health experts.

Unfortunately, these expert agencies have left the playing field. As has been widely reported, CDC has not received White House clearance to publish officially its detailed guidance for businesses to reopen, and recent reporting suggests that the guidance has been shelved. As far as I can tell, OSHA has neither issued guidance for companies to follow, nor has it brought any enforcement actions against companies with rampant infection rates, even against those companies that appear to have disregarded OSHA's general duty clause, which provides that employers "shall" provide employees a place of employment that is "free from recognized hazards that are causing or likely to cause death or serious physical harm." 29 U.S.C. § 654. And the Environmental Protection Agency has announced that it will curtail enforcing the environmental laws for the duration of the pandemic. *See EPA, COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program*, March 26, 2020.

To the extent that employers and businesses face a Covid-19 related liability threat, the failure of federal government to provide employers and businesses expert guidance on how to safeguard the health of workers and consumers that they

can depend on is the greatest source of that threat. The federal government needs to be at the vanguard to facilitate reopening, not on the sidelines. If Congress is serious about liability protection, it should ensure that the federal government steps up and provides the guidance that employers and businesses urgently need. With guidance, existing state common-law standards—which protect reasonable, responsible businesses—will provide those businesses with far stronger protections.

Providing Immunity Would Be Unprecedented

Congress has, from time to time, displaced state liability laws by enacting statutes that preempt state laws, including liability laws and common law torts, but has invariably substituted regulatory measures designed to protect the public. Because preemption cuts against the historic understanding of federalism, the Supreme Court has applied a presumption against preemption and construed preemptive statutes narrowly. After all, the preemption of state laws represents “a serious intrusion into state sovereignty.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996) (plurality opinion); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (“in all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (citations omitted).

Congress has always been careful when it preempts state liability law, and for good reason. Since the founding of the Republic, states have set their own

liability rules. And that makes sense. Although liability rules are based on the common law, they are not homogenous—there are significant variations among the states. For these reasons, to the extent that immunities—total protection against liability—are needed to help open up our economy (and I disagree that immunities will accomplish that goal) that is a decision that the states can and will make if necessary. There is no need for Congress to claim the role of decider here.

In every instance in which Congress has preempted state liability laws, it has done so to enhance public protections, not weaken them, which would be the goal and result of immunity legislation. In contrast, statutes that preempt state liability law are based on one or more of several factors—none of which is present here. First, federal preemption is invariably laser-focused on discrete economic sectors that are subject to pervasive federal oversight and regulation, such as the life-saving medical devices at issue in *Medtronic*, or the development of commercial nuclear power, *see Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978). The grant of immunity contemplated here is not sector or product-specific.

Second, the courts have held that federal law may preempt state liability rules to ensure that they do not interfere with the achievement of important federal goals. Express preemption, contemplated in immunity legislation, takes place only when federal statutory goals or regulatory requirements conflict with state law, including common law. *See, e.g., Medtronic, supra* (addressing the Medical Device Amendments to the Food, Drug and Cosmetic Act); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (holding that a state law on due-on-sale

requirements conflicted with federal law and thus was preempted). Eliminating state liability rules furthers no discernable federal interest other than the aspiration that immunity *might* speed up the reopening of our economy. But as the Supreme Court recently drove home, “Invoking some brooding federal interest or appeal to a judicial policy preference should never be enough to win preemption of state law; a litigant must point to ‘a constitutional text or statute’ that does the displacing or conflicts with state law.” *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1893, 1901 (2019).

Here, no underlying federal statute conflicts with state liability laws. The preemption bargain is the exchange of protective *ex ante* federal regulation for *ex post* state liability remedies. But in contrast to cases like *Medtronic*, here there is no ongoing federal regulatory effort to provide safeguards for workers and consumers against the risks of the virus, and immunity would significantly weaken the ability of states to protect their citizens. It has been the states, not the federal government, on the front line fighting the virus. To put it charitably, it would be anomalous for Congress to arrogate to itself the right to wipe away state law when it is the states, not the federal government, addressing the direct threats from the virus every hour of every day.

