

# COURTS AND CIVIL JUSTICE IN THE TIME OF COVID: EMERGING TRENDS AND QUESTIONS TO ASK

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*COVID-19 is a highly infectious virus that has caused worldwide disruption, large numbers of deaths, and economic dislocation. Since its appearance in 2019, containment of COVID-19 has depended, in part, upon forms of social distancing that have strained and made impossible traditional forms of judicial and legal practice. This Article focuses on how state and federal courts in the United States so far have adapted to the COVID-19 pandemic. We argue that the judiciary's initial responses to COVID-19 were constrained by political decisions of the President and Congress that tended to magnify, rather than mitigate, some of the pandemic's worst effects. We further show that the ability of the judiciary to make a quick transition to virtual practice drew from the courts' experience with legal technology, investments in electronic infrastructure, changes in legal education, and flexible procedural rules. These emergency measures are testing the limits of what it means to be in court and to have one's day in court. By their nature, these measures do not address the extreme economic and racial inequalities that pre-existed but were exacerbated by political responses to the pandemic and that threaten the principle of equal justice*

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*under law. Whether these emergency judicial adaptations prove to be expedient and transient, or permanent and seismic, remains uncertain. We argue that the judiciary's response to the pandemic, although impressive, may not provide an appropriate blueprint for post-COVID court reforms.*

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#### INTRODUCTION

In 2018, Richard Marcus, an astute observer of civil procedure, reported “that those seeking procedural reform in the US are ‘treading water’—staying afloat but not moving very far.”<sup>1</sup> In part, reform efforts had stalled because proponents disagreed about why procedural change was needed.<sup>2</sup> Some critics pointed to a “justice gap” in the American legal system, citing the soaring numbers of pro se litigants with legal needs for whom civil justice was out of reach.<sup>3</sup> Others questioned the fairness of the rules of pleading and motion practice, citing an excessive emphasis on expedition to the detriment of democratic values,<sup>4</sup> countered by those who saw these rules as a source of cost

1. Richard Marcus, *Treading Water? Current Procedural Issues in America*, 23 ZZPINT 183 (2018) (UC Hastings Research Paper No. 371).

2. See Victor Marrero, *The Cost of Rules, The Rule of Costs*, 37 CARDOZO L. REV. 1599, 1608 (2016) (discussing the “many-sided blame game” in discussions of American litigation and the need for reform).

3. See LEGAL SERVICES CORPORATION, *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 9 (2017) (referring to a “justice gap” in the American legal system given unmet legal needs); see also Mark D. Gough & Emily S. Taylor Poppe, *(Un)changing Rates of Pro Se Litigation in Federal Court*, 45 LAW & SOC. INQUIRY 567, 584–85 (2020) (finding “no evidence of a dramatic increase in pro se litigation rates” in federal court, but reporting “consistently high rates of pro se litigation among some types of cases” in federal court and “very high rates” in some types of state court proceedings, such as family law cases); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1234, 1313 (2016) (discussing “disparities in racial and socioeconomic civil justice utilization”).

4. See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 296 (2013) (criticizing judicial trends that prevent cases from reaching the merits).

and delay that pushed litigants outside the court system to more informal means of redress.<sup>5</sup> The Black Lives Matter and #MeToo movements gave salience to overlooked concerns about racial, gender, and class bias in judicial proceedings,<sup>6</sup> while, in a different vein, some commentators decried a “litigation explosion” that in their view negatively affected firm value and dampened economic growth.<sup>7</sup> Still other critics urged widening the discussion of procedural reform to include not only the Article III courts, but also the state courts.<sup>8</sup> Overall, proponents of reform lacked a consensus about the nature of current problems, the values that ought to guide procedural change, or the importance of litigation as a democratic activity.

Almost three years later, the words “treading water” could describe the entire United States, as the country barely stays afloat amidst a global pandemic traced to the lethal effects of an airborne virus called COVID-19.<sup>9</sup> As of February 2021, the pandemic has left more than 500,000 Americans dead and infected more than 28 mil-

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5. See, e.g., Jon O. Newman, *The Current Challenge of Federal Court Reform*, 108 CALIF. L. REV. 905, 906 (2020) (expressing the view that “[b]y expanding opportunities to litigate a case with thoroughness to achieve fairness, we have unintentionally created a cumbersome process where cases languish before trial and subsequently crawl up the appellate ladder,” resulting in “delays and attendant escalating costs [that] drive many out of the federal court system and into arbitration or abandonment of claims”).

