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Saving the Nonessential With Radical Tax Policy

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SAVING THE NONESSENTIAL WITH RADICAL TAX POLICY

*Rodney P. Mock** and *Kathryn Kisska-Schulze***

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INTRODUCTION

In 1979, Gary Mootz and his partner opened the Male Image barbershop in the Castro district of San Francisco.¹ For over 40 years, patrons walked through its doors to discuss the latest in political and social goings-on, while enjoying \$18 dollar haircuts.² Little did Mootz know as he rang in the 2020 New Year that an impending viral pandemic, originating thousands of miles away in Wuhan, China, would result in his business being forcibly shut down by a California Executive Order,³ ultimately resulting in its permanent closure just months later.⁴

Six miles away, foodies and tourists alike have enjoyed meals and unobstructed views of the Pacific Ocean at the Cliff House for 157 years.⁵ The iconic restaurant, which weathered a storied history including two fires, earthquake damage, visits by five United States presidents, a movie appearance, and a feature in the video game *Watch Dogs 2*, likewise could not withstand the financial harm caused by lockdowns and governmental restrictions.⁶ On December 31, 2020, the Cliff House closed

1. Steven Bracco, *Castro barbershop closes after 40 years in the neighborhood*, HOODLINE (June 29, 2020), <https://hoodline.com/2020/06/castro-barbershop-closes-after-40-years-in-the-neighborhood/>.

2. *Id.*

3. Exec. Order No. 33-20, EXEC. DEP'T ST. OF CAL. (Mar. 4, 2020), <https://covid19.ca.gov/img/N-33-20.pdf>.

4. *See* Bracco, *supra* note 1.

5. Bay City News, *San Francisco's historic Cliff House restaurant to close permanently*, ABC NEWS (Dec. 14, 2020), <https://abc7news.com/society/sfs-iconic-cliff-house-restaurant-to-close-permanently-/8756231/>.

6. *Id.* (noting that the Covid-19 pandemic exacerbated the restaurant's financial problems, but it was not the sole reason the restaurant closed its doors). *See also* History, THE CLIFF HOUSE, <https://cliffhouse.com/history/> (last visited Dec. 22, 2020); *Cliff House*, FANDOM, https://watchdogs.fandom.com/wiki/Cliff_House (last visited Dec. 22, 2020); and *Cliff House, San Francisco*, WIKIPEDIA, https://en.wikipedia.org/wiki/Cliff_House,_San_Francisco (last visited Dec. 22, 2020).

permanently—leaving 180 employees without jobs.⁷

More than two thousand miles to its east, Governor Andy Beshear issued an executive order on March 22, 2020, mandating that all nonessential businesses close,⁸ leading to the permanent cessation of Highland Fitness, a Louisville, Kentucky neighborhood fitness center.⁹ This venture, which operated for over twelve years, succumbed to the financial strains of the lockdowns.¹⁰ Highland Fitness is not an anomaly; by August 2020, almost 300 Louisville businesses closed permanently due to mandated lockdowns and restrictions.¹¹ For those that remained operational, revenue had declined almost 26 percent since the start of the pandemic, with some revenues falling 50 to 75 percent.¹² These small business casualties, accompanied by countless other stories of the lockdowns' devastating economic impact across the United States, have become increasingly familiar; however, they are largely overshadowed by the COVID-19 public health crisis.¹³

The first confirmed case of COVID-19 appeared in the United States on January 20, 2020.¹⁴ Eleven days after the initial United States patient diagnosis, then-President Donald Trump issued Proclamation 9984, suspending border entry to those arriving from the People's Republic of China.¹⁵ Just one week prior, China officially locked down Wuhan, which was ground zero for the pandemic, with approximately 11 million

7. Bay City News, *supra* note 5.

8. Executive Order No. 2020-246, COMMONWEALTH OF KY. (Mar. 22, 2020), https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf.

9. Haley Cawthon, *Highland Fitness closes permanently due to Covid-19*, LOUISVILLE BUS. FIRST (Aug. 21, 2020, 1:38 PM), <https://www.bizjournals.com/louisville/news/2020/08/21/highland-fitness-closes-due-to-covid.html>.

10. *Id.* See also Highland Fitness, FACEBOOK (July 30, 2020), <https://www.facebook.com/HighlandFit/>.

11. Haley Cawthon, *Yelp data shows nearly 300 Louisville businesses have permanently closed since March*, WLJY (Aug. 17, 2020, 11:18 AM), <https://www.wlky.com/article/yelp-data-shows-nearly-300-louisville-businesses-have-permanently-closed-since-march/33623385>. Note, for simplicity purposes, this article references “lockdown” to include any resulting restrictions on businesses’ free flow of commerce, to include social distancing and ensuing state-mandated capacity limitations on business enterprises.

12. Gina Glaros, *Louisville small businesses’ overall revenue down 26% during pandemic*, WDRB (Dec. 9, 2020), https://www.wdrb.com/news/louisville-small-businesses-overall-revenue-down-26-during-pandemic/article_956b865e-3a48-11eb-829d-e329000e2f8e.html.

13. See *COVID-19’s economic fallout will long outlive the health crisis, report warns*, UNCTAD (Nov. 19, 2020), <https://unctad.org/news/covid-19s-economic-fallout-will-long-outlive-health-crisis-report-warns>.

14. See Erin K. Stokes et. al, *Coronavirus Disease 2019 Case Surveillance – United States, January 22 – May 30, 2020*, CTR. FOR DISEASE CONTROL AND PREVENTION, 69 MORBIDITY AND MORTALITY WEEKLY REPORT 759, 760 (June 15, 2020).

15. See Proclamation 9984, 85 Fed. Reg. 6709 (Republic of China) (Jan. 31, 2020) (suspending “entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the People's Republic of China”).

inhabitants.¹⁶

Less than two months after initiating the Schengen border suspension, and on the same day that the World Health Organization (“WHO”) declared the virus a global pandemic, the United States temporarily suspended travel from Europe.¹⁷ On March 13, 2020, as the stock market crashed and oil prices plunged, Mr. Trump declared a “national emergency.”¹⁸ America was fighting an invisible enemy, with the Executive branch, politicians, and the media alike, referring to the nation’s crusade against the novel virus as a “War on COVID.”¹⁹

As the outbreak continued, governors in all but seven states issued executive orders directing residents to stay-at-home and temporarily forced any businesses identified as nonessential to close, including retail establishments, dine-in restaurants, fitness centers, and theaters.²⁰ Only those ventures deemed essential, such as grocers, emergency services, healthcare, information technologies, transportation, and energy, remained operational.²¹ For the first time in United States history or case

16. *Inside China’s Virus Zone, Unease Gropes a City in Lockdown*, BLOOMBERG (Updated Jan. 23, 2020), <https://www.bloomberg.com/news/articles/2020-01-23/inside-china-s-virus-zone-unease-grips-a-city-in-lockdown>.

17. Lev Facher, *Trump suspends travel from Europe for 30 days in response to coronavirus outbreak*, STAT (Mar. 11, 2020), <https://www.statnews.com/2020/03/11/trump-europe-travel-ban/>. See also Presidential Proclamation 9993, 85 Fed. Reg. 15,045, 15,046 (suspending “entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the Schengen Area”). The Schengen Area includes: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

18. Lev Facher, *President Trump just declared the coronavirus pandemic a national emergency. Here’s what that means*, STAT (Mar. 13, 2020), <https://www.statnews.com/2020/03/13/national-emergency-coronavirus/>.

19. See, e.g., Jacqueline Policastro, *The military’s war on COVID-19*, WMCATIONNEWS5 (Oct. 15, 2020, 4:20 PM), <https://www.wmactionnews5.com/2020/10/15/militarys-war-covid-19/>; Alex Fitzpatrick, *Why the U.S. Is Losing the War on COVID-19*, TIME (Aug. 13, 2020), <https://time.com/5879086/us-covid-19/>; Dick Hoskins, *Trump’s ‘war’ on COVID-19*, MISSOULIAN (Dec. 8, 2020), https://missoulian.com/opinion/letters/trumps-war-on-covid-19/article_f947ddef-43a9-558f-bcb6-0b44a682ff93.html; and Jonathan Levin et al., *Republican War on Covid Orders Grinds on Despite Trump’s Illness*, BLOOMBERG (Oct. 2, 2020, 8:22 PM), <https://www.bloomberg.com/news/articles/2020-10-03/republican-war-on-covid-orders-grinds-on-despite-trump-s-illness>.

20. See Maggie Davis et al., *Governors’ Emergency Declarations During The Covid-19 Pandemic*, 12 CONLAWNOW 95, 95 (2020). See also *States that did not issue stay-at-home orders in response to the coronavirus (COVID-19) pandemic*, 2020, BALLOTEDIA, [https://ballotpedia.org/States_that_did_not_issue_stay-at-home_orders_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/States_that_did_not_issue_stay-at-home_orders_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020) (last visited Dec. 22, 2020) (explaining that the seven states that never issued stay at home orders during March or April 2020 were: Arkansas, Iowa, Nebraska, North Dakota, South Dakota, Utah, and Wyoming). See also Chabon et al., *Shelter in Place Orders: Are You an “Essential Business”?*, 10 THE NAT’L L. REV. no. 83 (Mar. 23, 2020), <https://www.natlawreview.com/article/shelter-place-orders-are-you-essential-business>.

21. See Elizabeth Brenner, *Love (Of the Constitution) and Liberty in the Time of Covid-19: The Role of a Lawyer Is Vigilance*, 83 TEX. B. J. 462, 462 (2020) (documenting that only “essential businesses” could remain open amidst state-wide COVID closures). See also Chabon et al., *supra* note 20.

law, arbitrary lines were established to distinguish between essential and nonessential business operations.²²

Within six months of the pandemic's onset in the United States, 60 percent of businesses forcibly shut down permanently due to the stay-at-home executive orders.²³ For those small to mid-size businesses remaining operational, 43 percent reported a "significant to severe impact" due to decreased sales, diminished business valuations, and lost revenue.²⁴ In contrast, big-box retailers like Walmart, Target, Costco and Amazon, all essential by state government standards, profited from the forced closures of over 140,000 nonessential businesses.²⁵ These large, one-stop establishments that provide food, necessities, contactless shopping, home delivery, and have matured e-commerce platforms, reported record sales in 2020.²⁶ Even after states lifted closure restrictions on the nonessential businesses, a myriad of operational constraints required these businesses to maintain capacity limits and follow stringent guidelines.²⁷ Forced closures and limitations proved disastrous for already fragile small businesses unable to defend themselves against the financial tsunami.²⁸ To address these injustices, some have suggested the

22. See Irene Jiang, *Here's the difference between an 'essential' business and a 'nonessential' business as more than 30 states have imposed restrictions*, BUS. INSIDER (Mar. 31, 2020), <https://www.businessinsider.com/what-is-a-nonessential-business-essential-business-coronavirus-2020-3> (noting that although there existed some types of business operations that all states seemed to identify as being either "essential" or "nonessential", it was up to each individual city and state to determine more specifically which business could stay open, versus close). See also *Omnistone Corp. v. Cuomo*, 485 F. Supp. 3d 365 (E.D.N.Y. 2020), and *White v. CSX Transp., Inc.*, 2020 U.S. Dist. LEXIS 192293 (W.D.N.Y. 2020) (identifying the first two United States cases which draw distinctions between "essential" and "nonessential" business operations).

23. *Local Economic Impact Report*, YELP (Sept. 2020), <https://www.yelpeconomica.verage.com/business-closures-update-sep-2020.html> (Total permanent business closures reported were 97,966).

24. See Sandy McKenzie, *Small Businesses Feel Biggest Impact of Coronavirus Pandemic*, BUSINESSWIRE (Oct. 8, 2020, 9:30 AM), <https://www.businesswire.com/news/home/20201008005232/en/Small-Businesses-Feel-Biggest-Impact-of-Coronavirus-Pandemic> (data derived from a CBIZ survey analyzing more than 1,600 United States businesses).

25. Hayley Peterson, *The pandemic is ramping up the war between Amazon, Walmart, and Target, and making them more powerful than ever*, BUS. INSIDER (Aug. 23, 2020, 9:45 AM), <https://www.businessinsider.com/amazon-walmart-and-target-are-getting-more-powerful-2020-8>. See also Anne Sraders & Lance Lambert, *Nearly 100,000 establishments that temporarily shut down due to the pandemic are now out of business*, FORTUNE (Sept. 28, 2020, 10:25 AM), <https://fortune.com/2020/09/28/covid-buisnesses-shut-down-closed/>.

26. Gillian Friedman, *Big-Box Retailers' Profits Surge as Pandemic Marches On*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/business/coronavirus-walmart-target-home-depot.html>. See also Sraders & Lambert, *supra* note 25.

27. See, e.g., Staff, *Where states reopened and cases spiked after the U.S. shutdown*, WASH. POST (updated Sept. 11, 2020), <https://www.washingtonpost.com/graphics/2020/national/states-reopening-coronavirus-map/>; @CAGovernor, TWITTER (Oct. 3, 2020, 1:00 PM), <https://twitter.com/CAGovernor/status/1312437371460173825>.

28. Alexander W. Bartik et al., *The Impact of Covid-19 on Small Business Outcomes and Expectations*, 117 PNAS, no. 30, 17656-17666 (July 28, 2020), <https://www.pnas.org/content>

imposition of an excess profits tax on large companies profiting from the pandemic.²⁹ In addition, legal arguments promote that just compensation be provided to closed businesses under the Constitutional Takings Clause.³⁰ Meanwhile, Congress entertained its own legislative remedies in the form of the Coronavirus and Economic Security Act (hereinafter “the CARES Act”).³¹

To rescue the rapidly declining United States economy and support individuals and businesses, on March 27, 2020, Congress enacted the CARES Act, which contains over \$2 trillion in economic relief.³² In addition to providing taxpayer stimulus checks and business reprieve via Paycheck Protection Program (PPP) forgivable loans, the CARES Act contains several tax relief provisions that relax business’ net operating losses and deduction restrictions.³³ However, at present there are no proposals at the federal or state levels directing compensatory relief specifically to nonessential businesses for the various harms suffered from forcible lock downs, at the exclusion of the essential businesses.

/117/30/17656. See also, Michael T. Osterholm & Mark Olshaker, *Why We Are So Ill-Prepared for a Possible Pandemic Like Coronavirus*, TIME (Feb. 4, 2020), <https://time.com/5777923/america-prepared-pandemic-coronavirus/>.

29. See, e.g., Reuven Avi-Yohan, *COVID-19 and US Tax Policy: What Needs to Change?*, PUB. LAW AND LEGAL THEORY RES. PAPER SERIES, NO. 679 (Apr. 2020) (suggesting the enactment of an excess profits tax on corporations benefitting from the pandemic); Press Release, *Rep. Tulsi Gabbard: Reinstate WWII-era Excess Profits Tax on Large Corporations Seeing Windfall Profits from Pandemic to Help Small Business Recovery*, TAX NOTES, Dec. 18, 2020 (documenting that Rep. Tulsi Gabbard (HI-02) called on Congress to impose an excess profits tax on large corporations like Amazon, Google, and Walmart that enjoyed significant profits due to the Coronavirus); Bianca Agustin et al., *Billionaire Wealth vs. Community Health: Protecting Essential Workers from Pandemic Profiteers*, TAX NOTES, 1, 25, Nov. 2020 (proposing an excess profits tax to discourage COVID-19 profiteering); Chuck Collins et al., *Billionaire Bonanza 2020, Wealth Windfalls, Tumbling Taxes, and Pandemic Profiteers*, INST. FOR POL’Y STUD. 1, 16 (Apr. 23, 2020) (recommending an excess profits tax due to the pandemic); and Allison Christians & Tarcísio Diniz Magalhães, *It’s Time for Pillar 3: A Global Excess Profits Tax For COVID-19 and Beyond*, TAX NOTES INT’L, at 507, May 4, 2020 (suggesting that global excess profits taxes on companies profiteering from the pandemic will be more successful than individual countries imposing such tax). *But see* Joseph J. Thorndike, *If the Pandemic Is a War Should We Consider a War Profits Tax?*, TAX NOTES, 2023-26, Mar. 30, 2020 (suggesting that imposing an excess profits tax for purposes of COVID-19 is beyond the scope of Treasury’s intent in enacting it in the first place); George K. Yin, *Is It Really Time for an Excess Profits Tax?*, TAX NOTES, 833, May 4, 2020 (suggesting that arguments to impose an excess profits tax to combat the financial strain of COVID-19 are weak).

30. See *infra* Part II.A.

31. See Coronavirus Aid, Relief, and Economic Security Act, 15 U.S.C. § 9001 (2020) [hereinafter CARES Act]. Note that the Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted December 27, 2020 as part of the Consolidated Appropriations Act, 2021 made significant changes and updates to the CARES Act. See also H.R. 133, 116th Cong. (2020) [hereinafter, TCDTRA].

32. Brian Soucek, *Discriminatory Paycheck Protection*, 11 CALIF. L. REV. ONLINE 319, 320 (2020).

33. See CARES Act, *supra* note 31, at §§ 2301 – 2308. See also Thomas W. Joo & Alex Wheeler, *The “Small Business” Myth of the Paycheck Protection Program*, 54 U.C. DAVIS L. REV. ONLINE 21, 25 (2020) (addressing Congress’ response to the pandemic via the CARES Act), and Paul Holdsworth, *Employment Law*, 55 U. RICH. L. REV. 113, 119 (2020) (noting the relaxed tax provisions in the CARES Act §§ 2301-2302).

Soon after the pandemic's onset, scholars began examining COVID-19's impact on commercial ventures. Such intellectual contributions include: (1) scrutinizing financial institutions' ethical behaviors and cultural norms amidst the pandemic,³⁴ (2) defending large business ventures taking advantage of the CARES Act PPP loans,³⁵ (3) proposing metrics to allow franchise systems within the food and restaurant industries to better adjust to COVID-19 disruptions,³⁶ (4) examining the PPP program from a First Amendment perspective,³⁷ (5) exploring the enforceability of COVID-19 liability waivers on consumers and business owners,³⁸ and (6) arguing against collegiate institutions hosting revenue-generating sporting events while remaining academically virtual.³⁹

In addition to the proposal that Congress impose an excess profits tax on COVID-profiting enterprises, scholars have explored broader, tax-specific issues stemming from COVID-19 disruptions. Such inquiries include analyzing flaws in the temporary suspension of deduction limitations on certain business tax losses under the CARES Act,⁴⁰ evaluating key tax provisions of the CARES Act with regard to employee benefit plans⁴¹ and business practices,⁴² and examining the function of the United States corporate income tax in pandemic-transformed business organizations.⁴³

This Article adds to the aforementioned literature as follows. First, this Article maintains that essential businesses are not responsible for the annihilation of numerous small businesses. Rather, such is a consequence of the executive action of state governors in response to the perceived threat of COVID-19.⁴⁴ Under the Internal Revenue Code of 1986, as amended ("Code"), for-profit enterprises are distinguishable from tax-exempt organizations in that they are, among other factors, vested in being

34. Nizan Geslevich Packin, *In Too-Big-To-Fail We Trust: Ethics and Banking In The Era Of Covid-19*, 20 WIS. L. REV. 1043 (2020).

35. Joo & Wheeler, *supra* note 33.

36. Paul Brunkhorst, *Contactless Currency During Covid-19: How The Pandemic's Business Disruptions Will Change Franchise System Payment Standards*, 40 FRANCHISE L.J. 259 (2020).

37. Soucek, *supra* note 32, at 319-20 (with particular attention paid to strip clubs).

38. Zahra Takhshid, *Nonessential Businesses and Liability Waivers in the Time of COVID-19*, 105 MINN. L. REV. HEADNOTES 42 (2020).

39. Thomas A. Baker III et al., *College Football In The Time Of COVID-19*, 2020 WIS. L. REV. FORWARD 101 (2020).

40. Clint Wallace, *The Troubling Case of the Unlimited Pass-Through Deduction: Section 2304 of the CARES Act*, 87 U. CHI. L. REV. ONLINE 1 (2020).

41. Samantha A. Kopacz & Samuel L. Parks, *COVID-19 and Employee Benefit Plans: Congress and IRS Provide Taxpayer Relief Under Certain Plan Rules Due To Pandemic*, 99 MI. BAR J. 24 (2020).

42. Scott E. Vincent, *Pandemic Tax Developments*, 76 J. MO. B. 126 (2020).

43. Mindy Herzfeld, *Corporate Tax in the New Normal*, TAX NOTES INT'L, June 1, 2020, at 981.

44. *See infra* Part I.C.

profitable,⁴⁵ thereby enjoying unrestricted commercial activity.⁴⁶ Targeting already-thriving, large for-profit entities for profiting during the lockdowns fails to acknowledge the societal obligation that governments have to businesses that were forcibly restricted from engaging in commerce.

In concert with this premise, this Article dismisses recent proposals to impose an excess profits tax on companies benefitting from pandemic lockdowns.⁴⁷ Treasury introduced this tax during the previous World Wars in an effort to target businesses engaged in “war profiteering” amidst everyday Americans who otherwise sacrificed “life and limb.”⁴⁸ Mr. Trump’s and others’ wartime analogy to a War on COVID, akin to President Ronald Reagan’s War on Drugs,⁴⁹ is mere rhetoric. Federal tax policy engenders that an excess profits tax “be used in time of war.”⁵⁰ The United States judicial system defines “war” as a hostile engagement between nation[s], government[s], and the like.⁵¹ Suggesting that excess profits taxation be imposed on large companies benefitting from the COVID-19 pandemic contradicts historical tax policy in the United States. Further, this Article proposes that recent lawsuits, brought by injured businesses alleging Takings Clause claims against states that imposed lockdowns, will provide little meaningful relief.⁵²

Finally, this Article establishes that the CARES Act does not sufficiently remedy the financial devastation suffered by nonessential businesses as a result of state-mandated lockdowns.⁵³ Instead, this Article suggests that an overriding public interest warrants significant radical tax

45. John Tyler et al., *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 QUINNIPIAC L. REV. 235, 255 (2015). *See also* I.R.C. § 501(c)(6) (2021).

46. *See infra* Part III.

47. *See infra* Part II.C.

48. Ajay K. Mehrotra, *Lawyers, Guns, and Public Moneys: The U.S. Treasury, World War I, and the Administration of the Modern Fiscal State*, 28 LAW & HIST. REV. 173, 185 (2010). *See also* Revenue Act of 1917, 40 Stat. 300 (1917).

49. *See* Peter Bowal et al., *Regulating Cannabis: A Comparative Exploration of Canadian Legalization*, AM. BUS. L. REV. (2021).

50. *See* Carl Shoup, *The Federal Revenue System: The Excess Profits Tax, A Report to the Secretary of the Treasury*, TAX HISTORY (Sept. 20, 1934), <http://www.taxhistory.org/Civilization/Documents/Surveys/hst23735/23735-1.htm>.

51. *See* *Universal Cable Prods., LLC v. Atlantic Specialty Ins. Co.*, 929 F. 3d 1143, 1155 (9th Cir. 2019) (citing to 10A COUCH ON INSURANCE § 152:3 (3rd ed. 2017) (defining “war”, in part, as “the employment of force between governments or entities essentially like governments.”). *See also* *Noasha LLC v. Nordic Group of Cos.*, 630 F. Supp. 2d 544, 554 (E.D. Pa., 2009) (citing to THE COMPACT ED. OF THE OXFORD ENG. DICTIONARY 3682 (26th Ed. 1987), which defined “war” as the “hostile contention by means of armed forces, carried between nations, states, or rulers, or between parties in the same nation or state.”).