Nor is the risk of litigation sufficient to justify displacing state liability laws. To be sure, there has been some satellite litigation involving Covid-19 over matters regarding insurance coverage and price gouging. A few cases have been brought by workers to force employers to provide more effective protection. And a few similar

cases have been brought by individuals imprisoned or in detention. Those are not the cases that concern Congress. Congress instead worries about the possibility that a tsunami of tort cases against businesses struggling to reopen might be on the horizon. Like many worries, this one is unlikely to materialize, and even though we've been in the grip of the virus for months, it has yet to rear its ugly head.

One reason is that causation—the core allegation in any tort action—will be devilishly difficult, if not impossible, to make in most cases. The unprecedented transmissibility of this virus will generally make causation guesswork at best, and guesswork is insufficient for pleading in a tort case. Lawyers bring contingency fee cases only when they have a reasonable chance of recovering the costs of the litigation and the value of the time they expend on it. Covid-19 cases would be a very risky bet at best. Another reason not to fear a tsunami is that in the few cases where pleading causation is plausible—mainly cases in which large numbers of employees have been sickened in a plant or factory—questions of liability will often be resolved by state workers' compensation systems, not by the courts.

To be sure, there will be some cases that neither founder on causation nor are subject to workers' compensation. The restaurant example discussed above might well be a viable case. And it is cases like that one that *should* go to court, lest the restaurant owner continues to engage in unsafe practices that spread the virus. Or consider nursing home residents who contracted the virus because their institution failed to take basic steps to stop the virus's spread. Shouldn't they have their day in court? If employers or businesses take unreasonable risks and jeopardize public

health, immunizing the bad actor shifts the costs of the harm to the injured, elevates the risks to the public, and adds to the already crushing burden and risk to our first responders.

Last, but hardly least, when Congress preempts state liability rules it often provides a substitute system of compensation. The Price-Anderson Act, 42 U.S.C. § 2210, limited the liability of our commercial nuclear power industry, but preserved the right to sue; the September 11th Victims Compensation Fund, 49 U.S.C. § 40104, also gave victims an option to sue and it is still helping the first responders; and the Radiation Exposure Compensation Act, 42 U.S.C. § 2200 note, is still providing compensation to those injured by our nation's atmospheric testing of nuclear weapons. These are just a few examples of instances where the federal government stepped in to compensate those injured or the families of those whose death was caused by forces beyond their control. Indeed, there is already a statute in place designed to compensate people injured by drugs or vaccines that are administered to treat Covid-19 patients, but had unexpected side effects and cause injury or death.¹

Before the Senate considers an immunity bill, and I urge it not to do so, it should first ensure that strong, enforceable federal protection standards are in place, through guidelines and enforcement actions. And it should provide an

¹ The Countermeasures Injury Compensation Program is authorized by the Public Readiness and Emergency Preparedness Act, and its purpose is to compensate those injured by “countermeasures”—vaccines, medications, and devices, and other items recommended to diagnose, prevent or treat a declared pandemic. 42 U.S.C. § 247-d.

alternative compensation system to ensure that the burden of this pandemic is not borne by the doctors, nurses, orderlies, other first responders, workers, consumers and family members who, under current law, could have obtained redress in courts. Denying them any remedy at all would be fundamentally unfair, especially since immunity legislation will almost certainly contribute to the virus's spread. If Congress decides that it is necessary for the greater good of the nation to close the courthouse door to the injured or the dependents of those who lost their lives, then Congress should ensure that they do not bear losses caused by employers and businesses who acted unreasonably or irresponsibly. The nation should bear those losses. Anything less would be unjust.

Immunity Legislation Likely Exceeds Congress's Constitutional Authority

The constitutional issue presented by this proposal is whether Congress may bestow a broad immunity from liability for purely private suits with no connection to an existing or newly created federal program that safeguards the public from the virus. As I have said, in that respect, this legislation appears to be unprecedented. Because Congress can only legislate based on its enumerated powers, *see, e.g.*, *United States v. Comstock*, 560 U.S. 126, 133-34 (2010), the only provision of the Constitution that could conceivably justify this proposed legislation is the Interstate Commerce Clause. U.S. Const., Art. I, § 8, cl. 3. Even with that footing, it is far from clear that legislation immunizing businesses for Covid-19 related liability cases would survive constitutional review, which would be inevitable. And until the

constitutional issue is resolved, a grant of immunity would be conditional; there is no guarantee that immunity legislation will pass judicial muster.