6. See Walter Johnson, *Ferguson’s Fortune 500 Company*, ATLANTIC (Apr. 26, 2015), [www.theatlantic.com/politics/archive/2015/04/fergusons-fortune-500-company/390492/](http://www.theatlantic.com/politics/archive/2015/04/fergusons-fortune-500-company/390492/) (“The familiar convention of the true-crime story turns out to be utterly inadequate for describing the social, economic, and legal subjection of black people in Ferguson, or anywhere in America.”); Helen Hershkoff & Elizabeth M. Schneider, *Sex, Trump, and Constitutional Change*, 34 CONST. COMMENT. 43, 45 (2019) (discussing the #MeToo movement and implicit gender bias in judicial decision making); see also Brooke D. Coleman, *#Sowhitemale: Federal Civil Rulemaking*, 113 NW. U. L. REV. ONLINE 52, 63–65 (2018) (discussing the disproportionate representation of white men on federal committees that undertake federal civil rulemaking); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1060 (2016) (discussing the disproportionate impact of corporate and business lawyers on federal civil rulemaking committees).

7. See, e.g., David S. Schwartz, *Judicial Capacity, Causation, and History: Next Steps for the Judicial Capacity Model*, 2020 WIS. L. REV. 195, 212 (2020) (explaining that “[i]t was in the 1980s that the Court began talking in terms of a litigation explosion, trimming back civil discovery procedures, embracing mandatory arbitration, and tightening standing rules, among other things”).

8. See, e.g., Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 WIS. L. REV. 249, 266–72 (2018) (discussing the insufficient study of state courts and state judges despite their importance to American civil justice).

9. Throughout this article, we refer to the same virus as “COVID-19” and “COVID.”

lion,<sup>10</sup> and a new virus strain has appeared that apparently is more infectious than its predecessor.<sup>11</sup> Moreover, the infection rates and death toll do not fully capture the severity of the pandemic's impact on the nation. At various points, the pandemic has pushed as many as fifteen percent of the population into unemployment, with 140,000 jobs lost in December 2020 alone;<sup>12</sup> placed another 40 million Americans at risk of eviction;<sup>13</sup> and compelled uncounted others to face extreme medical emergencies without health insurance or savings.<sup>14</sup> These harmful effects have not been evenly distributed during the pandemic: the fatality and infection rate among Black Americans is dis-

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10. *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)*, JHU CORONAVIRUS RESOURCE CENTER, <https://coronavirus.jhu.edu/map.html> (last visited Feb. 16, 2021).

11. See Robert Bollinger & Stuart Ray, *New Variants of Coronavirus: What You Should Know*, JOHNS HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/a-new-strain-of-coronavirus-what-you-should-know> (last visited Feb. 16, 2021) (explaining that although “mutations may enable the coronavirus to spread fast from person to person, and more infections can result in more people getting very sick, overall, there is not yet clear evidence that any of these variants are more likely to cause severe disease or death”).

12. See Ben Casselman, *The U.S. Lost 140,000 Jobs in December, The First Drop In Employment Since April, As The Economy Began to Backslide Amid a Resurgent Pandemic*, N.Y. TIMES (Jan. 8, 2021, 8:37 AM), [https://www.nytimes.com/live/2021/01/08/business/us-economy-coronavirus?campaign\\_id=60&emc=edit\\_na\\_20210108&instance\\_id=0&nl=breaking-news&ref=headline&regi\\_id=83638272&segment\\_id=48735#december-2020-jobs-report](https://www.nytimes.com/live/2021/01/08/business/us-economy-coronavirus?campaign_id=60&emc=edit_na_20210108&instance_id=0&nl=breaking-news&ref=headline&regi_id=83638272&segment_id=48735#december-2020-jobs-report); see also GENE FALK, JAMESON A. CARTER, ISAAC A. NICCHITTA, EMMA C. NYHOF & PAUL D. ROMERO, CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC: IN BRIEF 1 (2020) (reporting that in April 2020, “every state and the District of Columbia reached unemployment rates greater than their highest unemployment rates during the Great Depression”); Patricia Cohen, *Further Slowdown in Job Creation Sets off Economic Alarms*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/business/economy/november-jobs-report.html> (reporting 10 million fewer jobs in December 2020 than in February 2020); *How Coronavirus Created US Unemployment Crisis*, PHARM. TECH. (Dec. 4, 2020), <https://www.pharmaceutical-technology.com/special-focus/covid-19/how-coronavirus-created-us-unemployment-crisis/> (reporting that COVID has caused a 22% contraction in the U.S. workforce and “pushed nearly 4 million Americans out of the labour market”).