52. *See infra* Part II.A.

53. *See infra* Part II.B.

reform, which will require Congress to reevaluate the manner in which it views non-profit organizations. Specifically, this Article proposes that certain, qualifying businesses forcibly locked down during the pandemic ("COVID-Companies") should be provided temporary federal tax-exempt status, and any donations made to these entities should be treated as tax deductible.⁵⁴

To better address how the United States can make COVID-Companies whole again, this Article proceeds as follows. Part I provides an evolutionary discussion of the negative spillover effects resulting from state-mandated lockdowns on business operations in the United States. Part II evaluates recent scholarly proposals to remedy or "fix" these harms. Part III recommends that Code section 501 be revised to provide temporary relief to nonessential businesses, akin to that enjoyed by tax exempt, non-profit organizations. Finally, this Article concludes that society has a vested interest in preserving and resurrecting nonessential businesses, and revolutionary tax reform is the means by which to effectuate nonessential businesses' recoveries.

I. THE MONUMENTAL HARM CAUSED BY THE LOCKDOWNS

One of the earliest peer-reviewed articles to address the role of social distancing in mitigating pandemic influenza derived from a high school science fair project.⁵⁵ While an abundance of scholarly research is dedicated to studying the function of social distancing to minimize contagion exposure,⁵⁶ prior to 2020, only negligible consideration was given to the impact of social distancing on the restrictive free flow of commerce.⁵⁷ In late 2019, while most people across the globe were doing

54. See *infra* Part III.C.

55. Robert J. Glass, et. al., *Targeted Social Distancing Design for Pandemic Influenza*, 12 EMERGING INFECTIOUS DISEASES 1671 (2006) (Laura M. Glass, one of the authors of this study, was a high school student at the time of publication). See also Ollie Reed Jr., *Social distancing born in ABQ teen's science project*, ALBUQUERQUE J. (May 2, 2020) (on file with author).

56. See, e.g., Peter Caley et al., *Quantifying social distancing arising from pandemic influenza*, 5 J. OF THE ROYAL SOC'Y INTERFACE, 631-39 (Oct. 4, 2007) (studying the impact of social distancing amidst potentially infectious contacts); Harunor Rashid et al., *Evidence compendium and advice on social distancing and other related measures for response to an influenza pandemic*, 16 PAEDIATRIC RESPIRATORY REV. 119 (2015) (examining the role of social distancing against pandemic influenza); Duo Yu et al., *Effects of reactive social distancing on the 1918 influenza pandemic*, PLOS ONE 12(7) (2017); Joel K. Kelso et al., *Simulation suggests that rapid activation of social distancing can arrest epidemic development due to a novel strain of influenza*, 9 BMC PUB. HEALTH 117 (2009) (utilizing computer simulations to examine the extent and timing of social distancing measures to quench pandemic influenza spread); and Faruque Ahmed et al., *Effectiveness of workplace social distancing measures in reducing influenza transmission: a systematic review*, 18 BMC PUB. HEALTH 518 (2017) (analyzing the impact of social distancing in non-healthcare workplaces to slow influenza transmission).

57. U.S. DEP'T OF LAB., GUIDANCE ON PREPARING WORKPLACES FOR AN INFLUENZA PANDEMIC, at 4 (2007) (making a brief statement that pandemics may result in employee absences, changes to

anything *but* socially distancing in their personal or business endeavors, a novel coronavirus began silently spreading its way across Wuhan, China.⁵⁸

History supports that health-related pandemics and small-scale lockdowns are not societal novelties. What makes the COVID-19 pandemic unique, from a commerce perspective, is its breadth of economic calamity, magnitude of residential and commercial lockdowns, and novel distinctions drawn between essential and nonessential business ventures under the law. Events that transpired after COVID-19 impacting the United States now require radical tax policy initiatives to rehabilitate the ensuing economic fallout. To appreciate this Article's ultimate appeal that critical and revolutionary tax relief be granted to nonessential businesses forcibly closed by governmental mandates, Section A offers a brief narrative of the evolution of COVID-19. Section B discusses the history of mini-lockdowns and other minor suspensions previously instituted. Finally, Section C examines the effect of government lockdowns and other restrictions on America's small businesses.

A. A Virus Originating Seemingly From Nowhere

The exact source of the COVID-19 virus was initially thought to originate from Wuhan, China's Huanan Seafood Wholesale Market.⁵⁹ The first recorded cases of Wuhan patients with a suspicious disease presenting as an atypical pneumonia arose in early December 2019.⁶⁰ However, evidence suggests that the virus may have been circulating months prior.⁶¹ By New Year 2020 disturbing reports were emerging from China by its "citizen journalists" who then mysteriously disappeared from

commerce, and interrupted supply chain).

58. See Jacques deLisle & Shen Kui, *Lessons From China's Response to COVID-19: Shortcomings, Successes, and Prospects for Reform in the Chinese Regulatory State*, 16 U. PA. ASIAN L. REV. 66, 67 (2020).

59. *Id.* at 72-3 (noting the Seafood Market as the suspected source of the virus' origination). But see James T. Areddy, *China Rules Out Animal Market and Lab as Coronavirus Origin*, WALL STREET J. (May 26, 2020, 4:51 PM), <https://www.wsj.com/articles/china-rules-out-animal-market-and-lab-as-coronavirus-origin-11590517508> (documenting that Chinese scientists dismissed suspicions that the coronavirus originated at the Wuhan Seafood Market, or in a laboratory as had otherwise been claimed). See also Ken Dilanian et al., *Did the coronavirus really escape from a Chinese lab? Here's what we know*, NBCNEWS (May 4, 2020, 2:35 PM), <https://www.nbcnews.com/politics/national-security/did-coronavirus-really-escape-chinese-lab-here-s-what-we-n1199531> (discussing the coronavirus lab release theory).

60. deLisle & Kui, *supra* note 59, at 71.

61. Elaine Okanyene Nsoesie et al., *Analysis of hospital traffic and search engine data in Wuhan China indicates early disease activity in the fall of 2019*, HARV. LIBR. (2020), <https://dash.harvard.edu/handle/1/42669767>.

the public eye.⁶² Gruesome images showed people dying in streets,⁶³ infected residents sealed behind closed doors and left for dead,⁶⁴ residents forcibly removed from their homes,⁶⁵ portable crematory cover-ups,⁶⁶

62. See Jan Li, *Another citizen journalist covering the coronavirus has gone missing in Wuhan*, QUARTZ (Feb. 12, 2020), <https://qz.com/1801361/wuhan-virus-citizen-journalists-fang-bin-chen-qiushi-go-missing/> (noting that a second Chinese citizen covering the coronavirus went missing after posting online videos from city hospitals); Vivian Wang, *They Documented the Coronavirus Crisis in Wuhan. Then They Vanished*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/business/wuhan-coronavirus-journalists.html> (documenting that a Chinese amateur reporters went missing after posting unfiltered videos online of the devastating impact of the coronavirus); Guo Rui, *Chinese citizen journalist detained after live-streaming on coronavirus from Wuhan*, SOUTH CHINA MORNING POST (May 18, 2020), <https://www.scmp.com/news/china/politics/article/3084882/chinese-citizen-journalist-detained-after-live-streaming> (reporting on the detainment of a Chinese citizen reporter following her criticism of the government's handling of the virus).

63. Agence France-Presse, *A man lies dead in the street: the image that captures the Wuhan coronavirus crisis*, THE GUARDIAN (Jan. 30, 2020), <https://www.theguardian.com/world/2020/jan/31/a-man-lies-dead-in-the-street-the-image-that-captures-the-wuhan-coronavirus-crisis>; Mark Hodge, *Coronavirus leaves Wuhan a 'zombieland' with people collapsing in streets and medics patrolling in hazmat suits*, THE SUN (Jan. 24, 2020), <https://wwwthesun.co.uk/news/10808633/coronavirus-wuhan-zombieland/>; Brendan McFadden, *Coronavirus: Infected people seen 'dead in streets' in Chinese City dubbed 'zombieland'*, MIRROR (Jan. 24, 2020), <https://wwwthesun.co.uk/news/10808633/coronavirus-wuhan-zombieland/>.

64. Nicola Stow, *Sealed in Virus Tomb Coronavirus patients WELDED into homes in China as death toll spirals to 813*, THE SUN (Feb. 10, 2020), <https://www.the-sun.com/news/378365/coronavirus-patients-welded-into-homes-in-china-as-death-toll-spirals-to-813/>; Huizhong Wu, *Sealed in: Chinese trapped at home by coronavirus feel the strain*, REUTERS (Feb. 22, 2020), <https://www.reuters.com/article/us-china-health-quarantine/sealed-in-chinese-trapped-at-home-by-coronavirus-feel-the-strain-idUSKCN20G0AY>; Faye Brown, *Wuhan woman screams as Chinese authorities barricade her inside own home*, METRO (Feb. 2, 2020), <https://metro.co.uk/2020/02/02/wuhan-woman-screams-chinese-authorities-barricade-inside-home-12162599/>.

65. Minyvonne Burke et al., *Video appears to show people in China forcibly taken for quarantine over coronavirus*, ABC NEWS (Feb. 8, 2020), <https://www.nbcnews.com/news/world/video-appears-show-people-china-forcibly-taken-quarantine-over-coronavirus-n1133096>; Eileen AJ Connelly, *Coronavirus crisis: Video allegedly shows Chinese officials removing people from homes*, N.Y. POST (Feb. 8, 2020), <https://nypost.com/2020/02/08/coronavirus-crisis-video-allegedly-shows-chinese-officials-removing-people-from-homes/>; Rory Sullivan, *Coronavirus: Video from China shows screaming woman being placed in metal box by quarantine workers*, INDEP. (Feb. 13, 2020), <https://www.independent.co.uk/news/world/asia/coronavirus-quarantine-china-video-shanghai-wuhan-watch-a9333566.html>; Connor Boyd, *Suspected coronavirus patient is wheeled out of a Chinese airport in a see-through quarantine box while flanked by medics wearing face masks*, DAILY MAIL (Jan. 23, 2020), <https://www.dailymail.co.uk/health/article-7921351/Suspected-coronavirus-patient-wheeled-Chinese-airport-quarantine-box.html>.

66. Henry Holloway, *China deploys 40 incinerators to Wuhan amid fears of coronavirus death toll 'cover up'*, DAILY STAR (Feb. 19, 2020), <https://www.dailystar.co.uk/news/world-news/china-deploys-40-incinerators-wuhan-21529067>; Bloomberg, *Reports of Urns Stacked at Wuhan Funeral Homes Raises Questions about the Real Coronavirus Death Toll in China*, TIME (Apr. 3, 2020), <https://time.com/5811222/wuhan-coronavirus-death-toll/>; Spencer Neal, *'We can't stop': Funeral worker says Wuhan cremating 'at least 100' bodies a day amid coronavirus outbreak*, WASH. EXAMINER (Feb. 5, 2020), <https://www.washingtonexaminer.com/news/we-cant-stop-funeral-worker-says-wuhan-cremating-at-least-100-bodies-a-day-amid-coronavirus-outbreak>; Mai He et al., *Cremation based estimates suggest significant under-and delayed reporting of Covid-19 epidemic data in Wuhan China*, MEDRXIV (June 16, 2020), <https://www.medrxiv.org/content/10.1101/2020.05.28.20116012v2.article-info>.

stacks of body bags,⁶⁷ claims of patients being burned alive,⁶⁸ medical personnel wearing full biohazard suits,⁶⁹ and makeshift hospitals built in a matter of days to withstand the volume of sick and dying patients.⁷⁰ All of these shocking and theatrical scenes were eerily reminiscent of the 2011 horror movie, *Contagion*, where a bat virus originating in China made the biological leap from animals to humans before rapidly spreading across the globe.⁷¹

In the latter part of January 2020, the world watched as Chinese governmental authorities shut down the once thriving Wuhan metropolis.⁷² Transportation into and out of Wuhan ceased, and large-scale activities were cancelled.⁷³ Commentators suggested China's "sledgehammer" approach to its handling of the pandemic would be deemed unconstitutional in the United States, where individuals reap considerable civil liberties and human rights.⁷⁴ Notwithstanding such rights and liberties, by April 2020, social distancing was the "new normal" in the United States.⁷⁵—shelters-in-place ensued,⁷⁶ in-school learning ceased,⁷⁷ essential versus nonessential business categorizations

67. Footage of 'body bags' from inside Wuhan, AL JAZEERA (Feb. 10, 2020), <https://www.aljazeera.com/program/newsfeed/2020/2/10/footage-of-body-bags-from-inside-wuhan/>; Robert Mann & Eliot Hastie, *Killer Bug Chaos Man arrested after filming covert video showing true scale of body bags piling up at Wuhan hospital*, THE SUN (Feb. 6, 2020), <https://www.the-sun.com/news/346486/man-arrested-for-filming-body-bags-and-staff-in-hazmat-suits-at-wuhan-hospital-treating-patients-with-deadly-coronavirus/>; *Coronavirus: Body-bag stocks 'in danger of running out'*, BBC NEWS (Apr. 13, 2020); <https://www.bbc.com/news/health-52205655>.

68. Keoni Everington, *Chinese woman describes Wuhan virus patients being burned alive*, TAIWAN NEWS (Feb. 26, 2020), <https://thewatchtowers.org/watch-chinese-woman-describes-wuhan-virus-patients-being-burned-alive-taiwan-news/>.

69. Spencer Neal, *WATCH: Doctors in hazmat suits treat patients with deadly coronavirus*, WASH. EXAMINER (Jan. 22, 2020), <https://www.washingtonexaminer.com/news/watch-hazmat-clad-doctors-treat-patients-with-deadly-coronavirus>.

70. Yuliya Talmazan, *China's coronavirus hospital built in 10 days opens its doors, state media says*, NBC NEWS (Feb. 3, 2020), <https://www.nbcnews.com/news/world/china-s-coronavirus-hospital-built-10-days-opens-its-doors-n1128531>.

71. CONTAGION (Participant Media, Image Nation Abu Dhabi, Double Feature Films 2011).

72. deLisle & Kui, *supra* note 59, at 76.

73. *Coronavirus: Wuhan shuts public transport over outbreak*, BBC (Jan. 23, 2020), <https://www.bbc.com/news/world-asia-china-51215348>.

74. James Hamblin, *A Historic Quarantine*, THE ATLANTIC (Jan. 24, 2020), <https://www.theatlantic.com/health/archive/2020/01/china-quarantine-coronavirus/605455/>.

75. See Charles Courtemanche et al., *Strong Social Distancing Measures In The United States Reduced The COVID-19 Growth Rate*, HEALTH AFFAIRS (May 14, 2020), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00608>.

76. State "Shelter-in-Place" and "Stay-at-Home" Orders, FINRA, <https://live-thornton2020.pantheonsite.io/wp-content/uploads/2020/03/2020-03-State-Stay-at-Home-Guidelines.pdf> (last visited October 21, 2021).

77. *School responses to the coronavirus (COVID-19) pandemic during the 2019-2020 academic year*, BALLOTEDIA, [https://ballotpedia.org/School_responses_to_the_coronavirus_\(COVID-19\)_pandemic_during_the_2019-2020_academic_year](https://ballotpedia.org/School_responses_to_the_coronavirus_(COVID-19)_pandemic_during_the_2019-2020_academic_year) (last visited Jan. 5, 2021).

mysteriously arose,⁷⁸ and all commercial ventures identified as nonessential closed.⁷⁹ While government mandated lockdowns were virtually unheard of in modern United States history, they evolved from a lengthy history of small-scale lockdowns imposed globally.

B. A History of Mini-Lockdowns and Other Suspensions

History suggests that as early as the 17th Century Italian Renaissance, lockdowns were implemented to guard against pandemic health emergencies, terrorism, and industrial cataclysms.⁸⁰ For example, in an effort to contain the 1630 plague, Florence, Italy went into lockdown, with individuals forced to stay home.⁸¹ When the 1665 bubonic plague emerged in London, the city similarly went into lockdown.⁸² During the 1800s cholera outbreak, ships were barred entry into European ports, contact with known-infected persons resulted in mass quarantining, restrictions were placed on those wanting to enter urban locations, and officials limited the mobility of beggars and prostitutes, who were considered carriers of the disease.⁸³

The Spanish Flu, which has been increasingly likened to the COVID-19 pandemic,⁸⁴ endured lesser prohibitive measures than the 2020 lockdowns.⁸⁵ Although the federal government did not institute a

78. *Essential vs. Nonessential Businesses*, JUSTIA, <https://www.justia.com/covid-19/business-assistance-during-the-coronavirus-pandemic/essential-vs-nonessential-businesses/> (last visited Jan. 7, 2021).

79. Kelly Deere & Christine Gottesman, *We Can Do This: Reopening the Non-Public Office Sector and Keeping it Open During the COVID-19 Pandemic*, 16 RUTGERS BUS. L. REV. 10, 12 (2020).

80. See Dhananjay Khadilkar, *17th-century Florence: When lockdown became the template to fight pandemics*, RFI (July 4, 2020), <https://www.rfi.fr/en/europe/20200407-17th-century-florence-when-lockdown-became-the-template-to-fight-pandemics-coronavirus-covid-19-plague>. See also Ramin Jahanbegloo, *Life lessons from the history of lockdowns*, LIVEMINT (updated Mar. 27, 2020), <https://www.livemint.com/news/india/life-lessons-from-the-history-of-lockdowns-11585312953744.html>.

81. Khadilkar, *id.*

82. *'Lockdown' was used during the Great Plague*, NEWS LETTER (Nov. 16, 2020), <https://www.newsletter.co.uk/arts-and-culture/film-and-tv/lockdown-was-used-during-great-plague-3037488>.

83. Eugenia Tognotti, *Lessons from the History of Quarantine, from Plague to Influenza A*, EMERGING INFECTIOUS DISEASES 254, 255-56 (2013).

84. See, e.g., E. Lars Phillips & Lucas Hamilton, *Coronavirus In Montana: Quarantine Authority In Montana*, 45 MONT. LAW. 12, 14 (2020) (noting the Spanish Flu forced public, religious, and business closures similar to the COVID movement); *COVID-19's Next Victim? The Rights Of The Accused*, DUBIN RES. AND CONSULTING, 44 CHAMPION 22, 23 (2020) (noting the Spanish Flu provided some legal precedent to the COVID-19 pandemic); Russell Lewis et al., *COVID-19 Force Majeure To The Rescue?*, 56 TENN. B.J. 20, 20 (2020) (referencing that the Spanish Flu was the "most challenging epidemic" prior to the emergence of COVID-19).

85. Francois R. Velde, *What Happened to the US Economy During the 1918 Influenza Pandemic? A View Through High-Frequency* at 37 (Fed. Res. Bank of Chi., Working Paper No. 2020-11, Apr. 2020), <https://www.chicagofed.org/publications/working-papers/2020/2020-11>.

nationwide lockdown in 1918, select cities took varied actions to “flatten the curve”.⁸⁶ In St. Louis, Missouri the health commissioner closed schools, movie theaters, and social halls while banning public gatherings.⁸⁷ In San Francisco, mask mandates became law, with fines imposed for failure to wear face coverings in public.⁸⁸ Violet Harris, a 15 year old living in Seattle, Washington, documented her six week lockdown experience and was delighted once her school finally reopened.⁸⁹

Estimates suggest that 500 million people were infected with the Spanish Flu worldwide, and between 50 and 100 million people perished.⁹⁰ Adjusted for today’s current population, this death toll equates to between 175 and 350 million deaths.⁹¹ In the United States alone, approximately 675,000 people died.⁹²

More recently, in 2003 Toronto, Canada issued a city-wide lockdown, closed nonessential businesses, implemented social distancing measures, and required at least 13,000 people to quarantine in an effort to curb Severe Acute Respiratory Syndrome (SARS).⁹³ President Dr. Ernest Bai Koroma issued a three-day lockdown in Sierra Leone in 2014 amidst the Ebola outbreak.⁹⁴ Ebola also resulted in the closure of governmental offices in Liberia for 30 days, schools in Nigeria for 43 days, as well as schools and universities indefinitely in Guinea until the outbreak was under control.⁹⁵

Brussels, Belgium locked down in 2015 after a series of terrorist attacks in Paris.⁹⁶ For a brief period, the city’s metro system closed,

86. David Roos, *How U.S. Cities Tried to Halt the Spread of the 1918 Spanish-Flu*, HIST. (updated Mar. 27, 2020), <https://www.history.com/news/spanish-flu-pandemic-response-cities>.

87. *Id.*

88. *Id.*

89. Noah Y. Kim, *How the 1918 Pandemic Frayed Social Bonds*, THE ATL. (Mar. 31, 2020), <https://www.theatlantic.com/family/archive/2020/03/coronavirus-loneliness-and-mistrust-1918-flu-pandemic-quarantine/609163/>.

90. *1918 Pandemic (H1N1 virus)*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> (last visited July 24, 2020).

91. John M. Berry, *1918 Revised: Lessons and Suggestions for Further Inquiry*, in THE THREAT OF PANDEMIC INFLUENZA: ARE WE READY? 58, 58 (Knobler et al. eds. 2005) (adjustment based on 1918 population, which was 28 percent of the current population).

92. Jeffery K. Taubenberger, *Chasing the Elusive 1918 Virus: Preparing for the Future by Examining the Past*, in THE THREAT OF PANDEMIC INFLUENZA: ARE WE READY? 69, 69 (Knobler et al. eds. 2005).

93. Jeff St. Clair, *Toronto’s SARS Outbreak Provides a Cautionary Tale of Lifting a Lockdown Too Soon*, WKSU (Apr. 14, 2020), <https://www.wksu.org/post/torontos-sars-outbreak-provides-cautionary-tale-lifting-lockdown-too-soon#stream/0>. See also James G. Hodge, Jr. et al., *Efficacy In Emergency Legal Preparedness Underlying The 2014 Ebola Outbreak*, 2 TEX. A&M L. REV. 353 (2015) (documenting the number of people quarantined in Toronto).

94. ADNAN I. QURESHI, EBOLA VIRUS DISEASE: FROM ORIGIN TO OUTBREAK 188 (2016).

95. Hodge, Jr. et al., *supra* note 94, at 360-61.

96. Jasmine Coleman, *Brussels lockdown: How is city affected by terror threat?*, BBC (Nov. 24,

residents were asked to avoid gatherings, restaurants and cafes closed early, and soldiers patrolled the streets amidst warnings of “serious and imminent” terrorist attacks.⁹⁷ In 2019, a one month lockdown was imposed on a Russian naval base following an accidental missile explosion.⁹⁸ Certainly, brief lockdowns of military bases, governmental offices, and schools in the United States have become the norm following active or potential shooter incidents.⁹⁹ While each of these instances are critical to understanding the efficacy of emergency preparedness across numerous fronts, none of these historic examples come close to paralleling the unprecedented magnitude of global lockdowns resulting from COVID-19, and the financial calamity that followed.

C. Locking Down the Nonessentials

The first mandatory COVID-19 lockdown was recorded on January 23, 2020, in three Chinese cities: Wuhan, Ezhou, and Huanggang.¹⁰⁰ Referred to as the “Wuhan lockdown,” the Chinese central government levied the “largest attempted cordon sanitaire in human history,” unknowingly creating a framework for globally mandated closures that included travel bans and business cessations.¹⁰¹ On that date, Wuhan had only 495 positive COVID-19 cases.¹⁰² The next day, China instituted lockdowns in twelve additional cities, and by January 28, 2020, a total of seventeen cities in the country were forcibly shut down.¹⁰³ As a result, trains and bus systems were suspended, temperature detection centers were established, cafes, theaters and exhibitions closed, gatherings were cancelled, and

2015), <https://www.bbc.com/news/world-europe-34900353>.