The heady days when Congress could justify virtually any legislation under the Commerce Clause are gone. The Supreme Court's more recent rulings explain that, while Congress's power under the Commerce Clause is broad, it is far from boundless. *See, e.g., Nat'l Fdn. of Ind. Business v. Sebelius*; 567 U.S. 519 (2012); *United States v. Lopez*, 514 U.S. 549 (1995). In *Sebelius*, for instance, the Court rejected the government's claim that the independent mandate set out in the Affordable Care Act could be justified under the Commerce Clause, notwithstanding the mandate's predictable and direct impact on insurance markets. 567 U.S. at 548. And in *Lopez*, the Court held that the Commerce Clause could not support a ban on guns near schools and playgrounds, even though gun sales often involve interstate transactions. 514 U.S. at 552-59; *see also United States v. Morrison*, 529 U.S. 598, 614, 618 (2000) (holding that the regulation of punishment—there, violence against women—is not directed at the instrumentalities, channels, or goods involved in interstate commerce [and] has always been the province of the States").

Congress's burden of justification is not trivial. State sovereignty reflects that our Constitution presupposes shared power between the federal government and the states. As the Court drove home in *Bond v. United States*, 564 U.S. 211, 222 (2011), much of governmental power “is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed. The Framers

thus ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison).” Since our nation’s founding, liability rules have generally been set by state and local governments, which are “closer to the governed” and “more accountable” to the people.

Much of the Court’s reasoning in the modern federalism cases strongly suggests that immunity legislation, untethered to an ongoing federal regulatory program, could not be justified under the Commerce Clause. For one thing, these cases drive home that Congress must demonstrate that the “activities” subject to federal legislation must “have a substantial effect on interstate commerce.” *See, e.g., NFIB*, 567 U.S. at 549. But at this point, however, there is scant evidence, empirical or even anecdotal—either from before states imposed stay-at-home orders or from states that have remained open or have reopened—that litigation by individuals over the spread of Covid-19 is having any effect at all, let alone the substantial effect on commerce the Constitution requires.

Even more problematic is the fact that, even if a substantial number of cases related to Covid-19 were filed, many, perhaps most, would almost certainly be *intrastate* disputes that have no appreciable effect on interstate commerce, let alone a substantial effect.

The absence of real evidence exposes yet another pitfall. The Interstate Commerce Clause gives Congress the power to “*regulate* Commerce.” As the *NFIB*

Court points out, the “power to *regulate* commerce presupposes the existence of commercial activity to be regulated.” *Id.* at 550 (emphasis in original). In other words, Congress may not legislate simply “because of prophesied future activity.” *NFIB*, at 557. To be sure, “Congress can anticipate the *effects* on commerce of an economic activity,” *id.*, but the Court has “never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.” *Id.* Again, there is no evidence that Covid-19 related cases are having any impact on interstate commerce. For that reason, this proposal has the same flaw that led the Court to reject the government’s argument in *NFIB* that the individual mandate could be grounded in the Commerce Clause—namely, the factual predicate for immunity legislation would be based on the prophecy that the tsunami Congress fears will materialize. Particularly given the significant Tenth Amendment concerns, “prophesy” is not a sound footing for legislation based on the Commerce Clause. *See New York v. United States*, 505 U.S. 144, 156-57 (1992).