13. See Emily Benfer, David Bloom Robinson, Stacy Butler, Lavar Edmonds, Sam Gilman, Katherine Lucas McKay, Zach Neumann, Lisa Owens, Neil Steinkamp & Diane Yentel, *The COVID-19 Eviction Crisis: An Estimated 30–40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk>.

14. See Jessica Wapner, *Covid-19: Medical Expenses Leave Many Americans Deep in Debt*, BMJ (Aug. 14, 2020), <https://www.bmj.com/content/bmj/370/bmj.m3097.full.pdf>; see also PANDEMIC HUNGER CRISIS: SAFETY NET SOARS WHILE CHARITIES STRUGGLE, HUNGER FREE AMERICA: 2020 UNITED STATES HUNGER ATLAS 4 (2020) (reporting that, in 2017, one in five United States households “had zero or negative net worth, meaning they owed more than they earned,” and the pandemic has worsened their financial position).

proportionately higher than the rest of the United States population;<sup>15</sup> the net worth of America's 664 billionaires so far has increased by one trillion dollars, with their composite wealth of \$3.88 trillion almost twice that of the 165 million Americans who now comprise the bottom half of the economy.<sup>16</sup>

This Article focuses on the first year of the pandemic and how the state and federal courts have responded to COVID's extraordinary dislocation of traditional legal practice. The Article also raises questions about how the judiciary's emergency responses might affect future efforts at procedural reform. The pandemic's immediate impact on the courts resulted from COVID's mode of transmission: it spreads person-to-person through respiratory droplets that result from talking, coughing, sneezing, or wheezing, and is highly contagious.<sup>17</sup> Early in the emergency, the medical community emphasized that the first line of defense against COVID required individual discipline, institutional commitment, and community support: to stay at least six feet apart from other people while also wearing a face covering over the nose and throat; to quarantine if infected or exposed to an infected person; to wash hands regularly; and to clean surfaces and spaces after even casual contact.<sup>18</sup> Judicial systems quickly adapted their facilities in light of these guidelines, showing an impressive resolve to operate an essential service—a working system of civil justice—while protecting the health of judges, lawyers, witnesses, jurors, and court personnel.

State and federal courts have remained in operation by limiting physical contact both between personnel within the courthouse and with the world outside the courthouse—holding proceedings behind

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15. See *COVID-19 and The Disproportionate Impact on Black Americans, Q&A with Enrique Neblett*, UNIV. OF MICH. SCH. OF PUB. HEALTH (July 1, 2020), <https://sph.umich.edu/news/2020posts/covid-19-and-the-disproportionate-impact-on-black-americans.html>.

16. See Chuck Collins, *Updates: Billionaire Wealth, U.S. Job Losses and Pandemic Profiteers*, INEQUALITY.ORG (Dec. 9, 2020), <https://inequality.org/great-divide/updates-billionaire-pandemic>.

17. See *Modes of Transmission of Virus Causing COVID-19: Implications For IPC Precaution Recommendations*, WORLD HEALTH ORG. (Mar. 29, 2020), <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (“According to current evidence, COVID-19 virus is primarily transmitted between people through respiratory droplets and contact routes.”).