97. Ben Taub, *Belgian Terror: Brussels On Lockdown*, THE NEW YORKER (Nov. 21, 2015), <https://www.newyorker.com/news/news-desk/belgian-terror-brussels-on-lockdown>.

98. Oli Smith, *What is Putin hiding? Emergency lockdown of Russian base after ‘nuclear missile’ accident*, EXPRESS (Aug. 10, 2019), <https://www.express.co.uk/news/world/1163716/Russia-latest-news-Putin-military-explosion-nuclear-missile-radiation-leak-world-war-3>.

99. See, e.g., Carl Prine, *Threats trigger lockdown at Naval Air Station Corpus Christi*, NAVY TIMES (Dec. 11, 2019), <https://www.navytimes.com/news/your-navy/2019/12/11/suspect-in-custody-at-naval-air-station-corpus-christi/>; *Virginia Beach shooting: 12 killed after city worker opens fire at colleagues*, BBC (June 1, 2019), <https://www.bbc.com/news/world-us-canada-48481814>; and Gwen Filosa, *Three Key West schools were put on lockdown as police search for a student*, MIAMI HERALD (Dec. 16, 2020), <https://www.miamiherald.com/news/local/community/florida-keys/article247893855.html>.

100. *Global COVID-19 Lockdown Tracker*, AURA VISION (last updated June 11, 2020), <https://auravision.ai/covid19-lockdown-tracker/>.

101. Rui Bao & Acheng Zhang, *Does lockdown reduce air pollution? Evidence from 44 cities in northern China*, 731 SCI. OF THE TOTAL ENV'T 1, 2 (2020).

102. Chong You et al., *An Estimation of the Total Number of Cases of NCIP (2019-nCoV) – Wuhan, Hubei Province, 2019-2020*, 2 CHINA CDC WEEKLY 6, at 87 (2020), <http://weekly.chinacdc.cn/fileCCDCW/journal/article/ccdcw/2020/6/PDF/2019-nCoV-en.pdf>.

103. *Global Covid-19 Lockdown Tracker*, *supra* note 101.

masks became mandatory.¹⁰⁴ Virtually overnight, food became scarce, streets emptied, and Lunar New Year festivities were cancelled.¹⁰⁵

It took slightly over a month before the first European country announced a shutdown. On March 9, 2020, Italy issued a national lockdown.¹⁰⁶ Schools and universities closed, visitors were banned from prisons, sporting events and outdoor gatherings were forbidden, curfews ensued, pubs closed, and travel restrictions were enforced.¹⁰⁷ Italy's ventilator crisis unfolded across television screens as the world watched.¹⁰⁸ Countries around the globe reacted swiftly by instituting lockdowns, including in Europe, South America, Australia, the Philippines, and the Caribbean.¹⁰⁹

Puerto Rico was the first United States territory to institute a lockdown on March 15, 2020.¹¹⁰ Puerto Ricans were required, by executive order, to remain indoors for two weeks, with an overnight curfew beginning at nine o'clock.¹¹¹ Violators were subject to a maximum fine of \$5,000 or six months imprisonment.¹¹² Most businesses were also forcibly shut down, with exceptions granted to grocers, pharmacies, medical equipment companies, carry-out dining, gas stations, and banks.¹¹³

The first state in the United States to institute a move was California. On March 4, 2020, Governor Gavin Newsom declared a State of Emergency.¹¹⁴ The announcement came one week after Orange County officials declared health and local emergencies, without any recorded cases in the area at the time.¹¹⁵ On March 16, 2020, seven Bay area counties issued "shelter-in-place" orders, demanding that millions of residents stay in their homes, with exceptions granted to certain essential

104. *China coronavirus: Lockdown measures rise across Hubei province*, BBC (Jan. 23, 2020), <https://www.bbc.com/news/world-asia-china-51217455>.

105. *Id.*

106. Jason Horowitz, *Italy Announces Restrictions Over Entire Country in Attempt to Halt Coronavirus*, N.Y. TIMES (Mar. 9, 2020), <https://www.nytimes.com/2020/03/09/world/europe/italy-lockdown-coronavirus.html>.

107. *Id.*

108. See Daniel M. Horn, *How America Can Avoid Italy's Ventilator Crisis*, N.Y. TIMES (Mar. 22, 2020), <https://www.nytimes.com/2020/03/22/opinion/health/ventilator-shortage-coronavirus-solution.html>.

109. *Global Covid-19 Lockdown Tracker*, *supra* note 101.

110. *Id.*

111. Edmy Ayala & Patricia Mazzei, *Puerto Rico Orders Coronavirus Lockdown. Violators Could Be Fined.*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/03/15/us/coronavirus-puerto-rico.html>.

112. *Id.*

113. *Id.*

114. Staff, *Timeline: California reacts to coronavirus*, CALMATTERS (Apr. 1, 2020), <https://calmatters.org/health/coronavirus/2020/04/gavin-newsom-coronavirus-updates-timeline/>.

115. *Id.*

services and the homeless.¹¹⁶

As more counties in the United States adopted shelter-in-place orders, Newsom issued the first statewide shelter-in-place order on March 19, 2020.¹¹⁷ His *Executive Order N-33-20*, which cited to the United States Department of Homeland Security's Cybersecurity & Infrastructure Security Agency (CISA), designated certain critical infrastructures as having a "special responsibility" to remain operational during the pandemic.¹¹⁸ The CISA lists sixteen critical infrastructure units that are "imperative during the response to the COVID-19 emergency" for public health, safety, and community well-being.¹¹⁹ Around the same time period, Mr. Trump issued a memorandum documenting, in relevant part, "if you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule."¹²⁰

Newsom's Executive Order indicated that categorized units identified by the CISA are "so vital to the United States that their incapacitation or destruction could have a debilitating effect on security, economic security, public health or safety..." thus requiring that these businesses remain operational during the closure.¹²¹ All businesses falling outside of such were ordered closed. Those refusing to abide by the Order were subject to a misdemeanor and fines up to \$1,000, six months imprisonment, or both.¹²²

116. Julia Wick, *Newsletter: Shelter-in-place orders in seven Bay Area counties*, L.A. TIMES (Mar. 17, 2020), <https://www.latimes.com/california/newsletter/2020-03-17/shelter-in-place-coronavirus-bay-area-newsletter-essential-california> (Essential businesses permitted to remain open included police and fire departments, hospitals, grocers, gas stations, banks, pharmacies, and carry-out restaurants). *Id.*

117. *See* Exec. Order No. 33-20, *supra* note 3.

118. *See* Exec. Order No. 33-20, *supra* note 3 *See also* *Advisory Memorandum On Identification Of Essential Critical Infrastructure Workers During COVID-19 Response*, U.S. DEPT. OF HOMELAND SEC. (May 19, 2020), https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_0.pdf (the sixteen essential critical infrastructure workers include: Communications, Chemical, Critical Manufacturing, Commercial Facilities, Dams, Defense Industrial Base, Emergency Service, Energy, Financial, Government Facilities, Food & Agriculture, Nuclear Reactors, Materials & Waste, Information Technology, Water, Transportations Systems, and Healthcare & Public Health).

119. *See id.*

120. *See* Loren Wolff & Catherine Gorman, *Impact of The U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency's Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, Graydon (Mar. 23, 2020), <https://graydon.law/impact-of-the-u-s-department-of-homeland-security-cybersecurity-infrastructure-security-agencys-memorandum-on-identification-of-essential-critical-infrastructure-workers-during-covid-19-r/>.

121. Exec. Order No. 33-20, *supra* note 3 (In addition, the Order states that Governor Newsom "may designate additional sectors as critical in order to protect the health and well-being of all Californians"). *Id.*

122. *Id.* *See also* Cal. Gov't Code § 8665 (1983).

Following California's stay-at-home order, a cascade of states quickly followed including Colorado, Hawaii, Illinois, Massachusetts, Michigan, Ohio, New York, and Virginia.¹²³ Only seven states withheld from issuing such orders.¹²⁴ Each jurisdiction that executed a stay-at-home order likewise created various distinctions between essential versus nonessential operations.¹²⁵ While each state's definition of "essential" (allowed to operate) as compared to "nonessential" (not allowed to operate) varied, many jurisdictions utilized the CISA guidance.¹²⁶

Violators of these orders faced criminal misdemeanor penalties, fines, and imprisonment.¹²⁷ In May 2020, for example, a Dallas, Texas beauty salon owner was jailed for opening her business in defiance of the state emergency order.¹²⁸ That same month, in Camden, New Jersey, a gym owner was arrested following a series of citations for refusing to comply with the state's closure.¹²⁹ Even Elon Musk reopened his Tesla factory

123. Rosie Perper et al., *More than half of the US population is now under orders to stay at home – here's a list of coronavirus lockdowns in US states and cities*, BUS. INSIDER (Apr. 1, 2020), <https://www.businessinsider.com/states-cities-shutting-down-bars-restaurants-concerts-curfew-2020-3>.

124. *States that did not issue stay-at-home orders*, supra note 20.

125. *Id.*

126. *Defining critical industries, essential, and nonessential businesses*, BALLOTPEDIA, [https://ballotpedia.org/Status_of_lockdown_and_stay-at-home_orders_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020#Defining_critical_industries.2C_essential.2C_and_nonessential_businesses](https://ballotpedia.org/Status_of_lockdown_and_stay-at-home_orders_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020#Defining_critical_industries.2C_essential.2C_and_nonessential_businesses) (last visited Feb. 17, 2021). *See also, e.g.*, Exec. Order No. 2020-21, STATE OF MICH. OFF. OF THE GOV. (Mar. 23, 2020), https://content.govdelivery.com/attachments/MIEOG/2020/03/23/file_attachments/1408152/EO%202020-21%20Stay%20Home,%20Stay%20Safe.pdf; Exec. Order No. 7H, STATE OF CONN. BY HIS EXCELLENCY NED LAMONT (Mar. 20, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7H.pdf?la=en>; *Executive Order 20-08*; STATE OF IND. EXEC. DEP'T INDIANAPOLIS (Mar. 23, 2020), https://www.in.gov/gov/files/Executive_Order_20-08_Stay_at_Home.pdf; Exec. Order No. 20-03-30-01, ORDER OF THE GOV. OF THE STATE OF MD. (Mar. 30, 2020), <https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-FOURTH-AMENDED-3.30.20.pdf>; and Exec. Order No. 2020-21, STATE OF S. C. EXEC. DEP'T (Apr. 6, 2020), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-04-06%20eFILED%20Executive%20Order%20No.%202020-21%20-%20Stay%20at%20Home%20or%20Work%20Order.pdf>.

127. *See, e.g.*, Exec. Order No. 121, STATE OF N.C. (Mar. 27, 2020), <https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf> (violations may be subject to prosecution under N.C. Gen. Stat. § 166A-19.30(d), and punishable as a misdemeanor under N.C. Gen. Stat. § 14-288.20A); Emergency Order #12, STATE OF WIS. DEP'T. OF HEALTH SERV. (Mar. 24, 2020), <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf> (violations punishable by imprisonment, fine, or both per Wis. Stat. § 252.25); and Exec. Order No. 20-12, OFF. OF THE GOV. STATE OF OR. (Mar. 23, 2020), https://govsite-assets.s3.amazonaws.com/jkAULYKcSh6DoDF8wBM0_EO%2020-12.pdf (violations are subject to penalties described in ORS 401.990).

128. Emma Platoff, *How a Dallas salon owner changed Texas' reopening debate*, TEX. TRIBUNE (May 15, 2020), <https://www.texastribune.org/2020/05/15/texas-reopening-shelley-luther-dallas-salon-owner/>.

129. Christine Holbert, *N.J. coronavirus recovery: Atilis Gym owners arrested for defying judge's order*, WHYY (July 27, 2020), <https://whyy.org/articles/n-j-coronavirus-recovery-atilis-gym-owners-arrested-for-disregarding-judges-order/>.

production line in defiance of Alameda County's shelter-in-place order, later prompting the billionaire's decision to relocate Tesla's headquarters to Texas.¹³⁰

Amidst the increasing phenomenon surrounding state-mandated closures, there appeared at the outset to be minimal federal encouragement to issue such orders. In fact, most news reports from March and April 2020 indicate that Mr. Trump encouraged "shuttered businesses to reopen."¹³¹ Meanwhile, the Executive Office designated the Department of Homeland Security to identify critical businesses that should remain open during the pandemic and encouraged people to work from home when possible.¹³²

While characterizing essential versus nonessential businesses was left to the states,¹³³ on May 19, 2020, the CISA published an updated advisory memorandum, listing specific businesses that might fall within the critical infrastructure workforce of the United States. However, the memo noted that the list was not "a federal directive or standard" and "individual jurisdictions should add or subtract essential workforce categories based on their own requirements and discretion."¹³⁴ States thus made independent determinations, resulting in a clash of business categorizations across the nation. Almost immediately, scholars began opining on remedies to save the nonessentials, while Congress passed the CARES Act in an attempt to "fix" the United States economy.

130. Sean O'Kane, *Elon Must defy coronavirus order and asks to be arrested*, THE VERGE (May 11, 2020), <https://www.theverge.com/2020/5/11/21255149/elon-musk-tesla-fremont-factory-reopen-order-arrest-alameda>. See also Sissi Cao, *Why Elon Musk And Other Tach Billionaires Are Leaving Silicon Valley For Texas*, OBSERVER (Dec. 15, 2020), <https://observer.com/2020/12/elon-musk-tech-leaving-silicon-valley-for-texas-billionaires/>.

131. See Philip Rucker et al., *Trump says he may soon push businesses to reopen, defying the advice of coronavirus experts*, THE WASH. POST (Mar. 23, 2020), https://www.washingtonpost.com/politics/trump-says-he-may-soon-lift-restrictions-to-reopen-businesses-defying-the-advice-of-coronavirus-experts/2020/03/23/f2c7f424-6d14-11ea-a3ec-70d7479d83f0_story.html. See also Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html>; Christopher Rugaber & Lori Hinnant, *US job losses mount as Trump presses plan to reopen business*, AP NEWS (Apr. 16, 2020), <https://apnews.com/article/donald-trump-us-news-ap-top-news-international-news-virus-outbreak-1c0c92ce66dda8dd88a4c66d83506be>; and Addy Baird, *Trump Suggested Businesses Might Open Again Soon, Defying Public Health Experts*, BUZZFEED NEWS (Mar. 23, 2020), <https://www.buzzfeednews.com/article/addybaird/trump-open-business-soon-coronavirus-weeks>.

132. See *Coronavirus Guidance for America*, *supra* note 121.

133. See Ari Natter, *Businesses Lobby to Make Trump's List of 'Essential' Industries*, BLOOMBERG (Apr. 14, 2020), <https://www.bloomberg.com/news/articles/2020-04-14/-essential-label-stirs-business-frenzy-to-make-trump-s-list> (noting the differences across state lines of what is deemed "essential").

134. *Supra* note 119.

II. PROPOSED LOCKDOWN REMEDIES AND OTHER "FIXES"

In the Spring of 2020 when state-mandated closures reached their peak, approximately 140,000 businesses in the United States were shut down.¹³⁵ By August of 2020, reopenings resulted in a comparatively smaller number of closures. However, almost 98,000 businesses had already permanently shuttered.¹³⁶ These extensive closures were a result of state and local governments' exercising police powers to regulate businesses during the health emergency.¹³⁷

Various reactions to the pandemic raise important questions regarding the constitutionality of such closures,¹³⁸ particularly with respect to police powers and due process rights. While outside the scope of this Article to evaluate the constitutionality of forced closures, it is important to consider whether business owners are entitled to "just compensation" after their property was "taken" by the government, and whether such a premise is a realistic vehicle for uniform relief. In addition, Congress' enactment of the CARES Act raises important questions as to whether such rapidly produced legislation adequately targeted nonessential businesses. Finally, scholarly proposals to implement an excess profits tax on companies profiting from COVID-19 policies contradicts historical tax policy in the United States. To better appraise these issues, Section A examines the constitutional arguments in support of nonessential businesses shuttered during the lockdowns. Section B evaluates whether the CARES Act really "cared." Finally, Section C demonstrates that Mr. Trump's and others' use of the term "war" in reference to the COVID-19 pandemic is merely a metaphor to describe the challenges facing the country, rather than an actual claim that the United States is at war.¹³⁹

A. Taking From the Nonessential Without Just Compensation

The United States Supreme Court has supported the use of state police powers as far back as 1824, when Chief Justice John Marshall in *Gibbons v. Ogden* identified police powers as "that immense mass of legislation, which embraces everything within the territory of a state, not surrendered

135. Sraders & Lambert, *supra* note 25.

136. *Id.* (By August 2020, state-mandated closures reduced business closures to 65,769).

137. See Schiffer Hicks Johnson, *Government-Mandated Closures: Who is Liable If Businesses Fail?*, JDSUPRA (July 23, 2020), https://www.jdsupra.com/legalnews/government-mandated-closures-who-is-34495/#_ftn1.

138. *Id.*

139. See Constanza Musu, *War metaphors used for COVID-19 are compelling but also dangerous*, THE CONVERSATION (Apr. 8, 2020), <https://theconversation.com/war-metaphors-used-for-covid-19-are-compelling-but-also-dangerous-135406>.

to the general government.”¹⁴⁰ Chief Justice Marshall further acknowledged “that inspection laws, quarantine laws, and health laws of every description...” fall within the purview of state powers.¹⁴¹ Valid state police powers include laws and regulations enacted with the intent to secure and improve the population’s health and safety,¹⁴² and authority to enforce such laws generally resides with the governor.¹⁴³

The Supreme Court has yet to rule on the issue of mandatory communicable disease quarantining.¹⁴⁴ Nevertheless, in the 1905 Supreme Court case, *Jacobson v. Massachusetts*, the Court ruled on the issue of mandatory vaccinations, thus providing some minimal guidance.¹⁴⁵ The defendant in that case appealed a Massachusetts Supreme Court decision holding that the state’s smallpox vaccination mandate was constitutional.¹⁴⁶ The Supreme Court affirmed the lower court’s decision, stating, in relevant part:

[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...a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.¹⁴⁷

Notably, however, the *Jacobson* Court also stressed the need for courts to intervene when state police powers are “exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what is reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.”¹⁴⁸ Notwithstanding such, the courts have generally conceded to public health authorities or legislatures in enforcing public health decisions with minimal exceptions.¹⁴⁹ It is, however, feasible that select state governors exceeded

140. 22 U.S. 1, 203 (1824).

141. *Id.*

142. Lawrence O. Gostin, *Public Health Theory And Practice In the Constitutional Design*, 11 HEALTH MATRIX 265, 285 (2001).

143. Maggie Davis et al., *Calling Their Own Shots: Governors’ Emergency Declarations During The COVID-19 Pandemic*, 12 CONLAWNOW 95, 97 (2020).

144. Edward P. Richards, *A Historical Review of the State Police Powers and Their Relevance to the COVID-19 Pandemic of 2020*, 11 J. NAT’L SECURITY L. & POL’Y 83, 101 (2020).

145. 197 U.S. 11 (1905).

146. *Id.* at 23.

147. *Id.* at 26-28.

148. *Id.* at 28.

149. Richards, *supra* note 145, at 83-4. *See also, e.g.,* Hartman v. May, 151 So. 737, 739 (Miss. 1934) (granting discretion to public health authorities in mandating smallpox vaccinations for those attending public schools); Booth v. Bd. of Educ., 70 S.W. 2d 350, 353 (Tex. App. 1934) (In affirming a lower court’s decision supporting a Texas Board of Education’s decision requiring that public school students be vaccinated, the Court stated, “we [the Court] cannot attempt to measure how pressing a

their police power discretion when imposing lockdowns. Only history will tell whether such actions were reasonable, and not arbitrary, in light of the public health threat.¹⁵⁰

When evaluating the legitimacy of state police powers within the context of COVID-19, scholar Edward Richards notes, “when fear is great, the public supports intrusive public health actions. When fear wanes... support wanes and officials hesitate to employ the police powers.”¹⁵¹ Richards does, however, acknowledge a peculiar phenomenon with regard to the recent coronavirus pandemic, observing that some courts chose to circumvent *Jacobson*, substituting their own judgment over that of public officials.¹⁵² Still, for more than 200 years a state's authority to regulate and protect public health has been legally sustained,¹⁵³ and thus far *Jacobson* remains the leading decision on the appropriate legal standard when assessing the exercise of state police powers.¹⁵⁴

Within the milieu of COVID-19, it may prove challenging to question the validity of states' actions to close nonessential businesses under the color of their protected police powers, absent evidence of arbitrary and unreasonable orders, or a Supreme Court overhaul of *Jacobson*.¹⁵⁵ The courts have historically hesitated to apply the Due Process and Takings Clauses of the United States Constitution when governmental action takes

necessity must be in order to allow the board's discretion to be exercised.”); and *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 149 (1992) (noting that “the subject matter and expediency of public health disease prevention measures are ‘beyond judicial control, except as they may violate some constitutional right guaranteed to [defendants].”

150. See *James Gallagher & Kevin Kiley v. Galvin Newsom*, No. CVCS20-0912 (Cal. App. Dep't Super. Ct. Nov. 2, 2020) (holding that Newsom's Executive Order regarding elections was unconstitutional as he exercised legislative power in violation of the separation of powers. The governor was further enjoined and prohibited from exercising any power under the California Emergency Services Act which amends, alters or changes existing statutory law or makes new statutory law or legislative policy).

151. *Id.* at 104-05 (citing to Milton J. Rosenau, *The Uses of Fear in Preventive Medicine*, 162 BOS. MED. & SUR. J. 305 (1910)).

152. *Id.* at 105. See also, e.g., *Robinson v. Attorney General*, 957 F.3d 1171 (11th Cir. 2020) (in finding that the state of Alabama had not made a “strong showing that is likely to succeed on its merits” with regard to its suspension of medical procedures, including abortions, during the COVID-19 pandemic, the Court found that *Jacobson* “was not an absolute blank check for the exercise of governmental power”). *Id.* at 1179. See also *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (“*Jacobson* hardly supports cutting the Constitution loose during a pandemic”). *Id.* at 212. But see *Roman Catholic*, 141 S. Ct. at 79 (Sotomayor, J., dissenting) (“Justices of this Court play a deadly game in second guessing the expert judgment of health officials.”).

153. See Michele Goodwin, *Pandemic Constitutional Rights: Not An All-Or-Nothing Proposition*, 46 S.F. ATT'Y 28, 30 (2020).

154. Stephanie Wylie, *The Supreme Court Should Not Politicize Valid Public Health Orders*, CTR. FOR AM. PROGRESS (Sept. 2, 2020), <https://www.americanprogress.org/issues/courts/reports/2020/09/02/489964/supreme-court-not-politicize-valid-public-health-orders/>.