Perhaps ironically, one of the preexisting statutes that affords immunity highlights the second constitutional problem with the proposal, namely that it is untethered to any extant or newly-initiated federal regulatory program. The Defense Production Act, 50 U.S.C. § 4557, provides liability protection for claims arising from a business’s compliance with government orders under the Act. The immunity provision is part of a broader statute that permits claims for declaratory and injunctive relief. But the statute provides immunity *only* for action taken at the behest of the federal government; it is not a broad, all-purpose immunity for

conduct that arises in other contexts. *See In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 844-45 (E.D.N.Y. 1984). The same is true for the common law immunity that extends to government contractors. *See Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). *Ad hoc* legislation that simply wipes away state law without advancing the goals of any existing or even newly created federal program falls well outside the scope of Commerce Clause power, and the extinguishing of state law claims, with no federal substitute, likely violates the Due Process Clause as well.²

As this discussion makes clear, it is far from certain that immunity legislation would survive constitutional review. It would be unprecedented, it would be based on predictions about an activity that may never materialize, it would regulate activities that are predominantly *intrastate*, it would be an outlier because it does not further any federal statutory goal and extinguishes state-created rights, and it would be antagonistic to the sovereignty of every state and thus at odds with the Tenth Amendment. Each of these factors will weigh heavily against the legislation in the constitutional analysis.

² It does not appear that the Supreme Court has ever directly addressed the Due Process question, which is likely novel. But the Supreme Court has strongly suggested that eliminating state liability law without any *quid pro quo* would violate Due Process. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 (1979) (upholding the constitutionality of the Price-Anderson Act). That is exactly what immunity legislation would do.

The Risk of Unintended Consequences

The law of unintended consequences will loom large over any effort to draft immunity legislation. Conferring immunity would require Congress to define with exacting care the parameters of immunity and decide whether to substitute a government compensation scheme in lieu of state remedies. That task will be extremely difficult because, as I have said, a federal law granting broad, non-sector specific, immunity from state tort and statutory law is unprecedented.

Congress will thus have to answer many questions on an entirely blank slate. One vexing question will be what is the scope of the immunity? Common law tort claims? Torts alleging negligence *per se*? State statutory claims, including those embedded in state workers' compensation laws? Federal statutory claims? Will federal worker protection laws such as the Occupational Safety and Health Act be nullified as well? Will the immunity apply only to personal injury claims? Will the immunity bar suits even against employers or businesses who irresponsibly expose their employees to the virus, in those instances where workers' compensation laws do not apply? Suppose a business has to shut down after a customer came in who knew that he or she was infected with the virus. Is the company barred from suing that individual for economic loss? And what about illnesses or contamination caused by pollution or waste emissions because EPA announced in March that businesses did not have to monitor or report their pollution if the pandemic made it difficult to do so?

We know from the last economic downturn that small businesses are especially vulnerable. What about claims against insurers who wrongfully deny coverage; would those claims be barred as well? What about economic and competitive harm claims—price gouging, collusion, or predatory conduct—that may be rife with so many businesses teetering on the edge of bankruptcy? Would those anti-competitive practices be immunized as well?

What about tort claims against manufacturers who engage in deceptive or fraudulent conduct related to Covid-19, such as selling quack medicines, dietary supplements, or devices? Would an immunity shield apply to scam artists? Would the immunity wipe away Covid-19 related cases brought under state unfair and deceptive acts and practices laws?

And what about civil rights claims? Prisons and detention facilities are the sites of some of the nation’s largest outbreaks, and many are privately owned and operated. Would detainees be barred from seeking injunctions requiring better protection against the virus or essential medical care? Could detainees bring constitutional tort claims, and if not, what is the justification for eradicating those claims? And would the legislation wipe out claims already filed, or claims ready to be filed based on ongoing conduct? How long will the immunity be in place? Will it sunset at a given time? If not, will there be a statutory trigger that would require Congress to renew it or repeal it, or would it be perpetual?

I could keep on going, but you see my point. Drafting legislation that immunizes conduct that has given rise to liability for decades if not centuries will be

difficult, and there will be no end to unforeseen pitfalls that will ultimately emerge. The better path is to abandon efforts to give immunity to those who act unreasonably, and instead to require our expert public health agencies to provide detailed, expert guidance to businesses on how to open safely and responsibly, assist states and localities to work with businesses on safe business practices, and find positive ways to support the reopening of our economy.