18. On face masks as an effective barrier in reducing the transmission of the coronavirus, see, for example, Jeremy Howard, Austin Huang, Zhiyuan Li, Zeynep Tufekci, Vladimir Zdimal, Helene-Mari van der Westhuizen, Arne von Delft, Amy Price, Lex Fridman, Lei-Han Tang, Viola Tang, Gregory L. Watson, Christina E. Bax, Reshama Shaikh, Frederik Questier, Danny Hernandez, Larry F. Chu, Christina M. Ramirez & Anne W. Rimoin, *An Evidence Review of Face Masks Against COVID-19*, 118 PROC. NAT'L ACAD. SCI. U.S.A. 1 (Jan. 2021).

plexiglass screens, electronically, by telephone, or not at all.<sup>19</sup> These judicial measures, taken in response to medical guidelines, have jump-started extraordinary changes in court process. In the short term, these changes have profoundly affected professional practice, testing the limits of what it means to have “one’s day in court” especially when the courts are physically closed to the public.<sup>20</sup> As pragmatic accommodations required by the moment, these measures reflected the judiciary’s significant resource constraints and the pandemic’s indefinite horizon. Whether these changes will prove to be expedient and transient, or permanent and seismic, remains uncertain. Any assessment of their long-term potential as a basis for reform necessarily remains tentative, not only because the health crisis is dynamic, but also because in the aftermath of COVID, the public may be motivated to seek more foundational procedural change.

In particular, the pandemic has exposed fissures in American society that dramatically affect not only the perceptions of civil justice, but also civil justice itself. To be sure, the pandemic’s overall effects have been catastrophic for the economy and social life. However, its harshest consequences have been differentially distributed in ways that key to class and race.<sup>21</sup> Black Americans have died at three times the rate of white Americans;<sup>22</sup> those who are homeless or underhoused cannot socially distance or shelter at home and have been at greater risk of exposure;<sup>23</sup> and those who depend on food pantries and soup

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19. See *infra* Part III.

20. See generally Miller, *supra* note 4.

21. The disparate effects of COVID parallel those that are now recognized to have accompanied the 1918 influenza pandemic. See Lakshmi Krishnan, S. Michelle Ogunwole & Lisa A. Cooper, *Historical Insights on Coronavirus Disease 2019 (COVID-19), The 1918 Influenza Pandemic, and Racial Disparities: Illuminating A Path Forward*, 173 ANNALS INTERN. MED. 474, 474 (2020) (“The coronavirus disease 2019 (COVID-19) pandemic is exacting a disproportionate toll on ethnic minority communities and magnifying existing disparities in health care access and treatment.”).

22. On death rates of Black and Brown Americans, see Ishena Robinson, *CDC’s New Numbers Show Black Americans and Other People of Color Dying at Higher Rates From COVID-19 Than It Previously Reported*, ROOT (Dec. 5, 2020, 2:30 PM), <https://www.theroot.com/cdc-acknowledges-black-and-latino-americans-dying-at-higher-rates> (reporting that Black Americans are dying at three times the rate of white Americans); see also, e.g., Rong-Gong Lin II, Andrew J. Campa & Luke Money, *In Alarming Shift, Latinos Getting Coronavirus At More Than Double Rate of Whites in L.A. County*, L.A. TIMES (Dec. 8, 2020, 9:17 AM), <https://www.latimes.com/california/story/2020-12-08/latinos-getting-covid-19-double-rate-whites-la>.

23. See Eliza Griswold, *How Do You Shelter In Place When You Don’t Have A Home?*, NEW YORKER (Mar. 26, 2020), <https://www.newyorker.com/news/dispatch/how-do-you-shelter-in-place-when-you-dont-have-a-home> (reporting that people who are homeless “are ten times more susceptible to COVID-19, by the fact they have nowhere to go and to clean themselves”).

kitchens have faced a greater threat of food insecurity and infection.<sup>24</sup> Further, the pandemic has coincided with widely publicized videos of police causing the brutal deaths of Black Americans; the public has responded by focusing greater attention on racial inequalities that implicate both law and the courts.<sup>25</sup> Indeed, commentators now refer to COVID and racism as the country's "two deadly viruses,"<sup>26</sup> as "dual pandemics,"<sup>27</sup> and as "twin pandemics."<sup>28</sup> The judicial system's emergency responses to COVID by necessity did not address this systemic problem, which before the pandemic we would say was hiding in plain sight and very much in need of redress.<sup>29</sup> A year into the health crisis,