155. See Jeffrey D. Jackson, *Tiered Scrutiny In A Pandemic*, 12 CONLAWNOW 39, 44 (2020).

the form of property regulation pursuant to state police powers.¹⁵⁶ However, if state police powers are called into question, as observed recently in *Robinson v. Attorney General* and *Roman Catholic Diocese v. Cuomo*,¹⁵⁷ the next examination is whether states' orders to shutter businesses categorized as nonessential, while allowing essential businesses to thrive, pass constitutional scrutiny.¹⁵⁸

One of the principal civil rights guaranteed to persons in the United States is their right to due process under the Fifth and Fourteenth Amendments of the Constitution. The Fifth Amendment, which applies to federal action, specifically states, in relevant part, "no person shall...be deprived of life, liberty, or property, *without due process of law*..."¹⁵⁹ The Fourteenth Amendment, applicable to individual state actions, similarly denotes, "nor shall any State deprive any person of life, liberty, or property, *without due process of law*..."¹⁶⁰ In coalition with these due process protections, the Takings Clause indicates that property cannot be taken for public use "without just compensation."¹⁶¹ Thus, when persons are forcibly deprived of their own private property for public use, they are entitled to fair compensation.¹⁶²

In the 1960 Supreme Court case, *Armstrong v. United States*, Justice Hugo Black wrote that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁶³ More than sixty years later, Justice Black's sentiment has been extensively supported by scholars and courts as the decisive construal of Takings Clause policy.¹⁶⁴ It is here, within the sphere of *Armstrong*

156. *National Western Life Ins. Co. v. Commodore Cove Imp. Dist.*, 678 F.2d 24 (1982).

157. See *Robinson v. Attorney General*, 957 F.3d 1171 (11th Cir. 2020); *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020). It is important to note that neither of these cases dealt with nonessential businesses being closed. In *Robinson*, the Court examined the legitimacy of abortion procedure suspensions in Alabama during the pandemic, while in *Roman Catholic* the Court reviewed whether in-person capacity restrictions on religious houses of worship were violative of plaintiffs' right to free action during the pandemic when such capacity impositions were not put on stores, factories, and schools.

158. *Johnson*, *supra* note 138.

159. U.S. Const. amend. V (emphasis added). See also Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 9, 9 (1993) (noting that the 5th Amendment applies to federal actions).

160. U.S. Const. amend. XIV § 1 (emphasis added). See also Laitos, *supra* note 160 (documenting that the 14th Amendment applies to state-level actions).

161. U.S. Const. amend. V.

162. See Laitos, *supra* note 160, at 9.

163. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See also Jeffrey M. Gaba, *Taking "Justice And Fairness" Seriously: Distributive Justice And The Takings Clause*, 40 CREIGHTON L. REV. 569, 574 (2007).

164. Kenneth J. Sanney, *Balancing The Friction: How A Constitutional Challenge To Copyright Law Could Realign The Takings Clause Of the Fifth Amendment*, 15 COLUM. SCI. & TECH. L. REV. 323, 342 (2014). See also, e.g., *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302

dogma, that aptly lays the starting point for analyzing whether states' categorical decisions to forcibly close nonessential businesses were constitutional. It is also here where the authors suggest, from a tax policy standpoint, that fairness and justice warrant the protection of COVID-Companies, as the public as a whole should bear the economic burden of the lockdowns and not specific businesses.¹⁶⁵

Amidst the various Spring 2020 lockdowns enacted by governors, nonessential businesses alone, in most states, bore the public burden of succumbing to forced closures.¹⁶⁶ Property held by these businesses was, in essence, seized by the states after mandated closures went into effect, as business assets could no longer be commercially utilized, and the sale or lease of any such assets was impractical.¹⁶⁷ While Justice Black made clear that not "every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense,"¹⁶⁸ similarities can certainly be drawn between the petitioner lien holders in *Armstrong* and nonessential business owners harmed by state lockdowns.

In *Armstrong*, the lien holders were entitled to recover the value of their liens after the United States government took title to a shipbuilder's boats and materials following a contract default.¹⁶⁹ Prior to the default, the petitioner-lien holders maintained regular, viable commercial enterprises whereby they furnished materials to the shipbuilder, which the shipbuilder then used to construct boats.¹⁷⁰ When the government

(2002) (finding no justification to create a new per se takings rule); Nat'l Board of YMCA v. United States, 395 U.S. 85, 89, 92 (1969) (finding that when a private party is a particular beneficiary of governmental activity, "fairness and justice" do not require that losses attributable to that activity "be borne by the public as a whole"); and Dames & Moore v. Regan, 453 U.S. 654, 691 (1981) (upholding the Takings Clause as dogma in stating that the government must pay just compensation when "it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons..."). See also, James E. Holloway & Donald C. Guy, *Weighing the Need to Establish Regulatory Takings Doctrine to Justify Takings Standards of Review and Principles*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 315, 332 (2010) (noting, "It is well settled that the Armstrong doctrinal statement ["The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."] is a firm, resilient measure of Armstrong's ability to contribute a substantive purpose and intent to takings disputes."). *Id.* (citing to *Armstrong*, 364 U.S. 40, 49).

165. See *infra* Part III.

166. See Erin Schumaker, *Here are the states that have shut down nonessential businesses*, ABC NEWS (Apr. 3, 2020), <https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806>.

167. See, e.g., Mike Rogoway, *Les Schwab Tire suspends plans to sell company, citing coronavirus*, OREGONLIVE (updated June 30, 2020), <https://www.oregonlive.com/business/2020/06/les-schwab-tire-suspends-plans-to-sell-company-citing-coronavirus.html> (documenting the suspension of a company sale due to potential buyers being unable to value the company's assets during the pandemic).

168. *Armstrong*, 364 U.S. at 49.

169. *Id.*

170. *Id.* at 41.

ultimately took title to the boats and materials, the petitioners had yet to be paid, thus resulting in their successful argument that the government's actions were a taking of their property without fair compensation.¹⁷¹ In a similar manner, the state lockdowns impacted thousands of nonessential business owners who were previously running active commercial business operations.¹⁷² Like the *Armstrong* lien-holders, the owners of these companies ran normal, day-to-day commercial ventures until their state governor instituted a mandatory lock-down, thus diminishing, or in some cases wholly abolishing, the value of their enterprises.

The Supreme Court recognizes two types of takings under the Fifth Amendment: (1) actual, physical takings of property by the government, and (2) regulatory takings.¹⁷³ Throughout most of the COVID-19 closures, states did not levy direct, physical seizures of property from residents as a result of the lockdowns.¹⁷⁴ Instead, nonessential business lockdowns were perhaps more representative of regulatory takings, whereby state governments limited the use of private property to such a degree that it deprived property owners of any economically reasonable use or value of their property.¹⁷⁵ With regard to regulatory takings, the Supreme court splices them into two categories: (1) categorical or *per se* takings¹⁷⁶ and (2) partial takings.¹⁷⁷

A *per se* taking occurs when a governmental regulation “denies all economically beneficial or productive use of land.”¹⁷⁸ It serves as the functional equivalent of “physical appropriation” of one’s private property.¹⁷⁹ Applying this standard to the various state level lockdowns

171. *Id.*

172. See *How Many Small Businesses Are There In The US In 2020*, OBERLO, <https://www.oberlo.com/statistics/number-of-small-business-in-the-us> (last visited Jan. 12, 2021) (documenting that in 2020, there existed more than 31 million small businesses).

173. See *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003 (1992).

174. *But see, e.g.*, N.J. Exec. Order No. 103 (Mar. 9, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-103.pdf> (“... I reserve the right to utilize and employ all available resources of the State government of each and every political subdivision of the State, whether or persons, properties, or instrumentalities, and to commandeer and utilize any personal services and any privately-owned property necessary to protect against this emergency.”). See also Noam N. Levey, *Hospitals say feds are seizing masks and other coronavirus supplies without a word*, L.A. TIMES (Apr. 7, 2020), <https://www.latimes.com/politics/story/2020-04-07/hospitals-washington-seize-coronavirus-supplies>.

175. See Gideon Kanner, *Making Laws And Sausages: A Quarter-Century Retrospective On Penn Central Transportation Co. V. City of New York*, 13 WM. & MARY BILL OF RTS J. 679, 682 (2005) (citing to *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414-16 (1922) when referencing that a regulatory taking occurs when a property regulation goes “too far” in impacting property owners’ rights).

176. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 442 (1982) (Blackmun, J., dissenting) (referencing to the majority’s *per se* takings rule as “a permanent physical occupation authorized by government... without regard to the public interests that it may serve).

177. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

178. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

179. *Id.* at 1017.

depends on the particular facts and circumstances of each case. Certainly, in *Lucas v. South Carolina Coastal Commission*, the Supreme Court's pronouncement that property "cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted," creates an extraordinary legal hurdle for nonessential businesses pursuing a *per se* taking if the state ultimately reopened for business.¹⁸⁰ On the other hand, businesses that never recovered from these closures, and were unable to remain commercially viable due to bankruptcy, loss of key employees, financial deprivation, event scheduling, or any other economic annihilation, would theoretically have *per se* takings.

Constitutional arguments for nonessential businesses that reopened after state closures lifted would likely fall within the parameter of a partial regulatory takings claim. In these situations, businesses' values did not deplete to zero. However, because of state-mandated lockdowns, businesses' commercial values diminished and, in many cases, substantially depleted. Analyzing the efficacy of partial takings claims is more stringent than that of *per se* takings, requiring satisfaction of a three-part test pursuant to *Penn Central v. New York City*.¹⁸¹ Here, the Supreme Court articulated specific factors as relevant to the inquiry: (1) the economic impact of the regulation, (2) the extent to which the regulation interfered with the distinct and reasonable investment backed expectations, and (3) the character of the state's action.¹⁸² As noted above, applying these standards would result in a case-by-case evaluation of each business. The Takings Clause has historically been applied to unreasonable price controls that deprive businesses of a reasonable profit.¹⁸³ It is thus not entirely out of the realm of imagination that regulations, or in this case, governors' orders, mandating that nonessential businesses close during the pandemic are perchance challengeable under *Penn Central*.¹⁸⁴

The challenges with nonessential businesses seeking just compensation via the Takings Clause are, however, multipronged. First, lawsuits would have to be filed by nonessential businesses already financially harmed by lockdowns. Not all of these ventures will have the financial wherewithal or desire to file costly lawsuits after suffering such devastation. Moreover, thousands of businesses in every state have been impacted by the

180. *See id.* at 1016.

181. 438 U.S. 104, 123 (1978).

182. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

183. *See Tenoco Oil Co. v. Dep't of Consumer Affairs*, 876 F. 2d 1013, 1021-21 (1st Cir. 1989). *See also* Matthew Baughman et. al, *Lessons For the COVID-19 Pandemic Landscape*, JDSUPRA (Apr. 29, 2020), https://www.jdsupra.com/legalnews/constitutional-limitations-on-emergency-43173/#_edn20.

184. *Baughman et al.*, *supra* note 184.

lockdowns. These lawsuits would clog the state and federal court dockets unless they were either consolidated or brought forth in some form of class action suit.

Second, nonessential businesses would have to prove injurious economic impact due to state-mandated closures. In some cases, this could prove exceedingly difficult given that some states have instituted second and third "rolling" lockdowns after previously lifting restrictions. Third, businesses would have to show the extent to which the closure interfered with their distinct and reasonable investment-backed expectations. This, again, may be exceptionally challenging depending on the extent of closures and restrictions involved. Certain businesses may also not have been locked down *per se*, but the operational restrictions were so draconian that such was the functional equivalent of being locked down.¹⁸⁵

In addition, injured businesses would have to successfully contend that the character of the government action of temporarily closing businesses amidst a global pandemic in an effort to protect the public health was not of greater interest than individual businesses' interests in remaining operational.¹⁸⁶ Perhaps the more reasonable approach with regard to this prong would be questioning governors' justifications as to why some businesses were categorized as nonessential, while others were deemed essential.¹⁸⁷ Finally, there is a reasonable probability that not every state will have sufficient resources to provide just compensation to harmed businesses in light of increasing budgetary shortfalls.¹⁸⁸ A more appropriate response would require deployment of compensatory damages at the national level, and for purposes of this Article, in the form of radical tax reform.¹⁸⁹

In instances where states *could* possibly afford paying recompense to injured businesses that succeed in overcoming the constitutional hurdles of the Takings Clause, providing a case-by-case legal analysis for every

185. Draconian restrictions might include, but are not limited to, extensive limits on numbers of customers, and/ or forcing indoor operations to move outdoors.

186. See *Leon County v. Gluesenkamp*, 873 So. 2d 460, 468 (Fla. Dist. Ct. App. 2004) ("In determining the character of the government action, courts must... balance appellees' interests against the County's needs to protect the public.").

187. See Stephen L. Carter, *Businesses Suing Over COVID-19 Shutdowns May Have a Case*, BLOOMBERG (Apr. 26, 2020), <https://www.bloomberg.com/opinion/articles/2020-04-26/business-owners-suing-over-covid-19-shutdowns-may-have-a-case> (raising important questions as to why some states allowed golf courses to remain open, while others did not; why Walmart in Pennsylvania was allowed to remain operational, but liquor stores in the state were not; and why in Michigan liquor stores could remain open, but clothing stores were forced closed).

188. See Nicolas Rapp & Brian O'Keefe, *State budgets on the brink; 2 maps of America's looming deficits*, FORTUNE (Dec. 3, 2020), <https://fortune.com/longform/state-budget-deficits-covid-economy-predictions-outlook/>.

189. See *infra* Part III.C.

suit filed would be inefficient, expensive, and cumbersome. Perhaps such concerns played a role in Congress' decision to pass the CARES Act, a rushed piece of tax legislation touted as critical economic relief for businesses and individuals.¹⁹⁰ Scholars have since opined, however, that the CARES Act cannot be the only Congressional response available to alleviate the financial burdens of the pandemic.¹⁹¹ As discussed below, Congress' failure to provide substantial reprieve to nonessential businesses by way of the CARES Act warrants further, more tailored relief.

B. The CARES Act That Never Cared

In response to the nascent COVID-19 recession, on March 27, 2020, Mr. Trump signed into law the CARES Act to provide emergency supplemental appropriations to individuals, families, businesses, health services, educational programs, and state and local governments.¹⁹² Public media referred to the \$2.2 trillion dollar emergency aid legislation as *unprecedented*¹⁹³ and *remarkable*.¹⁹⁴ The CARES Act was third in a line of federal coronavirus relief bills signed that month.¹⁹⁵ The CARES Act was intended to provide economic support across numerous fronts, including recovery rebate payments,¹⁹⁶ payroll tax relief,¹⁹⁷ unemployment insurance,¹⁹⁸ 401(k) loan limit increases,¹⁹⁹ charitable

190. See Pamela Foohey et al., *CARES Act Gimmicks: How Not To Give People Money During a Pandemic and What To Do Instead*, U. ILL. L. REV. ONLINE 81 (2020), at 81-2 [hereinafter Foohey et al., *CARES Act Gimmicks*]; Pamela Foohey et al., *The Folly of Credit as Pandemic Relief*, 68 UCLA L. REV. DISC. 126 (2020) (proposing the need for additional economic relief to Americans over and above the CARES Act);

191. See, e.g., Foohey et al., *CARES Act Gimmicks*, *supra* note 191, at 82 (promoting that the CARES Act financial support is not enough to prove helpful economic assistance to individuals harmed by the pandemic); Wallace, *supra* note 41 (proposing that the CARES Act unlimited pass-through deduction is not a "targeted response" to the COVID-19 circumstances).

192. See CARES Act, *supra* note 31. See also United States: President Signs CARES Act in Response to Coronavirus Pandemic, Library of Congress (Mar. 27, 2020), <https://www.loc.gov/item/global-legal-monitor/2020-03-27/united-states-president-signs-cares-act-in-response-to-coronavirus-pandemic/>.

193. Melinda Taschetta-Millane, *Unprecedented CARES Act Signed into Law*, IMAGING TECH. NEWS (Mar. 28, 2020), <https://www.itnonline.com/article/unprecedented-cares-act-signed-law>.

194. *Will the \$2.2 Trillion Coronavirus Aid Package Be Enough?*, KNOWLEDGE@WHARTON (Mar. 31, 2020), <https://knowledge.wharton.upenn.edu/article/will-the-2-trillion-coronavirus-relief-package-be-enough/>.

195. See Pub. L. 116-123, H.R. 6074 (2020), and Pub. L. 116-127, H.R. 6201 (2020).

196. CARES Act, *supra* note 31, at § 6428.

197. *Id.* at § 2302.

198. *Id.* at § 3603.

199. *Id.* at § 2202(b).

deduction reprieve,²⁰⁰ small business relief,²⁰¹ corporate loan assistance,²⁰² net operating loss (“NOL”) modifications,²⁰³ mortgage assistance,²⁰⁴ and temporary student-loan repayment suspensions.²⁰⁵

Markedly broader than the 2018 Tax Cuts and Jobs Act (“TCJA”), which dealt with Code reform, the CARES Act was both interwoven, and yet distinct, from its predecessor. Although similar to the TCJA in terms of the speed in which it was endorsed,²⁰⁶ the CARES Act retroactively corrected various drafting errors made by Congress in its 2018 legislation²⁰⁷ and relaxed several restrictions imposed by the TCJA on businesses.²⁰⁸ The CARES Act also provided numerous nontax aid to businesses, including expanding funding opportunities for entrepreneurial businesses,²⁰⁹ amending the Bankruptcy Code provisions on small business debtor reorganization,²¹⁰ and offering credit protection to entities during the pandemic.²¹¹

What the CARES Act failed to do was address the state level governmental actions and Justice Black-like inequities that followed.²¹² It also failed to provide any distinction between essential versus nonessential businesses. In fact, these terms are markedly absent from the four corners of the CARES Act. This is especially interesting given that such distinction was critical when it involved taking profits from businesses,²¹³ but when the legislation allowed for money to be given back, the distinction was non-existent.

The only exception to this is buried in the CARES Act’s definition of “eligible employer,” which Congress defined as one carrying on a trade or business that was fully or partially suspended because of COVID-19 governmental orders.²¹⁴ This term, however, is applied solely for

200. *Id.* at § 2204.

201. *Id.* at § 1102.

202. *Id.* at § 4003.

203. *Id.* at § 2303.

204. *Id.* at §§ 4022 and 4023.

205. *Id.* at § 3508.

206. *See* Wallace, *supra* note 41, at 2 (noting that the hastily enacted CARES Act exemplifies “a regular mode of tax legislating”).

207. *See* Vincent, *supra* note 43, at 127 (noting that the CARES Act corrected a drafting error included in the TCJA that impacted qualified improvement property bonus depreciation).

208. *See, e.g.*, CARES Act, *supra* note 31, at § 2303 (enacting modifications for net operating losses), and § 2306 (increasing allowable limitations on business interest expense deductions).

209. *See id.* at § 1103.

210. *See id.* at § 1113.

211. *See id.* at § 4021.

212. *See supra* notes 165-65, 169 and accompanying text.

213. *See supra* Part I.C.

214. CARES Act, *supra* note 31, at § 2301(c)(2)(A). *See also* TCDTRA, *supra* note 31, at § 303(b) (defining the term as, “any employer (A) which conducted an active trade or business in a qualified disaster zone at any time during the incident period of the qualified disaster with respect to such qualified

purposes of employee retention credit.²¹⁵ At best, these credits provided \$5,000 of relief per employee, which was minimally increased by the Tax Certainty and Disaster Tax Relief Act of 2020 (“TCDTRA”).²¹⁶ Such was not nearly enough to cover the monumental losses suffered under the lockdowns. Other than the aforementioned, every other relief provision included in the CARES Act applies to *all* ventures,²¹⁷ regardless of characterized distinction.

The CARES Act is comprised of several business tax assistance provisions intended to relieve the financial burdens on companies impaired by COVID-19. Embedded within Subtitle C of the CARES Act, these business provisions provide tax flexibility, and extend temporary relief for certain facets of the TCJA. The following chart identifies the pertinent sections of the CARES Act that provide some form of tax reprieve for all business operations in the United States.

Applicable CARES Act Provisions	Brief Description
Employee Retention Credit For Employers Subject to Closure Due to COVID-19 CARES Act § 2301 Updated per the TCDTRA of 2020 § 303	Provides eligible employers with a refundable payroll tax credit of up to \$5,000 for qualified wages paid to employees from March 13, 2020, to December 31, 2020.
Delay of Payment of Employer Payroll Taxes CARES Act § 2302	Allows an employer to defer its deposit and payment of the employer’s share of Social Security and select railroad retirement taxes.
Modifications for net operating losses CARES Act § 2303	Allows a 5 year carryback for NOLs arising in 2018, 2019, and 2020; temporarily repeals the 80% of taxable income limitation carryback rule; and corrects TCJA § 13302(e) by changing the original limitation on

disaster zone, and (B) with respect to whom the trade or business described in subparagraph (A) is inoperable at any time during the period beginning on the first day of the incident period of such qualified disaster and ending on the date of the enactment of this Act, as a result of damage sustained by reason of such qualified disaster”).

215. CARES Act, *supra* note 31, at § 2301(c)(2) (allowing a credit to be taken by eligible employers against applicable employment taxes in an amount equal to 50% of qualified wages for each employee). *Id.* at § 2301(a).

216. *Id.* at § 2301. *See also* TCDTRA, *supra* note 31 (increasing the amount of qualified wages).

217. The authors acknowledge that some provisions included in the CARES Act, such as the § 2304, specifically apply to taxpayers other than corporations (i.e., individuals and pass-through entities); however, there still exists no distinction in this section as to whether the benefit extended is available to nonessential businesses, as compared to essential businesses.

	carrybacks to NOLs arising in tax years beginning after December 31, 2017.
Modification of limitation on losses for taxpayers other than corporations CARES Act § 2304	Temporarily suspends IRC § 461(i), thus allowing for unlimited pass-through deductions of certain business tax losses.
Modification of credit for prior year minimum tax liability of corporations CARES Act § 2305	Allows corporations to accelerate the use of any of their remaining minimum tax credits (MTCs) for their 2019 tax years from their 2021 tax year, and further allows corporations to instead elect to recover 100% of any remaining MTCs in their 2018 tax year.
Modifications of limitation on business interest CARES Act § 2306	Increases the 30% limitation established in the TCJA on the deduction for business interest expense to 50% of adjusted taxable income for tax years beginning 2019 and 2020; and beginning in 2020 taxpayers can also elect to use their 2019 adjusted taxable income in determining the 50% limitation.
Technical amendments regarding qualified improvement property CARES Act § 2307	Fixes the “retail glitch” created by the TCJA by assigning a 15 year recovery period, and permitting 100% bonus depreciation, for qualified income property (QIP).

As the above chart depicts, seven of the CARES Act provisions were specifically designed to assist businesses during the pandemic. As previously mentioned, just one provision limits relief specifically to those businesses required to suspend operations because of state-mandated lockdowns.²¹⁸ The following subparts analyze these provisions more directly.

1. Section 2301 – Employee Retention Credit

Section 2301 of the CARES Act, later amended by the TCDTRA, provides eligible employers with a refundable tax credit against their share of the employment (payroll) tax, equal to a maximum of 50 percent

218. See CARES Act, *supra* note 31, at § 2301.

of qualified wages paid to employees,²¹⁹ with a maximum credit available for each employee of \$5,000.²²⁰ To be credit-eligible, employers must run a business operation that was either fully or partially suspended due to governmental orders limiting commerce, travel, or group meetings during 2020.²²¹ For employers with 100 or less full-time employees, the credit is available on wages up to \$10,000 per employee;²²² for those with more than 100 employees, qualified wages are limited to salaries paid to employees who were unable to provide services due to the pandemic.²²³ This credit is offered in addition to the Families First Coronavirus Response Act (FFCRA) payroll tax credits related to paid employee leave.²²⁴ While the credit provides some relief to nonessential businesses, it is not enough to offset the totality of economic damages suffered by these entities. In addition, the credit is entirely based on employees and their wages and thus wholly inadequate for the over 34 million non-employer sole proprietors running business operations in the United States.²²⁵

The six remaining CARES Act business tax provisions grant relief to business ventures, regardless of whether they were shut down. One could argue, however, that the entire CARES Act, or a substantial portion of the relief provided under it, should have applied only to businesses forcibly locked down or which suffered a significant decline in gross receipts due to COVID-19 closures. Instead, CARES Act relief was not effectively targeted—granting general tax relief to numerous businesses not in need of financial assistance.²²⁶

219. This percentage has since been increased to “70 percent of the average quarterly wages paid by the employer in calendar year 2019” per the TCDTRA. *See* TCDTRA, *supra* note 31, at § 207(b).

220. CARES Act, *supra* note 31, at § 2301 (this provision applies to wages paid after March 12, 2020 through December 31, 2020). The total wages that are attributed to an employee are capped at \$10,000, thus resulting in a maximum available credit per employee of \$5,000). *Id.* at (a), (b). Note that this amount has since been increased per the TCDTRA.

221. *Id.* at § 2301(c)(2)(A). This provision also applies to businesses that did not shut down, but which suffered significant declines in gross receipts during this period, and tax-exempt organizations. *Id.* at § (c)(2)(B), (C). *See also* TCDTRA, *supra* note 31, at § 207(c) (amending the CARES Act § 2301(b)(1) by striking “for all calendar quarters shall not exceed \$10,000”, and inserting, “for any calendar quarter shall not exceed \$10,000”).

222. CARES Act, *supra* note 31, at § 2301(c)(3)(A)(ii).

223. *Id.* at (c)(3)(A)(i).

224. *See* Pub. L. No. 116-127, 134 Stat. 178, §§ 7001-7004 (2020).

225. Self-employment income included in Schedule C of Form 1040, *U.S. Individual Income Tax Return*, does not qualify for this credit, nor do wages paid to direct family members. For the credit to apply, a sole proprietor must have employees. Per 2018 United States Census data, there are more than 34 million non-employer businesses in the United States. Because many small businesses are sole proprietorships with no employees or non-family member employees, the credit provides no relief to them. For additional data regarding the latest non-employer statistics, *see 2018 CBP and NES Combined Report*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2018/econ/nonemployer-statistics/2018-combined-report.html> (last visited Feb. 15, 2021).

226. *See* Terry Gross, *How The CARES Act Became A Tax-Break Bonanza For The Rich, Explained*,

2. Sections 2302 & 2305 – Employer Payroll Tax Payment Delays and the AMT

Section 2302 of the CARES Act allows all employers, including governmental entities, to defer the deposit and payment of their share of Social Security and certain railroad taxes as required by the Code.²²⁷ Section 2305 allows corporations to claim a refund of their alternative minimum tax (“AMT”) credits. In particular, this provision amends Code section 53(e), allowing corporations the opportunity to accelerate recovery of any outstanding minimum tax credits (“MTC”) in tax years beginning in 2019, even though at that time the United States pandemic was non-existent.²²⁸ This same provision allows corporations the option to recover 100 percent of their remaining MTCs beginning in tax year 2018.²²⁹ In effect, Congress remarkably chose to provide relief in tax years wholly unrelated to COVID-19.

3. Section 2307 – Technical Amendments

Section 2307 of the CARES Act implements a technical correction to a TCJA provision.²³⁰ Beginning January 1, 2018, Congress intended to include Qualified Improvement Property (“QIP”) as 15-year property, thus allowing bonus-depreciation eligibility beginning in 2018 via the TCJA.²³¹ In doing so, the TCJA eliminated three categories of assets, including Qualified Leasehold Improvement Property, Qualified Restaurant Property, and Qualified Retail Improvement Property, and instead consolidated them all into QIP.²³² However, because of a Congressional drafting error, QIP was not specifically included in the definition of 15-year property in Code section 163(e)(3)(E), nor as “qualified property” in Code section 168(k)(2)(A).²³³ Thus, QIP remained as 39-year property and was therefore ineligible for bonus depreciation.²³⁴ To amend this error, the CARES Act implemented a correction which

NPR (Apr. 30, 2020), <https://www.npr.org/2020/04/30/848321204/how-the-cares-act-became-a-tax-break-bonanza-for-the-rich-explained>.

227. See CARES Act, *supra* note 31, at § 2302(a). See also I.R.C. §§ 3111(a); 3221(a).

228. See CARES Act, *supra* note 31, at § 2305(a)(2), (d). See also I.R.C. § 53(e).

229. CARES Act, *supra* note 31, at § 2305(a)(1), (b).

230. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13204, 131 Stat. 2054 (2017) (hereafter, TCJA).

231. *Cares Act Fixes the Retail Glitch To Make Qualified Improvement Property Eligible For Bonus Depreciation*, BDO (Mar. 2020), <https://www.bdo.com/insights/tax/cost-segregation/cares-act-fixes-the-retail-glitch-to-make-qualifie>.

232. See I.R.C. § 168(e)(3)(E).

233. See *Cares Act Fixes the Retail Glitch*, *supra* note 232.

234. *Id.*

allows for 100 percent bonus depreciation for QIP.²³⁵ These technical corrections are intended to fix prior legislation, rather than provide financial stimulus.

4. Sections 2303, 2304, & 2306 – Relaxing the Rules

Sections 2303, 2304, and 2306 of the CARES Act relax the rules on tax loss and deduction claims. Section 2303 expands taxpayers' abilities to deduct NOLs arising prior to January 1, 2021 by temporarily repealing the 80% taxable income limitation imposed by the TCJA, thus allowing businesses to completely offset their taxable income using the new 5-year carryback period provided in the CARES Act.²³⁶ As a consequence, NOLs incurred during the 2018-2020 tax years can now reduce taxable income earned during the five-year period prior to the taxable year in which they were incurred, without the taxable income limitation for the 2018-2020 tax years.²³⁷

While financially valuable, the carry back benefit is moot for small businesses that had yet to turn a profit prior to 2020. The CARES Act does, however, permit businesses to elect to forego the carryback for tax years 2018-2020 to carry forward to future tax years—provided, however, any carryforwards to tax year 2021 and beyond will be subject to the 80% taxable income limitation (and of course the corporate rate is much lower than tax years 2017 and before - *i.e.*, a flat 21% rate). Carrying NOLs forward therefore can prove disadvantageous for many companies.

Considering that only 40 percent of small businesses are ever profitable,²³⁸ and start-up companies have been hit especially hard during the pandemic,²³⁹ Section 2303 is more advantageous to businesses historically in the black. Using NOLs as a form of "financial relief" is also concerning in that determining the exact amount of relief available depends on the tax attributes of each specific company.²⁴⁰ In addition,

235. See CARES Act, *supra* note 31, at § 2307.

236. See *id.* at § 2303(a), (b). See also I.R.C. § 172(a).

237. Adam Bergman, *A Pro-Business Provision In The CARES Act Every Business Owner Should Know*, FORBES (May 22, 2020), <https://www.forbes.com/sites/forbesfinancecouncil/2020/05/22/a-pro-business-provision-in-the-cares-act-every-business-owner-should-know/#55e714331b3a>.

238. *Small Business Statistics*, CHAMBER OF COM., <https://www.chamberofcommerce.org/small-business-statistics/> (last visited Aug. 28, 2020).

239. Erin Griffith, *Start-Ups Are Pummeled in the 'Great Unwinding'*, N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/2020/04/01/technology/virus-start-ups-pummeled-layoffs-unwinding.html>.

240. Martin A. Sullivan, *Economic Analysis: Monetizing NOLs During a Recession*, 98 TAX NOTES INT'L 994, 998, June 1, 2020 ("The use of NOLs during the prior two recessions holds two lessons. First, it is inherently difficult for current NOLs to provide immediate cash flow to businesses and rapid stimulus to the economy. Based on a review of procedures and the data, a lag of a year between occurrence of the loss and receipt of a refund seems common. Second, complexity and diminution of tax benefits (attributable to the interaction of carrybacks with other tax provisions) significantly reduces the use of

these rules were loosened for tax years wholly unrelated to the pandemic, which is peculiar (i.e., 2018 and 2019). The precise amount of relief available is further complicated as companies require prior year profitability before they can take advantage of NOL carrybacks, and NOLs are not dollar-for-dollar.²⁴¹ Thus, such relaxed NOL rules are of great benefit for some companies but of little to no benefit for others. Finally, as stated above, the CARES Act does not distinguish between essential and nonessential businesses, thereby prompting an important question as to why essential businesses profiting from the lockdowns are permitted to utilize relaxed NOL rules against prior profitable years that have no association to the pandemic or mandated lockdowns. Such an arbitrary provision begets a blanket tax giveaway, regardless of whether businesses were harmed by pandemic closures.

Section 2304 of the CARES Act amends Code section 461(l), which imposes limits on excess business losses of noncorporate taxpayers.²⁴² Before the TCJA's passage, individuals, estates and taxable trusts that realized business losses directly (or through pass-through entities) could generally offset those losses against non-business income, and carry any resulting NOLs back two years.²⁴³ In 2017, the TCJA restricted the ability to deduct these losses against non-business income to no more than \$250,000 (or \$500,000 for joint filers).²⁴⁴ In addition, Code section 461(l) removed the availability of NOL carrybacks.²⁴⁵ Section 2304 of the CARES Act provides some relief to these limitations.²⁴⁶ In particular, individuals, estates, and taxable trusts can now temporarily use business losses to offset non-business income above the previously established limits for tax years 2018-2020, with any remaining losses treated as NOLs.²⁴⁷ These relaxed rules are available for all individuals, estates and taxable trusts; however, they are contingent on each taxpayer's particular

NOL carrybacks below what might be expected based on the conventional wisdom that carrybacks are more valuable than carryforwards.").

241. For example, a NOL carried back to tax years 2017 (and prior) are subject to graduated corporate rates ranging from 15% to 35% with two surcharge tax brackets of 39% and 38%, respectively. Therefore, the exact amount of the "dollar-for-dollar" refund to the taxpayer depends on what the entity's "taxable income" was for that tax year involved (e.g., if it was 15%, it is 15% times the carryback). For tax years, 2018 and forward, however, the corporate rate is a flat 21%, so any carryback deduction will be exposed to a 21% rate with a resulting dollar-for-dollar refund.

242. See CARES Act, *supra* note 31, at § 2304. See also I.R.C. § 461(l) (2017).

243. Gary C. Karch & Alex Ruff, *Individual Loss Carryback Refunds Under the Cares Act*, MCDERMOTT WILL & EMERY (Apr. 15, 2020), <https://www.mwe.com/insights/individual-loss-carryback-refunds-under-the-cares-act-covid19/>.

244. See CARES Act, *supra* note 31, at § 2304. See also I.R.C. § 461(l) (2017) (preventing non-corporate taxpayers from deducting business losses in excess of \$250,000 (\$500,000 for joint returns)).

245. I.R.C. § 461(l)(2).

246. See CARES Act, *supra* note 31, at § 2304(a). See also Karch & Ruff, *supra* note 244.

247. CARES Act, *supra* note 31, at § 2304(c). See also Karch & Ruff, *supra* note 244.

tax circumstances. Section 2304 is largely impractical for many small businesses.²⁴⁸ Suspending this provision only allows those taxpayers with exorbitant incomes to deduct the full amount of their tax losses against available non-business income, thus reducing or eliminating their income tax liability currently and retroactively.²⁴⁹ In comparison, small businesses that have little-to-no ability to offset losses in this manner will continue to struggle. Funding large tax cuts for the wealthy, instead of creating pandemic relief tax policy aimed at supporting those most negatively impacted by the lockdowns, is largely inappropriate.²⁵⁰

Completing the trifecta of CARES Act provisions aimed at tax loss and deduction relief, section 2306 relaxes the limitations imposed by the TCJA on the deductibility of business interest expenses.²⁵¹ Code section 164(j) previously enforced a limitation on the deduction for business interest expenses based on the sum of the taxpayer's business interest, including 30 percent of their adjusted taxable income and floor plan financing interest for the taxable year.²⁵² These limits were imposed on businesses with average annual gross receipts of \$25,000,000 or more over the prior three year period.²⁵³ Many small businesses designated as nonessential were never limited by this provision because of the gross receipts threshold. Nevertheless, section 2306 lessened these limitations by increasing the adjusted taxable income percentage to 50 percent for tax years 2019 and 2020.²⁵⁴ In addition, beginning in 2020 taxpayers can elect to use their 2019 adjusted taxable income to determine the 50 percent limitation.²⁵⁵ This provision benefits taxpayers whose income fell in 2020, as compared to 2019.²⁵⁶ Overall, however, the usefulness of this provision to small businesses is questionable due to the gross receipts threshold.

Congress' failure to distinguish between essential and nonessential businesses in the CARES Act is a fatal flaw in addressing lockdown inequities. In many respects, the CARES Act was a knee-jerk reaction to a crisis, indiscriminately sprinkling tax benefits upon businesses with little thought given to tailoring the specific relief to those needing it

248. CARES Act, *supra* note 31. *See also* Karch & Ruff, *supra* note 244.

249. Wallace, *supra* note 41.

250. *See* Jeff Cox, *A Record 20.5 million jobs were lost in April as unemployment rate jumps to 14.7%*, CNBC (May 8, 2020), <https://www.cnbc.com/2020/05/08/jobs-report-april-2020.html>.

251. *See* CARES Act, *supra* note 31, at § 2306. *See also* I.R.C. § 163(j)(2017).

252. *See* I.R.C. § 163(j)(1).

253. *See* I.R.C. §§ 163(j)(3); 448(c)(1).

254. CARES Act, *supra* note 31, at § 2306 (a)(10)(A)(i).

255. *Id.* at (a)(10)(B).

256. Gene Schlack et al., *Summary of Certain Tax Relief Available In COVID-19 CARES Act*, DAY PITNEY (Mar. 31, 2020), <https://www.daypitney.com/insights/publications/2020/03/30-certain-tax-relief-available-covid19-cares-act>.

most—the nonessentials. The essential businesses that remained operational and profitable do not require additional tax relief. With the exception of the payroll retention credit, Congress' decision to grant tax relief to all businesses merely accelerated the unfair advantage essential companies already had over the nonessentials. It serves as the proverbial salt in the wound of governmental injustice.

Another concern is that the relief provided under the CARES Act was not substantial enough to offset the magnitude of economic devastation caused by the lockdowns.²⁵⁷ While in totality the CARES Act provided over \$2 trillion in funds, many small businesses may never recover.²⁵⁸ For those that survived, McKinsey estimates it may take decades to financially recuperate,²⁵⁹ requiring long-term, hand-holding solutions akin to the below-proposed tax-exemptions.²⁶⁰ The unique issues faced by small businesses, including slim margins, low financial resilience, heavy debt, and minimal cash liquidity to fund the additional costs required for Center for Disease Control (CDC) compliance, makes rapid recovery extremely difficult.²⁶¹

There has not been a level playing field in the marketplace since March 2020. Nonessential businesses were benched, while essential businesses hit home runs—posting record sales and profits.²⁶² The CARES Act enhanced this inequity. Cleaning services, grocers, fitness equipment companies, mask makers, and telehealth companies thrived because of increased consumer demands.²⁶³ From January to August 2020, e-commerce sales exceeded \$2 billion on 130 separate days, as compared to 2019 when only two days hit such a mark.²⁶⁴ While online sales skyrocketed, brick-and-mortar establishments crumbled.²⁶⁵ Fifty five

257. Josh Bivens & Heidi Shierholz, *Despite some good provisions, the CARES Act has glaring flaws and falls short of fully protecting workers during the coronavirus crisis*, ECON. POL'Y INST. (Mar. 25, 2020), <https://www.epi.org/blog/despite-some-good-provisions-the-cares-act-has-glaring-flaws-and-falls-short-of-fully-protecting-workers-during-the-coronavirus-crisis/>.

258. See André Dua et al., *US small-business recovery after the COVID-19 crisis*, MCKINSEY & CO. (July 7, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/us-small-business-recovery-after-the-covid-19-crisis#>.

259. *Id.*

260. *Id.* See also *infra* Part III.C.

261. See *id.*

262. Jason Del Rey, *Amazon just posted record sales and profit in the middle of a pandemic*, VOX (July 30, 2020), <https://www.vox.com/recode/2020/7/30/21348701/amazon-q2-earnings-record-profit-covid-pandemic-worker-bonus-hazard-pay>.

263. Sean Ludwig, *20 Small Businesses Thriving During Coronavirus*, U.S. CHAMBER OF COM. (Mar. 24, 2020), <https://www.uschamber.com/co/start/strategy/coronavirus-successful-businesses>.

264. April Berthene, *Online Merchants gain an extra \$107 billion on 2020 thanks to pandemic*, DIGITAL COM. 360 (Sept. 14, 2020), <https://www.digitalcommerce360.com/article/coronavirus-impact-online-retail/>.

265. Richard Wolff, *Brick and mortar, crumbling: The COVID pandemic has cemented Amazon's dominant position. What now?*, N.Y. DAILY NEWS (July 11, 2020), <https://www.nydailynews.com>

percent of businesses listed on Yelp closed permanently due to lockdown disruptions and restrictions.²⁶⁶ Eight hundred small businesses filed for Chapter 11 bankruptcy between mid-February and July 31, 2020.²⁶⁷ Hospitality operations, sports and performing art centers, restaurants, bars, and clothing stores were among the hardest hit.²⁶⁸ While the CARES Act provided unemployment aid and small business payroll support systems, it also gave financial assistance to companies profiting during the lockdowns.²⁶⁹

Economic aid under the CARES Act is disproportionately granted to large companies.²⁷⁰ The economic relief should have been directed at nonessential businesses forcibly shut down. If Congress really "cared" about small businesses, it would have offered deliberate and targeted support, carefully distinguishing between essential and nonessential businesses. Responding to concerns that essential businesses and select industries have financially capitalized on the lockdowns, some have proposed that an excess profits tax should be imposed to curb corporate profiteering, as next discussed.²⁷¹

C. You Can't Have An Excess Profits Tax Without a War

On January 31, 2020, United States Secretary of Health and Human Services ("HHS"), Alex M. Azar II, pronounced a public health emergency.²⁷² Within two months, Mr. Trump declared a "national emergency."²⁷³ Rather than frame the emergency as a public health crisis, however, Mr. Trump and others, both domestically and abroad, employed wartime rhetoric to reference COVID-19.²⁷⁴ Such metaphorical use of the term "war" during the global pandemic is perhaps not surprising, given

.com/opinion/ny-oped-brick-and-mortar-crumbling-20200711-xchmaiup6jailgxeiydch514ca-story.html.

266. See Nicole Lyn Pesce, *55% of businesses closed on Yelp have shut down for good under the coronavirus pandemic*, MARKETWATCH (July 22, 2020), <https://www.marketwatch.com/story/41-of-businesses-listed-on-yelp-have-closed-for-good-during-the-pandemic-2020-06-25>.

267. Madeleine Ngo, *Small Businesses Are Dying by the Thousands – And No One Is Tracking the Carnage*, BLOOMBERG (Aug. 11, 2020), <https://www.bloomberg.com/news/articles/2020-08-11/small-firms-die-quietly-leaving-thousands-of-failures-uncounted>.

268. Bryan Pietsch, *20.5 million people lost their jobs in April. Here are the 10 job types that were hardest hit*, BUS. INSIDER (May 12, 2020), <https://www.businessinsider.com/jobs-industries-careers-hit-hardest-by-coronavirus-unemployment-data-2020-5>.

269. Bivens & Shierholz, *supra* note 258.

270. Kathryn Judge, *The Design Flaw At the Heart Of The CARES Act*, FORBES (Apr. 20, 2020), <https://www.forbes.com/sites/kathrynjudge/2020/04/20/the-design-flaw-at-the-heart-of-the-cares-act/#41880e526bed>.

271. See, e.g., Christians & Magalhães, *supra* note 29.

272. Elizabeth Goitein, *Emergency Powers, Real and Imagined; How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis*, 11 J. NAT'L SEC. L. & POL'Y 27, 31 (2020).

273. Facher, *supra* note 18.

274. Musu, *supra* note 140.

the United States' obsession with war.²⁷⁵ Still, categorizing a national public health emergency as “war” is not a formidable approach to salvaging nonessential businesses harmed by lockdowns and restrictions.

Even before declaring a national emergency, in March 2020, Mr. Trump labeled himself as a “war-time president” battling an invisible enemy.²⁷⁶ That same month, French President Emmanuel Macron told his people, “We are at War.”²⁷⁷ In April 2020, Queen Elizabeth informed her constituents, “we will meet again,” summoning the spirit of World War I while assuring her country that “Together we are tackling this disease.”²⁷⁸ Politicians in the United States made similar wartime references amidst the pandemic. New York Governor Andrew Cuomo referred to health care workers as “soldiers in this fight.”²⁷⁹ Alabama Governor Kay Ivey informed her state, “[w]e are at war with an invisible enemy.”²⁸⁰ Even Bank of America CEO Brian Moynihan publicly acknowledged, “[w]e’re in a war to contain this virus.”²⁸¹

Such rhetoric manifests a sustained history of leaders declaring “war” against an enemy, no matter how realistically palpable the opponent is.²⁸² In 1971, President Richard Nixon declared a “war on cancer.”²⁸³ President George W. Bush was the first to use the term “war on terrorism” in reference to a battle with no identifiable enemy nation-state.²⁸⁴ President Lyndon B. Johnson used wartime rhetoric in reference to the “war on poverty.”²⁸⁵ President Ronald Reagan’s infamous “war on drugs”

275. See Paul M. Renfro, *War Has Been the Governing Metaphor for Decades of American Life. This Pandemic Exposes Its Weaknesses*, TIME (Apr. 15, 2020), <https://time.com/5821430/history-war-language/>.

276. *Id.*

277. *Coronavirus: ‘We are at war’ – Macron*, BBC (Mar. 16, 2020), <https://www.bbc.com/news/av/51917380>.

278. *‘We’ll meet again’: Queen Elizabeth invokes WW2 spirit to defeat coronavirus*, EURACTIV (Apr. 6, 2020), <https://www.euractiv.com/section/politics/news/well-meet-again-queen-elizabeth-invokes-ww2-spirit-to-defeat-coronavirus/>.

279. *Governor Andrew Cuomo New York COVID-19 Press Conference Transcript March 30*, REV (Mar. 30, 2020), <https://www.rev.com/blog/transcripts/governor-andrew-cuomo-new-york-covid-19-press-conference-transcript-march-30>.

280. Staff, *Governor issues call to action on mask wearing: “We are at war with an invisible enemy”*, ALA. POL. REP. (Aug. 7, 2020), <https://www.alreporter.com/2020/08/07/governor-issues-call-to-action-on-mask-wearing-we-are-at-war-with-an-invisible-enemy/>.

281. Shawn Langlois, *‘We’re in a war’ – Bank of America boss takes aim at coronavirus*, MARKETWATCH (Mar. 15, 2020), <https://www.marketwatch.com/story/were-in-a-war-bank-of-america-boss-takes-aim-at-coronavirus-2020-03-15>.

282. Renfro, *supra* note 276.

283. Ann Mongoven, *The War on Disease and the War on Terror: A Dangerous Metaphorical Nexus?*, 15 CAMBRIDGE Q. OF HEALTHCARE ETHICS, 403-15 (2006).

284. See *id.* (“I do not intend that the war against poverty become a series of uncoordinated and unrelated efforts...”).

285. *Modern History Sourcebook: President Lyndon B. Johnson: The War on Poverty, March 1964*, FORDHAM U., <https://sourcebooks.fordham.edu/mod/1964johnson-warpoverty.asp> (last visited Jan. 19,

campaign²⁸⁶ resulted in some questioning whether it was, instead, a “war on Blacks.”²⁸⁷ In fact, such combative expression is so commonplace in American culture that it has been exploited across numerous political escapades, including the “war on reason,”²⁸⁸ “war on cops,”²⁸⁹ “war on culture,”²⁹⁰ and “war on truth.”²⁹¹

Some have questioned the social costs of using warfare metaphors as a substitute for circumstantial reality.²⁹² The use of such rhetoric has led certain Americans to feel marginalized, diversified, and fatigued,²⁹³ while others enjoy the abstract glorification that their nation is engaged in battle, without actually experiencing the “horrors and sacrifices” of war.²⁹⁴ War, by definition, equates to “a state of usually open and declared armed hostile conflict between states or nations.”²⁹⁵ The Ninth Circuit defines the term as “the employment of force between governments or entities essentially like governments.”²⁹⁶ The Superior Court of New Jersey surmises that “war” should be given its ordinary meaning of “actual hostilities between the armed forces of two or more nations or states.”²⁹⁷

The COVID-19 pandemic is not a war any more than the fight against

2021).

286. See Bowal, et al., *supra* note 50.

287. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks”*, 6 J. GENDER RACE & JUST. 381, 384 (2002).

288. See Paul Bloom, *The War on Reason*, THE ATLANTIC (Mar. 13, 2014), <https://newdualism.org/papers/P.Bloom/Bloom-TheWaronReason-Atlantic.pdf> (defending that humans are more than mere biochemical puppets, swayed by factors beyond their control).

289. See Cynthia A. Brown, *Utah v. Strieff, Sound The Hue And Cry*, 45 S.U. L. REV. 1, 16 n. 93 (2017) (referencing the loose usage of the wartime rhetoric, to include the war on drugs, war on terror, and war on cops).

290. See Norman K. Denzin, *The War on Culture, The War on Truth*, 2 CRITICAL METHODOLOGIES 2, 137-142 (2004) (expounding that America is engaged in a war that destroys Iraqi culture).

291. *Id.* at 139-40 (questioning political truths made to the common people).

292. See, e.g., Mongoven, *supra* note 284 (observing ethical concerns in using military rhetoric to refer to disease and terrorism); Amanda Harmon Cooley, *God And Country: The Dangerous Intersection Of Religion And Patriotism In The First Term Of The George W. Bush Administration*, 16 KAN. J.L. & PUB. POL’Y 157, 167 (2006/2007) (noting the marginalization of Americans through the use of wartime rhetoric by the Bush Administration after September 11, 2001); Nadine Strossen, *Maintaining Human Rights In A Time Of Terrorism: A Case Study In The Value Of Legal Scholarship In Shaping Law And Public Policy*, 22 N.Y.L. SCH. J. & INT’L & COMP. L. 3, 23 n. 70 (2003) (citing to Magistrate Judge Mallon Faircloth, who noted in an unpublished opinion that although wartime rhetoric is regularly used, “Only Congress has the constitutional power to declare war.”).

293. Mongoven, *supra* note 284.

294. Renfro, *supra* note 276.

295. *War*, MERRIAM-WEBSTER DICTIONARY.

296. *Universal Cable Prods., LLC v. Atlantic Specialty Ins. Co.*, 929 F.3d 1143, 1155 (9th Cir. 2019) (citing to 10A Couch on Insurance § 152:3 (3rd ed. 2017)).

297. *Stanbery v. Aetna Life Ins. Co.*, 26 N.J. Super. 498, 504-06 (N.J. Super. Ct. App. Div. 1953).

cancer or heart disease.²⁹⁸ Unlike actual wars that often come to an end,²⁹⁹ the "war" against COVID-19 may never fully conclude, as similarly realized in health battles against pneumonia, the common cold, human immunodeficiency virus (HIV), or herpes.³⁰⁰ Disease is certainly an enemy of the people, making it easy for humanity to embrace a wartime metaphor to feel secure against its rage.³⁰¹ However, those who suggest that an excess profits tax be imposed on large companies benefitting from COVID-19 are misappropriating such rhetoric. Imposing an excess profits tax to combat the pandemic's economic damage would contradict historical tax policy, as federal tax policy supports the use of an excess profits tax only "in time[s] of war."³⁰²

The United States first experimented with an excess profits tax during the Civil War.³⁰³ In 1893, the state of Georgia adopted a graduated excess profits tax based on a ratio of invested capital to profits.³⁰⁴ The tax was a consequence of a generalized public concern over certain war-profiting, particularly with regard to those manufacturing uniforms and other war-related materials.³⁰⁵

A munitions tax was instituted on profits in the Revenue Act of 1916.³⁰⁶ In addition to the typical income tax, the munitions tax was a flat excise tax of 12.5 percent imposed on the net profits from the sale or disposition of munitions.³⁰⁷ "Munitions" included ammunition, and other articles of war like gunpowder, firearms, cannons, electric motor boats, and

298. Allison Wilkinson, *Pandemics are not wars*, VOX (Apr. 15, 2020), <https://www.vox.com/culture/2020/4/15/21193679/coronavirus-pandemic-war-metaphor-ecology-microbiome>.

299. GIDEON ROSE, *HOW WARS END: WHY WE ALWAYS FIGHT THE LAST BATTLE* (Simon & Schuster ed. 2010).

300. See Angus Chen, *Why Haven't We Cured the Common Cold Yet?*, SCI. AMER. (Sep. 4, 2018), <https://www.scientificamerican.com/article/why-havent-we-cured-the-common-cold-yet/>; Maryilynn Marchione, *Some COVID-19 Mutations May Dampen Vaccine Effectiveness*, ABC NEWS (Jan. 20, 2021), <https://abcnews.go.com/Health/wireStory/covid-19-mutations-dampen-vaccine-effectiveness-75388593>; *Scientists develop a new vaccine approach for HIV*, NEWS MED. LIFE SCI. (Nov. 20, 2020), <https://www.news-medical.net/news/20201120/Scientists-develop-a-new-vaccine-approach-for-HIV.aspx>; Amy Norton, *Are we getting closer to a herpes vaccine?*, MED. PRESS (Nov. 16, 2020), <https://medicalxpress.com/news/2020-11-closer-herpes-vaccine.html>.

301. See Renfro, *supra* note 276.

302. See Bryan, *supra* note 51.

303. Thomas S. Adams, *Should the Excess Profits Tax be Repealed*, 35 THE Q. J. OF ECON. 363, 365 (1921).

304. *Id.* (The act was modified and extended to 1963 and the tax was applicable to profits in excess of 8%, with graduated rates ranging from 5 to 25% on the excess).

305. Bryan, *supra* note 51.

306. Revenue Act of 1916, Pub. L. No. 271, § 201, 39 Stat. 756, 780-782 (1916) (providing that the U.S.'s excess profits tax was largely influenced by two UK taxes – a munitions duty on manufacturers, and an excess profits duty on all corporations).

307. *Id.* at 781.

submarines.³⁰⁸ Claude Kitchin, United States House of Representatives majority leader, and chairman for the House Ways and Means Committee, defended the tax, noting that companies like DuPont held a monopoly on the sale of gun powder to the government.³⁰⁹

In 1917, the excess profits tax entered the taxing landscape to finance World War I.³¹⁰ In particular, the United Kingdom (UK), Canada, New Zealand, South Africa, France, Italy, and the United States introduced excess profits taxes in light of the massive governmental expenditures needed for combat.³¹¹ In the United States, the eight percent tax was levied on corporations and partnerships with net income exceeding \$5,000 and eight percent of actual capital invested.³¹² It was met with significant controversy and protest,³¹³ resulting in few paying any tax under the original bill.³¹⁴ Instead, the Revenue Act of 1917 was largely superseded by the War Revenue Act, which Congress implemented to help defray war costs.³¹⁵ The new revenue act included graduated rates ranging from 20 to 60 percent.³¹⁶ The War Revenue Act was in effect only briefly, subsequently replaced one year later.³¹⁷ The 1918 excess profits tax was only levied on corporations, at a rate of 80 percent.³¹⁸ While the rate varied in tax years 1919, 1920 and 1921, it increased to an astounding 95 percent during World War II.³¹⁹ The tax has since remained dormant.

Recently, as many essential businesses' profits increased dramatically amidst state lockdowns, commentators proposed the re-deployment of an

308. *Id.*

309. Mehrotra, *supra* note 49, at 184 n. 25, 204-05.

310. Peter A. Prescott, *Taxing Luck*, 83 MISS. L.J. 117, 129 (2014).

311. Alex Dunnagan, *War, Taxes, and Excess Profits*, TAXWATCH (May 1, 2020), https://www.taxwatchuk.org/excess_profits/. See also Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1540 (1999).

312. Revenue Act of 1917, 65 P.L. 50, 39 Stat. 1000 (1917) (Capital was defined to include cash paid in, the cash value of assets other than cash at the time of payment, and undivided profits used or employed in the business.). *Id.*

313. George E. Holmes, *The Excess Profits Tax of 1917*, 4 THE BULL. OF THE NAT'L TAX ASSOC. 7, 7 (1918) ("A storm of protest greeted the introduction of this bill, which was heightened by the unfortunate expression of its sponsor that the tax would be collected and paid north of the Mason and Dixon line. Nevertheless, the bill was enacted in its original form, but its effect was nullified by the Act of October 3, 1917...").

314. *Id.* ("A small amount of tax was collected under the Act of March 3, 1917, from corporations and partnerships whose fiscal years ended after the beginning of the calendar year and prior to the passage of the later law.")

315. War Revenue Act, ch. 63, 40 Stat. 300 (1917). See also Holmes, *supra* note 314, at 7.

316. Scott A. Hodge, *The History of Excess Profits Taxes Not as Effective or Harmless as Today's Advocate's Portray*, TAX FOUND. (July 22, 2020), <https://taxfoundation.org/excess-profits-tax-pandemic-profits-tax/>.

317. *Id.*

318. *Id.*

319. *Id.*

excess profits tax to remedy perceived inequitable profiteering.³²⁰ Professor Reuven S. Avi-Yonah was one of the first tax scholars to do so, suggesting that such taxes be employed at a rate of 95 percent on companies benefitting from the pandemic.³²¹ He recommended using a modified version of the average earnings method to calculate the excess profits tax, using book income instead of taxable income.³²² He suggested the 95 percent tax rate should apply against the excess amount of income over a certain calculated base amount.³²³

Many economists have similarly recommended implementing an excess profits tax to target COVID-profiting companies,³²⁴ as have certain tax policy institutes.³²⁵ Congressional member Tulsi Gabbard (D-Hawaii) introduced a resolution in the House of Representatives for an excess profits tax on corporations benefitting from the pandemic and use the revenue to assist small businesses.³²⁶ Her proposal suggests a 95 percent tax rate (similar to Avi-Yonah's proposal), using average "gross receipts" from 2016-2019 as the base from which to subtract 2020 gross earnings.³²⁷ Scholars Tarcisio Magalhaes and Allison Christians suggest

320. See e.g., Nick Shaxson, *Tax Justice and the Coronavirus*, TAX JUST. NETWORK (Mar. 24, 2020), <https://www.taxjustice.net/2020/03/24/tax-justice-and-the-coronavirus/>, and Alex Hemingway, *Excess Profits Tax Needed to Prevent Profiteering Amid COVID-19*, TORONTO STAR (April 23, 2020), <https://www.thestar.com/opinion/contributors/2020/04/23/excess-profits-tax-needed-to-prevent-profiteering-amid-covid-19.html>.

321. Reuven S. Avi-Yonah, *Taxes in the Time of Coronavirus: Is it Time to Revive the Excess Profits Tax?*, U. OF MICH. PUB. L. RES. PAPER NO. 671, (May 19, 2020).

322. *Id.* (In addition, using net (taxable) income as the base is problematic because many highly profitable corporations can reduce or eliminate their tax liability by using deductions for tax purposes but not for book purposes. For example, Amazon paid little tax in 2019 because it (a) expenses physical equipment like servers and warehouses under the TCJA, (d) expenses R&D, and (c) deducts the excess value of its stock over the exercise price of stock options... Therefore, the tax base should be book income, not taxable income."). See also Michelle L. Engler, *Corporate Tax Shelters And Narrowing The Book/Tax "GAAP"*, 2001 COLUM. BUS. L. REV. 539, 541 (2001).

323. *Id.*

324. See e.g., Johnathan Nicholson, *Tax "Excess: Profits of Big Money-Making Companies to Fix Coronavirus Economy, Scholar Urges*, MKT. WATCH (Apr. 30, 2020), <https://www.marketwatch.com/story/tax-excess-profits-of-big-money-making-companies-to-fix-coronavirus-economy-scholar-urges-2020-04-30> (quoting economist Gabriel Zucman in his recommendation that an excess profits tax be implemented to remove incentives for profiteering by companies); Emmanuel Saez and Gabriel Zucman, *Jobs Aren't Being Destroyed This Fast Elsewhere. Why is That?*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/opinion/coronavirus-economy-saez-zucman.html> ("The government should impose excess profits taxes, as it has done several times in the past during periods of crisis.").

325. Agustin, *et al.*, *supra* note 29, at 25 (proposing an excess profits tax); Collins, *et al.*, *supra* note 29, at 16 (recommending the enactment of an excess profits tax); Melani Cammett & Evan Lieberman, *Building Solidarity: Challenges, Options, and Implications for COVID-19 Responses*, EDMOND J. SAFRA CTR. FOR ETHICS, at 5 (Mar. 30, 2020), <https://ethics.harvard.edu/files/center-for-ethics/files/safrawhitepaper4c.pdf> (suggesting the United States consider adopting an excess profits tax).

326. H.R. Res. 1267, 116th Cong. (2020).

327. *Id.* ("That it is the sense of the House of Representatives that Congress should reinstate a pandemic excess profits tax on large corporations who have made excess profits due to the pandemic and

that imposing a national-level excess profits tax would be ineffective, as the mobility of numerous business' capital and profits would enhance existing base erosion and profit shifting concerns.³²⁸ Instead, they recommend a "global excess profits tax," where country-by-country reporting exists, thus making such tax imposition more efficient and effective.³²⁹

Other commentators, like Joseph J. Thorndike, suggest that an excess profits tax misaligns the current issues, arguing that a "health care crisis" is distinctly different from a wartime crisis and the respective "sacrifices" involved.³³⁰ Some decry proponents of an excess profits tax as using the pandemic as an opportunity to further pre-crisis preferences for higher taxation on profitable multinationals.³³¹ In addition, some scholars find that historic excess profits taxes were difficult to administer, created compliance complexities, undermined innovation, and impacted economic growth.³³² Certainly, others have proposed additional tax solutions to the COVID-19 crisis, including expanding sales taxes, imposing mark-to-market taxation on certain types of wealth, and implementing digital advertising taxes.³³³

At first glance, proposals to increase taxation on companies that "profited" from the pandemic are superficially alluring. While nonessential businesses lost profits due to closures, essential businesses were permitted to thrive. However, the current COVID-19 crisis is by no means a "wartime" scenario; nor does it involve the same physical sacrifices as required on foreign battlefields during actual wartime. Instead, as discussed, the "wartime" metaphor that Mr. Trump and others have used in reference to the pandemic is mere rhetoric.³³⁴ Mandated lockdowns, and corresponding damages, were a direct result of numerous (albeit, not all) state governors' actions, rather than an enemy

related government restrictions by using average gross earnings from 2016, 2017, 2018, and 2019 and subtract the average from total 2020 gross earnings, and apply a 95-percent tax rate to the excess profits which shall be directed to fund economic relief to small businesses."). It is unclear whether this resolution would apply to book income or tax income.

328. Christians & Magalhães, *supra* note 29, at 508; Tarcisio Diniz Magalhães & Allison Christians, *Rethinking Tax for the Digital Economy After Covid-19*, 11 HARV. BUS. L. REV. (2021).

329. Magalhães & Christians, *supra* note 329.

330. Joseph J. Thorndike, *Should We Tax Excess Profits or Pandemic Profits?* 167 TAX NOTES FED. 399, 404, Apr. 20, 2020, ("As I have argued recently, I'm not entirely convinced that the moral arguments buttressing wartime excess profits taxes will translate so easily into the current pandemic emergency; limiting the profits of arms manufacturers carries a different moral and political valence than limiting profits of vaccine producers.").

331. George K. Yin, *Is it Really Time for an Excess Profits Tax?* 167 TAX NOTES FED. 833, 834, May 4, 2020.

332. See Hodge, *supra* note 317.

333. See e.g., Lauren Loricchio, *Academics Offer Solutions to Address COVID-19 Fiscal Crisis*, 170 TAX NOTES FED. 1166, Feb. 15, 2021.

334. See *supra* Part II.C.

combatant.³³⁵ Essential businesses played no part in this decision-making process, which effectively evolved from federal CISA guidance.³³⁶

Imposing an excess profits tax on pandemic-profiting businesses is a slippery slope because of the vagueness in identifying with any certainty what “profiting” means under the circumstances. For example, should profits attributable to the overriding health crisis, including vaccine or Personal Protective Equipment (PPE) sales, be included?³³⁷ Should select business ventures, allowed to remain operational in some states, but forcibly closed in others, be targeted for profiting? Does merely being in a state of a pandemic warrant the imposition of an excess profits tax on abnormally high profits; and if so, how would excessive profits be determined?³³⁸

During war times, increased military spending helped expand economic activity and the gross domestic product (GDP).³³⁹ Historically, the United States government spent significant funds on military contracts for war-like amenities, including ammunition and aircraft.³⁴⁰ Governmental contracts guaranteed a market for wartime production.³⁴¹ The United States government constructed and owned contractor-run factories that manufactured wartime products,³⁴² and purchase agreements between the government and the private sector helped eliminate private production risks.³⁴³ Throughout, lives were lost on foreign battlegrounds, thus legitimizing a tax on the “excess” profits of the “merchants of death” that profited from manufacturing weapons, ammunitions, and aircraft.

COVID-profiting businesses do not resemble war-profiting merchants. For example, Home Depot’s increased lumber sales due to persons

335. *See supra* Part I.C.

336. *Id.*

337. *See* Thorndike, *supra* note 29, at 2026 (suggesting that health care in general conceptually profits from the personal suffering of others, yet it also produces a good for society and those suffering).

338. In keeping with this query, the authors question how “abnormally high” would be determined? Would a theoretical standard be required to help establish what earnings should otherwise “look like”, perhaps based on prior earnings or capital?

339. *Economic Consequences of War on the U.S. Economy*, INST. FOR ECON. & PEACE, https://www.economicsandpeace.org/wp-content/uploads/2015/06/The-Economic-Consequences-of-War-on-US-Economy_0.pdf (last accessed Sept. 25, 2021) (“Using data from the Bureau of Economic Analysis, figure one shows the composition of U.S. GDP in consumption, investment, government spending and net exports and imports in per-capita terms. It can be seen the war years of 1941 to 1945 saw one of the most significant short term increases in economic growth in the history of the U.S. economy.”).

340. Price Fishback, *World War II in America: Spending, Deficits, Multipliers, and Sacrifice*, VOX EU (Nov. 12, 2019), <https://voxeu.org/article/world-war-ii-america-spending-deficits-multipliers-and-sacrifice>.

341. *See* Thorndike, *supra* note 29, at 2024.

342. *Id.*

343. *Id.*

tackling home improvement projects while under state-mandated quarantines should not result in added tax penalization³⁴⁴ any more than increased lumber sales should following hurricanes.³⁴⁵ Likewise, the surplus in persons' streaming movies while under quarantine should not result in Amazon Prime being penalized with additional taxes,³⁴⁶ any more than when viewers set TV viewing records during blizzards.³⁴⁷ Increased lumber sales and video streaming as a result of unanticipated state actions should not be equated to circumstances where businesses manufacture ammunition under guaranteed government contracts with no market risk while soldiers are on the front lines dying.³⁴⁸

An additional concern in imposing an excess profits tax is defining the exact nature of "excess" profit. It is not uncommon for a successful company, like Amazon, to continually outperform analysts' expectations in predicting its quarterly earnings.³⁴⁹ If expert analysts are unable to accurately predict Amazon's earnings, then there is little confidence that the United States government can adequately predict what a base amount of Amazon's "normal" earnings should look like, and what constitutes "excess" earnings.³⁵⁰ An excess profits tax would surely stifle growth, innovation and efficiencies in companies exceeding earnings expectations.³⁵¹ Even prior to the COVID-19 pandemic, Amazon was surpassing earning prospects.³⁵²

As discussed, two methods have historically been used to assess a company's excess profits: (1) the invested capital method³⁵³ and (2) the

344. See Sarah Kelleher, *Consumers Turning to Home Improvement Projects During Lockdown*, COMSCORE (May 7, 2020), <https://www.comscore.com/Insights/Blog/Consumers-Turning-to-Home-Improvement-Projects-During-Lockdown>.

345. See Michael Flood, *Why Strong Demand and Tight Supply Have Caused Lumber Prices to Soar*, NEBS, <https://nebdgsupply.com/strong-demand-and-tight-supply-have-caused-lumber-prices-to-soar/> (last visited Feb. 19, 2020).

346. See Kiko Martinez, *Viral Load: There's A Surplus of 'Virus Movies' to Stream on Amazon Prime During Quarantine*, SAN ANTONIO CURRENT (May 7, 2020), <https://www.sacurrent.com/sanantonio/viral-load-theres-a-surplus-of-virus-movies-to-stream-on-amazon-prime-during-quarantine/Slideshow/23604000>.

347. See Hope King, *Blizzard helps set record for on-demand TV viewing*, CNN BUS. (Jan. 25, 2016), <https://money.cnn.com/2016/01/25/media/blizzard-tv-comcast/index.html>.

348. Dwight Jon Zimmerman, *Bullets by the Billions: Chrysler Switches World War II Production From Cars to Cartridges*, DEF. MEDIA NETWORK (June 14, 2012), <https://www.defensemedianetwork.com/stories/bullets-by-the-billions-chrysler-switches-world-war-ii-production-from-cars-to-cartridges/>.

349. *Amazon, Inc. (AMZN), Earnings Estimates*, BARCHART (Feb. 12, 2021), <https://www.barchart.com/stocks/quotes/AMZN/earnings-estimates>.

350. *Amazon, Inc. (AMZN)*, CNBC (Feb. 12, 2021), <https://www.cnbc.com/quotes/AMZN?tab=earnings> (Amazon beat earnings estimates in the first and fourth quarters of 2019 and in every quarter of 2018).

351. *Id.*

352. *Id.*

353. See *supra* note 305 and accompanying text.

average earnings method.³⁵⁴ As scholar Avi-Yonah suggests, the invested capital method may be problematic for high-tech companies that are not capital intensive.³⁵⁵ Instead, he suggests the average earnings method be used.³⁵⁶ In deploying this method, he recommends using book income instead of taxable income because of companies like Amazon having low tax exposure.³⁵⁷

While book income can be significantly higher than taxable income, it is based on an entirely different set of principles, namely GAAP.³⁵⁸ In contrast, taxable income is determined under the Code.³⁵⁹ As scholar Mitchell Engler notes, these two sets of rules create a “mismatch of tax and book reporting[.]”³⁶⁰ The Code provides various opportunities for taxpayers to reduce their taxable income to the extent possible; in contrast, corporate managers are encouraged to increase their book income to the extent possible as shareholders, investors, and creditors prefer companies with high earnings. For tax purposes, losses and deductions are generally favored; in contrast, losses and deductions decrease book income and are thus generally disfavored. From a tax policy perspective, it would be inappropriate to assess a tax on excess profits defined under a set of rules outside the purview of the Code. Such concern would likewise exist if a global excess profits tax was imposed using GAAP principals.

The above recommendations suggest a repackaged version of a long-standing concern that many tax scholars harbor with respect to multinational companies earning significant income without paying their fair share.³⁶¹ However, recommending an excess profits tax as a backdoor means of addressing this issue is not appropriate. Such endorsement misses the underlying point of the excess profits tax, and its historical purpose. It also runs contrary to the current direction of the Code and the many tax incentives and avoidance opportunities it provides.

Numerous companies deemed “essential” were profiting long before the onset of the pandemic,³⁶² taking advantage of the evolving

354. *See supra* note 323 and accompanying text.

355. *See Avi-Yonah, supra*, note 322.

356. *Id.*

357. *Id.*

358. Engler, *supra* note 323, at 541.

359. *Id.*

360. *Id.*

361. *See Yin supra*, note 332.

362. *Amazon EPS - Earnings Per Share 2006 - 2020: AMZN*, MACROTRENDS, (last visited Sept. 26, 2021), <https://www.macrotrends.net/stocks/charts/AMZN/amazon/eps-earnings-per-share-diluted> (Amazon's annual EPS increased 227.48% in 2018 from 2017, 14.25% in 2019 from 2018, and 81.79% in 2020 from 2019).

marketplace shift from brick-and-mortar to online.³⁶³ State lockdowns only accelerated the technological shift in the marketplace.³⁶⁴ Still, while Amazon and others did indeed profit, they spent substantial amounts on CDC safety measures to remain operational.³⁶⁵

As this Article purports, it is the United States government's responsibility—not profiting enterprises—to make small businesses "whole" again. If essential companies, like Amazon, are identified as not paying enough taxes in light of their profits, it is the Code that must be amended to "fix" the issue, regardless of the pandemic.³⁶⁶ The excess profits tax is more appropriately designed for times of war; not by nomenclature but reality. The economic damage suffered by small businesses was a direct result of state-mandated lockdowns. Not every small business was financially decimated during the pandemic³⁶⁷ and, likewise, not all operational businesses enjoyed increased profits. Those that did filled a void in the free-market. Satisfying this need involved market-place and financial risk, rather than governmental assistance, co-ownership, or guarantees. Manufacturers during the pandemic did not profit from making weapons of war, but instead from toilet paper production.³⁶⁸ Tax law encourages profit making. Any proposals wanting to define what a "normal" profit base should look like in order to tax the excess runs contrary to existing tax law. Instead of taxing excess profits, this Article suggests that qualifying businesses that were forcibly locked down during the pandemic be granted temporary federal tax-exempt status during their economic recovery period and donations made to them be tax deductible.

III. RADICALIZING NON-PROFIT LAW FOR "COVID COMPANIES"

Historically, there exists a bright-line division between for-profit and

363. See Kathryn Kisska-Schulze et al., *Case Baiting*, 57 AM. BUS. L.J. 321, 327 (2020) (noting the transition from a brick-and-mortar market to that of e-commerce).

364. See Emmy Hawker, *Has Coronavirus Brought Brick-And-Mortar Retail To An End?*, BUS. BECAUSE (July 27, 2020), <https://www.businessbecause.com/news/insights/7119/the-end-of-brick-and-mortar-retail>

365. Lauren Debter, *Amazon Says it Will Forgo Billions in Profits to Invest Into Worker Safety Measures*, FORBES (April 30, 2020), <https://www.forbes.com/sites/laurendebter/2020/04/30/amazon-first-quarter-earnings/?sh=721154d6459e>

366. It is important to consider that the alternative minimum tax (AMT) was eliminated for corporations under the TCJA. Thus, from a Congressional standpoint, there is no theoretical "minimum" amount of federal tax that companies should be paying. See TCJA, *supra* note 231, at § 12001.

367. See Nina Roberts, *Some small businesses are flourishing during the COVID-19 pandemic*, MARKETPLACE (Mar. 25, 2020), <https://www.marketplace.org/2020/03/25/some-small-businesses-are-flourishing-during-the-covid-19-pandemic/>.

368. See Jen Wiczner, *The case of the missing toilet paper: How the coronavirus exposed U.S. supply chain flaws*, FORTUNE (May 18, 2020), <https://fortune.com/2020/05/18/toilet-paper-sales-surge-shortage-coronavirus-pandemic-supply-chain-cpg-panic-buying/>.

not for-profit organizations in the Code and judicial system.³⁶⁹ While continued support for this lucid distinction remains,³⁷⁰ some advocate that such rigid partition be relaxed to accommodate the increasing number of companies engaging in corporate social responsibility, for-profit philanthropy, and social enterprise.³⁷¹ In their seminal essay, *The Case For For-Profit Charities*, scholars Anup Malani and Eric Posner promote that tax benefits, akin to those granted to non-profit organizations, be extended to for-profit firms providing large-scale community benefits.³⁷² Responding to Malani and Posner's proposition, scholar Brian Galle criticized the legal transmutation of for-profit companies into charitable organizations, arguing that such metamorphosis would diminish, among other things, the nondistribution constraint and "warm glow" effects attributable to charitable organizations.³⁷³ Notwithstanding, philanthropic companies like Google.org have pursued the for-profit charitable model, even without the benefits of favorable tax-exempt status.³⁷⁴

Based on the staggering number of nonessential, for-profit businesses harmed or permanently shuttered as a consequence of state-mandated COVID-19 lockdowns, this Article advances that easing the legal barrier between for- and not for-profit organizations has reached a critical apex.

369. See I.R.C. § 501(c)(3)-(4); Treas. Reg. §§ 1.501(c)(3)-1 and 1.501(c)(4)-1. See also, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114, 1186 n. 10 (10th Cir. 2013) (noting that while the government differentiates for-and not for-profit organizations, numerous corporate forms fail to mirror the bright line distinction), and *Summers v. Cherokee Children & Family Servs.*, 112 S.W. 3d 486, 500 (Tenn. App. 2002) (professing that the distinction between for- and not for-profit entities lies in the premise that for-profit entities allow for private enrichment, while "nonprofit organizations are subject to the non-distribution constraint.").

370. See, e.g., Brian Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213, 1233 (2010) ("... extending the charitable-contribution deduction to include contributions to for-profit firms creates risks that are not worth the putative benefits. For-profit charity threatens to shift costs to charities, weaken the warm glow of giving, distort managerial incentives, and diminish or confuse donor choice."); Benjamin Moses Leff, *The Case Against For-Profit Charity*, 42 SETON HALL L. REV. 819 (2012) (arguing that it is proper for the government to withhold the deductibility of charitable contributions of for-profit enterprises); and Victor Fleischer, Response: "For Profit Charity": *Not Quite Ready for Prime Time*, 93 VA. L. REV. IN BRIEF 231 (2008) (positing that extending non-profit status to philanthropic for-profit entities is unworkable as a tax concept).

371. See, e.g., Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017 (2007) (proposing that federal tax law change to provide tax benefits to for-profit entities operating for "charitable" purposes), and Susannah Camic Tahk, *Crossing the Tax Code's For-Profit. Nonprofit Border*, 118 PENN. ST. L. REV. 489 (2014) (suggesting that federal tax law change to encourage more cross-sector collaborations between for- and not for-profit entities to allow for greater social good via corporate social responsibility, for-profit philanthropy, and social enterprise).

372. Malani & Posner, *supra* note 371, at 2062-64.

373. See Galle, *supra* note 371, at 1217, 1224-25 ("Mixing charitable enterprise with the for-profit form would undermine the benefits of warm glow for everyone....Malani and Posner's proposal would create this confusion by making it unclear whether any given firm producing charitable services was paying its employees a share of profits.").

374. See Christopher Lim, *Google.org, For-Profit Charitable Entity: Another Smart Decision By Google*, 17 KAN. J.L. & PUB. POL'Y 28, 29 (2007).

The pandemic's impact, and ensuing state closures, accelerated a monumental secular change in the United States economy from standard brick and mortar to a landscape dominated by multinational technology companies.³⁷⁵ This Article suggests that a genuine public interest exists in protecting and fostering nonessential businesses' perpetuities. Such public interest is not solely relegated to the equity in making these businesses "whole" again but embodies a societal interest in preserving the stout economic and innovative forces that these ventures provide.³⁷⁶

To help resurrect those businesses negatively impacted by COVID-19 closures, this Article posits a revolutionary federal tax solution, which applies the ideals of pre-existing federal tax policy to a new problem. Such elucidation is perhaps similar to NASA scientist Katherine Goble Johnson's use of "old math" to calculate the trajectory of John Glenn's space capsule, as illustrated in the movie *Hidden Figures*.³⁷⁷ Her answer to the problem: Euler's Method; to which one engineer jeers, "That's ancient", prompting her firm resolve, "Yes. But it works."³⁷⁸

Current tax policy, while robust, is insufficient to meet the economic needs of nonessential businesses as traditionally applied. The United States is facing abnormal times and somber economic setbacks. There is nothing "normal" about restricting taxpayers' abilities to run legal business operations due to severe government ascendancy; nor is it "ordinary" to confine consumers to their residences for lengthy periods of time. When a targeted group of businesses is selectively allowed to remain operational, while others are forcibly shut down, the conventional metrics of horizontal and vertical equity dissipate the boundaries of garden variety tax policy analysis.

Applying the same conventional tax policy to both locked-down and operational ventures, as the CARES Act purports to do, is simply not good tax policy. Similarly, employing carbon-copy vertical equity to both

375. James Conca, *The Coronavirus Accelerates Online's Destruction of Brick & Mortar Shopping*, FORBES (Aug. 21, 2020), <https://www.forbes.com/sites/jamesconca/2020/08/21/the-coronavirus-accelerates-onlines-destruction-of-brick--mortar-shopping/?sh=4bdb34c54734>.

376. See Melissa A. Peters, *The Little Guy Myth: The Fair Act's Victimization Of Small Businesses*, 42 WM. & MARY L. REV. 1925, 1941-42 (2001) (noting the vigorous impact of small businesses on the economy); Lyndsey Insani, *Is Financial Difficulty Really Enough? The Battle Of The Circuits To Define Reasonable Cause For Small Business' Failure To Pay Taxes*, 53 VAL. U.L. REV. 385, 394-5 (2019) (emphasizing the significance of small businesses on United States employment, particularly with respect to disadvantaged groups); Blake D. Morant, *The Quest For Bargains In an Age Of Contractual Formalism: Strategic Initiatives For Small Businesses*, 7 J. SMALL EMERGING BUS. L. 233, 242 (2003) (observing the impact of small businesses on entrepreneurial opportunities for women and minorities); Nadia Udeshi, *Saving Small Business From The Big Impact Of Data Breach: A Tiered Federal Approach To data Protection Law*, 14 BROOK. J. CORP. FIN. & COM. L. 389, 392-95 (2020) (evaluating the significant impact of small businesses on the United States economy).

377. HIDDEN FIGURES (20th Century Fox 2016).

378. *Id.*

profitable (operational) and nonessential (locked down) businesses is illogical. This Article suggests that employing the traditional notions of tax-exempt status to qualifying COVID-Companies is one solution to revitalizing the economic lifeblood of the United States economy. Allowing COVID-Companies, for a time, the same tax benefits afforded not for-profit organizations would allow these businesses to mitigate federal income tax exposure during their economic recovery period and incentivize individuals and profitable entities to participate in their renewal. This revolutionary application of “old” tax policy,³⁷⁹ strategically directed at COVID-Companies, need not be hindered by the longstanding scholarly debate surrounding for- and not for-profit charitable entities, but instead be the catalyst for resurrecting small business operations injured by government-mandated lockdowns. To evaluate the application of tax-exempt status on COVID-Companies, Section A considers the societal need to protect and foster nonessential businesses. Section B examines the application of “old” tax law to a new problem. Finally, Section C proposes that Code section 501(c) be revolutionized for COVID-Companies.

A. Protecting and Fostering Nonessential Businesses

Current and proposed small business tax policy measures, such as accelerated depreciation allowances,³⁸⁰ employment tax credits,³⁸¹ and qualified business income deductions,³⁸² are inadequate to address the long-term impact that state lockdowns have on nonessential businesses.³⁸³ Data evidences that COVID-19 closures resulted in 60 percent of businesses collapsing.³⁸⁴ Without significant financial assistance, small businesses floundering under the pandemic’s weight will likewise fail.³⁸⁵ To protect and foster these ventures’ perpetuities, novel and well-designed economic aid to COVID-Companies must be straightforward

379. Edward A. Zelinsky, *Why The Buffet-Gates Giving Pledge Requires Limitation Of The Estate Tax Charitable Deduction*, 16 FLA. TAX REV. 393, 397 (2014) (noting income tax charitable deduction limitations began with the Revenue Act of 1917).

380. I.R.C. § 179 (2021).

381. CARES Act, *supra* note 31, at § 2301.

382. *See* TCJA, *supra* note 231, at § 199A.

383. *See e.g.*, Garrett Watson et al., *Details and Analysis of President-Elect Joe Biden's Tax Proposals October 2020 Update*, TAX FOUND. (Oct. 2020), <https://files.taxfoundation.org/20201109095935/Details-and-Analysis-of-President-Elect-Joe-Bidens-Tax-Plan.pdf> (providing for a manufacturing Communities Tax Credit to reduce the tax liability of businesses experiencing work force layoffs or government closures.).

384. Anjali Sundaram, *Yelp Data Shows 60% of Business Closures Due to the Coronavirus Pandemic are now Permanent*, CNBC (Dec. 11, 2020), <https://www.cnbc.com/2020/09/16/yelp-data-shows-60percent-of-business-closures-due-to-the-coronavirus-pandemic-are-now-permanent.html>.

385. Bartik et al., *supra* note 28, at 17666.

and devoid of overly complicated rules and byzantine eligibility requirements.³⁸⁶

Small businesses tend to be financially fragile, having neither the economic sustainability nor requisite equity base to remain operational amidst a global pandemic.³⁸⁷ In addition, some may be unable to secure the accounting or legal counsel necessary to understand the myriad of tax details embedded in the CARES Act.³⁸⁸ While some may have the financial means to file federal lawsuits challenging the constitutionality of state closures,³⁸⁹ it is impractical to consider that every—or perhaps even most—small businesses harmed by state closures can fiscally withstand the expenses and hazards of litigation amidst deteriorating governmental revenues.³⁹⁰

As discussed, imposing an excess profits tax on essential businesses profiting from the pandemic is not the ideal means to address nonessential business funding amidst a non-wartime period.³⁹¹ Nonessentials are weary of governmental intrusion.³⁹² They were initially targeted by the Executive Office as recommended for closure³⁹³ and subsequently shut down against their will in most states.³⁹⁴ For those that defied lockdown orders, the media is replete with stories of governmental authorities imposing fines.³⁹⁵

386. *Id.* (noting that 13 percent of respondents (out of more than 5,800 small businesses surveyed) documented they did not anticipate taking out CARES Act PPP loans due to application hassles, federal governmental distrust, or complicated eligibility rules).

387. *Id.* at 17656, 17665 (documenting that small firms are “extremely fragile”, having only enough cash to sustain themselves for approximately 2 weeks). *See also* Mirit Eyal-Cohel, *Why Is Small Business The Chief Business Of Congress?*, 43 RUTGERS L.J. 1, 3 n. 4 (2012) (proposing that small businesses do not have enough equity base (collateral) to secure loans and credit).

388. Andrew Osterland, *Here’s why a nightmare tax season is ahead for small businesses*, CNBC (Dec. 14, 2020), <https://www.cnbc.com/2020/12/14/heres-why-a-nightmare-tax-season-awaits-small-businesses.html>.

389. *See, e.g.*, Damon Root, *This Business Is Suing the Government Over a Coronavirus Closure Order*, REASON (Mar. 30, 2020), <https://reason.com/2020/03/30/this-business-is-suing-the-government-over-a-coronavirus-closure-order/>.

390. In addition, ascertaining a business’ actual damages, and the exact nature of state law takings, becomes even more complicated amidst “rolling lockdowns”, with no foreseeable end on the horizon. *See* Matthew Boesler, *Kashkari Says U.S. May Face 18 Months of Rolling Shutdowns*, BLOOMBERG (Apr. 12, 2020), <https://www.bloomberg.com/news/articles/2020-04-12/fed-s-kashkari-says-u-s-may-face-18-months-of-rolling-shutdowns>.

391. *See supra* Part II.C.

392. *See* Nick Pecoraro, *“I’m tired of being told what to do”: Local ‘nonessential’ business opening ahead of Newsom’s schedule*, GOLD COUNTRY MEDIA (May 5, 2020), <https://goldcountrymedia.com/news/174248/im-tired-of-being-told-what-to-do-local-nonessential-businesses-opening-ahead-of-newsoms-schedule/>.

393. *See supra* notes 119-21 and accompanying text.

394. *States that did not issue stay-at-home orders, supra* note 20.

395. *See e.g.*, Leila Miller, *This L.A. company was hit with the state’s largest-ever Covid-19 fine. Some say it’s a model for worker safety*, L.A. TIMES (Sep. 25, 2020), [https://www.latimes.com/california/story/2020-09-25/la-me-overhill-farms-safety-committee; Jim Guy, \\$35,000 in fines](https://www.latimes.com/california/story/2020-09-25/la-me-overhill-farms-safety-committee; Jim Guy, $35,000 in fines)

Small businesses are vital to the United States employment sector.³⁹⁶ If their closures continue, the federal government may need to devote further resources to fund unemployment benefits. Of the more than 32.5 million United States business operations, 31.7 million are “small”.³⁹⁷ Since 2000, small businesses account for 65.1 percent of net new job creation.³⁹⁸ However, the United States Census Bureau Survey reports that approximately 34.2 percent of small businesses were financially impacted by COVID-19.³⁹⁹ A separate survey identifies that 43 percent of small and mid-size businesses suffered “significant to severe” impacts from the pandemic, with small businesses being most harshly affected.⁴⁰⁰ Although the term “small” is not inescapably synonymous with the term “nonessential,” data supports that small businesses—the quintessence of economic prosperity in the United States⁴⁰¹—have been disproportionately impacted by lockdown orders.⁴⁰² With fiscal aid vacillating, federal relief strained amidst bipartisan pushback, and state budgets emaciated, novel avenues must be considered to better foster and preserve nonessential businesses throughout their economic recovery from the pandemic.⁴⁰³

issued in Fresno to nonessential businesses for operating during pandemic, FRESNO BEE (May 7, 2020), <https://www.fresnobee.com/news/local/article242576966.html>; Reggie Ellis, *Lindsay approves fines for nonessential businesses still open*, SUN GAZETTE (May 6, 2020), <https://thesungazette.com/article/business/2020/05/06/lindsay-oks-fines-for-nonessential-businesses-still-open/>; and Kelly Bauer, *Businesses Rack Up \$120,000 In Fines To City For Not Following Stay At Home Order*, BLOCK CLUB CHI. (Apr. 8, 2020), <https://blockclubchicago.org/2020/04/08/businesses-rack-up-120000-in-fines-to-city-for-not-following-stay-at-home-order/>.

396. Stephen Michael Spivey, *A Snake Eating Its Own Tail: The Self-Defeating Nature of an Overly Broad Implementation of Section 1071*, 22 N.C. BANKING INST. 107, 115 n. 65 (2018) (documenting that small businesses are vital to the United States economy).

397. *Frequently Asked Questions*, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC. (Oct. 2020), <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf> (“Small” business is defined as an independent business having less than 500 employees). *See also* Todd Kehoe, *What counts as a ‘business’? It might not be what you think it is*, ALBANY BUS. REV. (Apr. 11, 2019), <https://www.bizjournals.com/albany/news/2019/04/11/number-of-businesses-in-the-united-states.html> (documenting that there are more than 32.5 million United States businesses).

398. *Frequently Asked Questions*, *supra* note 398.

399. *Id.*

400. *Small Businesses Feel Biggest Impact*, *supra* note 24 (per this survey, small businesses were identified as those having 1-4 employees).

401. Joseph A. Castelluccio III, *Sarbanes-Oxley and Small Businesses: Section 404 and the Case for a Small Business Exemption*, 71 BROOKLYN L. REV. 429, 437 (2005).

402. *Id.*

403. *See* Ben Casselman, *States Try to Rescue Small Businesses as U.S. Aid Is Snarled*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/business/economy/states-small-businesses.html>. *See also* Jarrett Renshaw & David Morgan, *Despite ‘productive’ Republican meeting, Biden will not accept a scaled-down COVID-19 bill – White House*, REUTERS (Feb. 1, 2021), <https://www.reuters.com/article/us-health-coronavirus-usa-congress-idUSKBN2A12TV>.

B. Applying "Old" Tax Law To a New Problem

The Code provides tax-exempt status to 29 variations of Code section 501(c)(3) charitable organizations.⁴⁰⁴ These non-profit organizations, no matter the type, are exempt from federal income taxation so long as certain requirements are satisfied.⁴⁰⁵ Federal law likewise grants individuals and corporations tax deductions for charitable contributions made during the year, if so permitted under Code section 170.⁴⁰⁶ However, tax deductibility restrictions exist; for example, donations made to section 501(c)(3) organizations are deductible, while donations made to section 501(c)(4) "social welfare" organizations are not.⁴⁰⁷

Congress's legislative intent in providing tax-exempt status to non-profit organizations was to support groups that promote the general welfare, thereby partially relieving the federal government of financial burdens.⁴⁰⁸ More pointedly, while Treasury loses revenue by providing tax-exempt status to qualifying organizations, such loss is

404. See I.R.C. § 501(c)(3). See also Chad J. Pomeroy, *Let My Arm Be Broken Off At The Elbow*, 71 OKLA. L. REV. 453, 462 n. 35 (2019). Examples of § 501(c)(3) organizations, which encompass "corporations, any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition... or for the prevention of cruelty to children or animals..." include the Bill and Melinda Gates Foundation, National Collegiate Athletic Association, United Way, Special Olympics, and Boy Scouts of America. Other types of entities falling within the parameter of § 501(c)(3) exemption from tax include civil leagues, labor organizations, chambers of commerce, recreational clubs, fraternal orders and societies, cemetery companies, credit unions, certain insurance companies, and veteran organizations. See I.R.C. § 501(c)(1), (2), (4)-(29).

405. For example, per I.R.C. § 501(c)(3), organizations are prohibited from attempting to influence legislation and supporting any candidates for public office, whereas veterans organizations under I.R.C. § 501(c)(19) are not prohibited from engaging in such activities.

406. See I.R.C. §§ 170(a) (permitting a tax deduction for charitable contributions made); 170(b)(1) (providing percentage limitations for individuals), and 170(b)(2) (providing a 10% taxable income limit for corporations). See also Jennifer McCrabb Black, *Reforming 501(c)(3): Putting the "Charity" Back In The Charitable Deduction*, 13 RICH. PUB. INT. L. REV. 251, 253 (2010).

407. I.R.C. § 170(c) defines "charitable contribution" narrowly, to include only certain types of donations such as those made to the government, I.R.C. § 501(c)(3) organizations, and veteran's organizations. I.R.C. § 501(c)(4) organizations are not included in this list, thus delineating the ability of donors to take a tax deduction for contributions made to them per I.R.C. § 170(a)(1); however, some have advocated that "social welfare organizations" be treated in a similar manner to charitable organizations, thereby permitting the deductibility of donations. See e.g., *IRS Denials of Charitable Status: A Social Welfare Organization Problem*, 82 MICH. L. REV. 508 (1983).

408. H.R. Rep. No. 75-1860, at 19 (1938) ("The exemption from taxation of money and property devoted to charitable and other purposes is based on the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare."). See also *Bob Jones University v. United States*, 461 U.S. 574 (1983) ("Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind. Tax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community, are deeply rooted in our history, as in that of England.").

counterbalanced by the federal government appropriating less taxpayer money to public service engagements funded by charitable organizations.⁴⁰⁹ Indeed, with more than one million charitable non-profits in the United States, these organizations are on the economic front lines of feeding the hungry, housing the homeless, and educating the populous.⁴¹⁰

The United States enjoys a rich history of charitable purpose organizations.⁴¹¹ During his 1831 visit to America, Alexis de Tocqueville perceived the establishment of voluntary associations that better served the common good.⁴¹² Such associations led to the founding of “hospitals, prisons, and schools.”⁴¹³ Even volunteer fire departments, still in existence today, found early root in 19th century American settlements.⁴¹⁴

Federal tax exemption for charitable organizations was first codified in the Tariff Act of 1894;⁴¹⁵ however, the Supreme Court found unconstitutional the Tariff Act’s income tax, resulting in the abandonment of charitable tax-exempt status.⁴¹⁶ The Revenue Act of 1909 restored the Tariff Act’s tax-exempt language, setting forth a private inurement prohibition.⁴¹⁷ Two years later, in 1913, Congress ratified the Sixteenth Amendment, which made the income tax constitutional, and passed the Revenue Act of 1913, which provided tax-exempt status for select non-profit organizations.⁴¹⁸ Individual income tax deductions first became available under the Revenue Act of 1917.⁴¹⁹ It was not until the Revenue Act of 1936, however, that similar corporate tax deductions were

409. *Id.* See also Lloyd Hitoshi Mayer, *A (Partial) Defense of § 501(c)(4)’s “Catchall” Nature*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 439, 457 (2018) (describing that for an organization to qualify for I.R.C. § 501(c)(3) status, the organization’s activities must be shown to lessen the government’s own burdens).

410. See Nathan Bult, *Why Congress must help nonprofits*, THE HILL (May 14, 2020), <https://thehill.com/opinion/finance/497825-why-congress-must-help-nonprofits>.

411. For a comprehensive examination of the history of tax-exempt nonprofit corporations, see Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719, 1727-40 (2016).

412. *Id.* at 1728.

413. *Id.* (citing to 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 106 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1951) (1840)).

414. Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. OF INCOME BULL., at 105 (Winter 2008), <https://www.irs.gov/pub/irs-soi/tehistory.pdf>.

415. Chaffee, *supra* note 412 at 1735. See also Tariff Act of 1894, ch. 349, 28 Stat. 509 (1894).

416. Chaffee, *supra* note 412 at 1735. See also *Pollock v. Farmer’s Loan & Trust Co.*, 158 U.S. 601, 634 (1895).

417. Corporate Income Tax of 1909, Pub. L. No. 61-5, 36 Stat. 112 (1909) (The private inurement prohibition disallows tax-exempt organizations from using income or assets to unreasonably benefit board members, trustees, officers, or key employees).

418. See Chaffee, *supra* note 412, at 1735-6. See also U.S. Const. amend. XVI ; Revenue Act of 1913, ch. 16, § IIG, 38 Stat. 114, 172 (1913).

419. War Revenue Act of 1917, ch. 63, § 214(a), 40 Stat. 300, 330 (1917).

introduced.⁴²⁰ The modern Code came to fruition with the passage of the Revenue Act of 1954, which introduced Code section 501(c) for tax-exempt organizations.⁴²¹ While numerous other amendments and acts have levied select requirements on charitable organizations,⁴²² the current section 501 is a highly refined provision spanning two centuries of congressional contemplation.⁴²³

Like small businesses, non-profit organizations are integral to economic stability and mobility in the United States.⁴²⁴ They provide essential public benefits that either fall outside the scope of government intrusion or relieve the government from providing similar assistance.⁴²⁵ These organizations profoundly rely on outside donations to finance their operations,⁴²⁶ and the tax benefits afforded under Code section 501(c)(3) enable them to remain competitive.⁴²⁷ As previously discussed, some suggest that Congress should relax section 501(c) restrictions to allow social enterprise organizations, that straddle for- and not for-profit missions, to enjoy more favorable tax treatment.⁴²⁸

Beyond the scope of social enterprises, there now exists a credible public purpose in expanding section 501 to include COVID-Companies. Prior to pandemic closures, 43 percent of small businesses in the United States made less than \$50,000 in annual sales.⁴²⁹ Currently, the average small business owner/operator salary is about \$65,000.⁴³⁰ More than 27 million non-farm sole proprietorship tax returns were filed in 2018.⁴³¹

420. Chaffee, *supra* note 412, at 1736. *See also* Revenue Act of 1936, Pub. L. No. 74-740, § 23(o), 49 Stat. 1648.

421. *Id.* at 1762. *See also* Revenue Act of 1934, ch. 277, § 23, 48 Stat. 680, 690.

422. *Id.* at 1737.

423. *Id.*

424. Naomi Camper, *A Strong Nonprofit Sector is Key to Thriving Communities*, ASPEN INSTITUTE (Mar. 7, 2016), <https://www.aspeninstitute.org/blog-posts/a-strong-nonprofit-sector-is-key-to-thriving-communities/>.

425. Seong J. Kim, *Hiding Behind The Corporate Veil: A Guide For Non-Profit Corporations With For-Profit Subsidiaries*, 5 HASTINGS BUS. L.J. 189, 193 (2009).

426. Joseph S. Klapach, *Thou Shalt Not Politic: A Principled Approach To Section 501(c)(3)'s Prohibition Of Political Campaign Activity*, 84 CORNELL L. REV. 504, 506 (1999).

427. *Id.*

428. *See* Justin Blount & Patricia Nunley, *What Is A "Social" Business An Why Does The Answer Matter?*, 8 BROOK. J. CORP. FIN. & COM. L. 278, 304-05 (2014) (noting that due to social enterprises straddling the line between for- and not for-profit organizations, novel hybrid entities are necessary to help acclimate these blurred organizations).

429. Janet Attard, *How Much Do Small Businesses Really Earn?*, BUS. KNOW-HOW (Dec. 18, 2020), <https://www.businessknowhow.com/money/earn.htm>.

430. *Average Small Business Owner/Operator Salary*, PAYSACLE (last updated Jan. 24, 2021), https://www.payscale.com/research/US/Job=Small_Business_Owner_%2F_Operator/Salary.

431. *Table 1. Nonfarm Sole Proprietorships: Business Receipts, Selected Deductions, Payroll, and Net Income, by Industry Sectors, Tax Year 2018*, IRS OFF. OF STAT. (last visited Feb. 29, 2021), <https://www.irs.gov/statistics/soi-tax-stats-nonfarm-sole-proprietorship-statistics/>.

Small businesses are the pulse of the economy;⁴³² however, COVID-19 lockdowns have forced many of these businesses to exhaust their life savings to keep their respective businesses afloat.⁴³³ Unemployment rates reached unprecedented levels since the pandemic's onset.⁴³⁴ Early stage small business losses may have longer-term job loss and economic equality implications.⁴³⁵ Current estimates predict the United States labor force may not yield to pre-pandemic levels until 2022.⁴³⁶ To help buffer the impact on small businesses, the historic notions of Code section 501 should be relaxed to allow COVID-Companies tax-exempt status during their recovery. If granted temporary tax-exempt status, section 501(c)(3) and complementary Code section 170 would provide COVID-Companies refuge to help salvage lost competitive advantages and customer bases amidst pandemic-related government lockdowns.⁴³⁷

C. Making IRC Section 501(c) Work for COVID-Companies

This Article recommends that Congress revolutionize Code section 501(c)(3) to aid small businesses harmed by pandemic closures. COVID-Company, tax-exempt status should be extended to qualifying businesses via default classification under the check-the-box regulations⁴³⁸ or by filing an income tax return specifically designed for businesses electing COVID-Company tax-exempt status.⁴³⁹ To bring this proposal to fruition, Congress must substantially loosen or eliminate the section 501(c)

432. See *Staff Report, COVID-19: A Roundup of Resources for Small Businesses*, DALLAS INNOVATES (July 14, 2020), <https://dallasinnovates.com/covid-19-a-roundup-of-resources-for-small-businesses/>.

433. Catherine Thorbecke, *Small business owners tapping into personal savings, 401(k)s and more amid coronavirus crisis*, ABC NEWS (Mar. 18, 2020), <https://abcnews.go.com/Business/small-business-owners-tapping-personal-savings-401ks-amid/story?id=69623954>.

434. *Unemployment Rates During the COVID-19 Pandemic: In Brief*, CONG. RES. SERV. (updated Jan. 12, 2021), <https://fas.org/sgp/crs/misc/R46554.pdf>.

435. Robert W. Fairlie, *The Impact of COVID-19 On Small Business Owners: Evidence Of Early-Stage Losses From The April 2020 Current Population Survey*, NBER WORKING PAPER No.27309 (June 2020), https://www.nber.org/system/files/working_papers/w27309/w27309.pdf.

436. Paul Davidson, *Economy will return to pre-pandemic output level by mid-2021, sooner than expected, CBO predicts*, USA TODAY (Feb. 1, 2021), <https://www.usatoday.com/story/money/2021/02/01/unemployment-economy-return-pre-covid-level-mid-2021/4342660001/>.

437. See David Bradley Olsen & Eric Friske, *Contractual Obligations During the Coronavirus Pandemic: Avoidance, Enforcement, and Renegotiation*, HENSON EFRON (Mar. 30, 2020), <https://hensonefron.com/contractual-obligations-during-the-coronavirus-pandemic-avoidance-enforcement-and-renegotiation/> (offering that some businesses, although perhaps unaffected by direct pandemic government closures, lost their customer base).

438. See Treas. Reg. § 301.7701-1, -2, -3 (2021).

439. I.R.S. Form 990, *Return of Organization Exempt From Income Tax*, is the method by which non-profit organizations file their annual income tax returns. This article proposes that this form either be amended to include COVID-Company status, or a new I.R.S. form could be crafted to account for COVID-Companies electing to be treated as non-profit organizations.

restrictions, which include limits on private inurement,⁴⁴⁰ lobbying and political activities,⁴⁴¹ the commerciality doctrine,⁴⁴² the unrelated business tax,⁴⁴³ as well as the tax-exempt purpose requirement for COVID-Companies.⁴⁴⁴ Qualifying entities would then be required to convert into federal tax corporations, as sole proprietorships, partnerships, limited liabilities companies, and other pass-through entities that are generally not permitted to operate as tax-exempt.⁴⁴⁵

COVID-Company status should be restricted to businesses that fiscally suffered under the lockdowns. To qualify, Congress could use language similar to that of the CARES Act section 2301.⁴⁴⁶ Thus, eligible employers must have operated a business that was either fully or partially suspended because of governmental orders during 2020.⁴⁴⁷ Any businesses not forcibly locked down by government order, but which suffered significant economic hardship, should likewise qualify for COVID-Company status if they can demonstrate a significant decline in gross receipts.⁴⁴⁸ The CARES Act section 2301 establishes a bright line test to determine if an eligible employer has suffered a significant decline in gross receipts.⁴⁴⁹ For purposes of COVID-Company tax-exempt status, this Article suggests this test would suffice.

In addition, COVID-Company eligibility should be limited to small businesses, and tax-exempt status for qualifying entities should be granted

440. See I.R.C. § 501(c)(3) (“no part of the net earnings of which inures to the benefit of any private shareholder or individual”).

441. See *id.* See also I.R.C. § 501(h)(1) (“In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consist of carrying on propaganda, or otherwise attempting, to influence legislation...”).

442. See I.R.C. § 501(c)(3) (“no part of the [tax-exempt organization’s] net earnings of which inures to the benefit of any private shareholder or individual.”); I.R.C. § 501(c)(4)(b) (documenting that the tax-exempt organization’s primary activity cannot have “a direct counterpart in, or [be] conducted in the same manner as is the case in the realm of for-profit organizations.”)

443. See I.R.C. § 501(b).

444. Organizations under I.R.C. § 501(c)(3) must be both organized and operated exclusively for one or more exempt purposes described in subsection (3). The organizational test looks at the entity’s organizational documents, such as articles of incorporation, to insure it complies; the operational test looks to the entity’s activities to determine if its operations are consistent with its charitable purpose.

445. See I.R.C. § 501(c)(3). See also *Roche’s Beach, Inc. v. Comm’r*, 96 F.2d 776, 778 (2d Cir. 1938) (“To gain exemption.... The petitioner must be a corporation”). See also Alicia E. Plerhoples, *Nonprofit Displacement And The Pursuit Of Charity Through Public Benefit Corporations*, 21 LEWIS & CLARK L. REV. 525, 540 (2017).

446. CARES Act, *supra* note 31, at § 2301.

447. *Id.* at § 2301(c)(2)(A). Business that did not shut down, but which suffered a significant decline in gross receipts during this period, and tax-exempt organizations also qualify for this credit. *Id.* at § (c)(2)(B), (C).

448. *Id.* at § 2301(c)(2)(B).

449. *Id.* at § 2301(c)(2)(B)(i). A significant decline in gross receipts essentially entails comparing 2020’s quarterly gross receipts to 2019’s quarterly gross receipts. For a significant decline, the 2020 receipts must be less than 50% of the gross receipts from the same quarter in the prior year.

for a limited period that would allow these businesses the opportunity to regain economic footing, without relying indefinitely on government and private party funding. Limiting tax-exempt status to small businesses can be achieved by deploying an average gross receipts threshold, similar to the gross receipts test in Code section 448(c).⁴⁵⁰ “Gross receipts” includes sales net of returns and allowances, and any amounts received for services.⁴⁵¹ To be considered a small taxpayer, Code section 448(c) sets forth an average gross receipts test for a three year period, where a taxpayer’s receipts do not exceed \$25,000,000.⁴⁵² If and when a COVID-Company fails to satisfy the average gross receipts test, it would be required to revert back to its former for-profit status without penalty. COVID-Companies should also be given the option to voluntarily opt out of tax-exempt status at any time. The tax year for the COVID-Company non-profit would end in the year the business fails to pass the gross receipts test or the year of for-profit election.

For entities electing into COVID-Company tax-exempt status, donations made to them should likewise qualify for Code section 170 tax deductibility.⁴⁵³ While most COVID-Companies would arguably remain for-profit entities during their tax-exempt election period, it is unlikely that the “warm glow” effect associated with non-profit organizations would hinder third parties from donating to them.⁴⁵⁴ Already, the public is contributing to small businesses affected by the pandemic.⁴⁵⁵ The GoFundMe Small Business Relief Initiative has revolutionized the manner in which donors can give to businesses facing financial depletion.⁴⁵⁶ These public donations, even without accompanying tax benefits, demonstrate the broad social interest that outside parties have in preserving nonessential businesses. Tax-deductibility would further encourage third-party giving, while also incentivizing estate and gift tax level contributions, as well as corporate donations. Particularly, large-scale companies that profited from the lockdowns may be more

450. I.R.C. § 448(c) sets forth an average gross receipts test for corporations and partnerships.

451. Treas. Reg. § 1.448-1T(f)(2)(iv) (“Gross receipts” also include interest, original issue discount, tax-exempt interest, dividends, rents, royalties, and annuities).

452. I.R.C. § 448(c)(1). This \$25,000,000 threshold has been increased for inflation to \$26,000,000 or less for tax years beginning in 2021, 2020 and 2019. *See* Rev. Proc. 2020-45, I.R.B. 1016 (Oct. 26, 2020).

453. I.R.C. §§ 501(c)(3) & 170. In addition, an estate tax deduction should be permitted under I.R.C. § 2055, as well as a gift tax deduction under I.R.C. § 2522.

454. *See* Galle, *supra* note 371, at 1224-25 (regarding the typicality of “warm glow” effects associated with charitable organizations).

455. *See Help Small Businesses Affected by Coronavirus*, GOFUNDME, <https://www.gofundme.com/small-business-relief-fundraisers> (last visited Feb. 5, 2021) (GoFundMe currently has 17,802 active fundraisers requesting relief attributable to Covid-19).

456. *Id.*

incentivized to aid nonessential companies in getting back on their feet.⁴⁵⁷

Some may argue that bestowing tax-exempt status on COVID-Companies is unjust, as a direct affront to non-profit charitable organizations competing for the same funds.⁴⁵⁸ However, COVID-Companies were forcibly locked out of the free market economy, prohibited for a time from making any form of profit due to government mandates. Any competitive edge that might arise from COVID-Companies being granted tax-exempt status would balance the injustices of being forcibly closed at no fault of their own. Criticisms have been raised about non-profit entities engaging in for-profit activities, while simultaneously enjoying the benefits of tax-exempt status.⁴⁵⁹ Scholars Gail Lasprogata and Marya Cotton note that non-profits participate in for-profit activities because “they have been forced into the positions they are in by the harsh and unforgiving fiscal environment and the need for more capital to stay alive.”⁴⁶⁰ This is the same merciless landscape that COVID-Companies are now forced to endure; it is therefore justifiable that they be granted similar Congressional reprieve as non-profit organizations.

To the extent COVID-Companies compete with preexisting charitable organizations engaging in similar commercial activities, this Article maintains that such competition is a necessary evil. Like the rest of the United States economy, non-profit organizations need small businesses and their employees. In 2019, \$309.66 billion of all charitable giving, equating to 69 percent, was derived from individuals.⁴⁶¹ In comparison, charitable funding by corporations amounted to just \$21.09 billion.⁴⁶² With 20.6 million jobs in the United States lost at the onset of the pandemic,⁴⁶³ it is improbable that individual contributions to charitable organizations will remain sustainable without new job growth. Charitable organizations are feeling the impact of the profound unemployment

457. See I.R.C. § 170(a), (b)(2). See also Brock Blake, *Amazon: Small Business Friend or Foe*, FORBES (Sep. 23, 2019), <https://www.forbes.com/sites/brockblake/2019/09/23/amazon-friend-or-foe/?sh=6684e7267367> (noting that Amazon is increasing its “efforts to encourage small and medium-sized businesses to partner with the brand. The company recently announced it has launched 150 tools and services since the beginning of the year, all aimed at helping independent small and medium-sized businesses grow their online sales. Last year Amazon Storefronts launched to help customers shop exclusively from U.S.-based small businesses.”).

458. This argument already exists even within the realm of non-profit and for-profit sector enterprises. See Gail A. Lasprogata & Marya N. Cotton, *Contemplating “Enterprise”: The Business And Legal Challenges Of Social Entrepreneurship*, 41 AM. BUS. L. J. 67, 73 (2003).

459. *Id.*

460. *Id.*

461. *Charitable Giving Statistics*, NAT’L PHILANTHROPIC TR., <https://www.nptrust.org/philanthropic-resources/charitable-giving-statistics/> (last visited Feb. 5, 2021).

462. *Id.*

463. Stephanie Soucheray, *US job losses due to COVID-19 highest since Great Depression*, CIDRAP (May 8, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/05/us-job-losses-due-covid-19-highest-great-depression>.

created by the lockdowns.⁴⁶⁴ Allowing COVID-Companies the possibility of increased outside donations would give these injured businesses the opportunity to replenish their own commercial activities. Once economically revitalized, COVID-Companies will be in a position to resume sustainable gifting back to the non-profit sector that so heavily relies on individual contributions, thus helping to bring the United States economy back full circle.

IV. CONCLUSION

Following the first confirmed United States case of COVID-19,⁴⁶⁵ state governors issued orders directing residents to shelter in place, while forcing nonessential businesses to temporarily close.⁴⁶⁶ Only those ventures deemed essential were permitted to remain operational. For the first time in United States history, distinctions were made between essential and nonessential business operations, ultimately devastating the latter, while big-box retailers economically flourished.

To remedy the economic calamity facing nonessential businesses, proposals have been made to include challenging the constitutionality of state governors' actions under the Takings Clause⁴⁶⁷ and imposing an excess profits tax on COVID-profiting companies.⁴⁶⁸ While these proposals raise important issues that warrant closer examination, they are each flawed in that they fall short of addressing the magnitude of the economic problem and the technological shift in the United States economy.

Imposing an excess profits tax on COVID-profiting companies may appear desirable on the surface; however, such a premise contradicts historical United States tax policy, which restricts the use of the tax to actual wartime engagements against enemy combatants. In addition, imposing an excess profits tax fails to address the root issue surrounding economically devastated businesses—that governmental action was the cause of the financial downturn. Essential businesses are not responsible for the economic destruction of numerous small businesses; thus, targeting for-profit entities that legally increased their profits during state-mandated lockdowns digresses from the fact that it is the government that should bear the burden of rehabilitating those businesses that were

464. Coral Murphy, *Nonprofits face grim outlook as worried Americans cut back on donations during COVID-19 pandemic*, USA TODAY (October 14, 2020), <https://www.usatoday.com/story/money/2020/10/14/nonprofits-american-heart-association-struggle-donations-drop-during-covid/3635486001/>.

465. *See supra* Part I.A., B.

466. *See supra* Part I.C.

467. *See supra* Part II.A.

468. *See supra* Part II.C.

forcibly restricted from participating in commercial engagement. While alternative suggestions that injured businesses should file lawsuits against state governments alleging constitutional takings garner considerable merit, the ability of devastated businesses to now tackle expensive and lengthy litigation is improbable. Further, depleted budgets would restrict states' abilities to provide just compensation.

In an attempt to remedy economic concerns arising during the pandemic, Congress passed the CARES Act.⁴⁶⁹ However, the CARES Act, in conjunction with the more recent Tax Certainty and Disaster Tax Relief Act of 2020, does not adequately remedy nonessential businesses, as it fails to directly target economic recovery for the nonessentials. Instead, the tax legislation benefits both essential and nonessential businesses, resulting in exacerbated inequities. This is particularly concerning given that the government found such distinction crucial when determining which businesses to take profits from at the onset of the pandemic but markedly absent when determining how to alleviate the resulting financial harms.

This United States has a quasi-charitable responsibility to economically heal those businesses that ultimately bore the greatest incumbrance.⁴⁷⁰ No business or set of businesses should bear the financial public burden of a national health crisis alone. To address the novel social circumstances resulting from COVID-19, radical tax policy is needed.⁴⁷¹ This Article recommends that nonessential businesses be granted a complete "shield" from taxation in the form of temporary non-profit status.⁴⁷² To bring this proposal to fruition, this Article proposes that Congress loosen or eliminate Internal Revenue Code section 501(c) restrictions, restrict "COVID-Company" status to small business that fiscally suffered under the lockdowns, and be available for a limited period to allow qualifying entities the ability to regain economic footing without relying indefinitely on government and private party funding. In addition, this Article suggests that donations made to qualifying businesses be tax deductible, which would then invite a more holistic, national approach to salvaging the nonessential businesses.

469. *See supra* Part II.B.

470. *See supra* Part III.A.

471. *See supra* Part III.B.

472. *See supra* Part III C.