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24. See generally *Considerations for Food Pantries and Food Distribution Sites*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/food-pantries.html> (last visited Feb. 16, 2020) (discussing risks of food insecurity with unemployment and off-site schooling, and risks of exposure at food distribution sites unless precautions are taken). On the rise of food insecurity during the pandemic, see Diane Schanzenbach & Abigail Pitts, *Food Insecurity Remains Elevated Across All 50 States*, NW. INST. POL'Y RSCH. (June 10, 2020), <https://www.ipr.northwestern.edu/news/2020/schanzenbach-household-pulse-survey-analysis-report-2.html> (reporting that overall food insecurity has doubled during the pandemic and child food insecurity has tripled).

25. Sheryl Gay Stolberg, "Pandemic Within a Pandemic": Coronavirus and Police Brutality Roil Black Communities, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/politics/blacks-coronavirus-police-brutality.html> (reporting the death of George Floyd when suffocated by a white police officer during a routine stop, and a Black organizer who stated, "I'm just as likely to die from a cop as I am from Covid").

26. Lisette Voytko, *America's 'Two Deadly Viruses'—Racism And Covid-19—Go Viral Among Outraged Twitter Users*, FORBES (May 31, 2020, 4:00 PM), <https://www.forbes.com/sites/lisettevoytko/2020/05/31/americas-two-deadly-virusesracism-and-covid-19-go-viral-among-outraged-twitter-users> (reporting that the CNN headline "Two Deadly Virus Are Killing Americans: Covid-19 and Racism" posted to Twitter on May 27, 2020 had been shared more than 870,000 times by May 31); see also *George Floyd: 'Pandemic of Racism' Led to His Death, Memorial Told*, BBC NEWS (June 4, 2020), <https://www.bbc.com/news/world-us-canada-52928304> (discussing briefly how Floyd's death both followed after, and forces reflection upon, previous cases of police violence); Shawn Hubler & Julie Bosman, *A Crisis That Began With An Image Of Police Violence Keeps Providing More*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html> ("A protest movement that was ignited by a horrific video of police violence — a white police officer pressing his knee against the neck of George Floyd, a black man, for nearly nine minutes — has now prompted hundreds of other incidents and videos documenting violent tactics by police.").

27. Nick Blumberg, *Black Fathers Face "Dual Pandemics" of Coronavirus, Racial Violence*, WTTW NEWS (June 18, 2020, 5:26 PM), <https://news.wttw.com/2020/06/18/black-fathers-face-dual-pandemics-coronavirus-racial-violence>.

28. Jack Drescher, Sue Kolod & Wylie Tene, *The Twin Pandemics of Racism and COVID-19*, PSYCH. TODAY (June 16, 2020), <https://www.psychologytoday.com/us/blog/psychoanalysis-unplugged/202006/the-twin-pandemics-racism-and-covid-19>.

29. *George Floyd: 'Pandemic of Racism' Led to His Death, Memorial Told*, *supra* note 26; see also Hubler & Bosman, *supra* note 26.

taking stock of the judicial response to COVID seems essential, if only to ensure that makeshift procedural changes do not become a new status quo that heightens rather than removes barriers to the fair, equal, and effective provision of civil justice in the United States.

Our starting premise resists treating the pandemic as a natural event that runs according to its own rules and conventions. The public frequently talks about the pandemic as moving in waves,<sup>30</sup> but the pandemic—or any public health crisis—is not an ocean with tides that rise and fall as predicted by the Farmer’s Almanac. The naturalistic metaphor ignores the ways in which a pandemic, in intensity and duration, responds to human interventions, institutional structures, and ideological priorities. To borrow from David Runciman, writing in April 2020 at an early point in the pandemic, “[t]he contingencies of politics are the contingencies of the disease; the contingencies of the disease are the contingencies of politics.”<sup>31</sup> COVID’s surges in infection rates and deaths were not and are not foreordained, but rather reflect, significantly, even if not entirely, responses to political decisions and individual conduct on such matters as whether persons take advised precautions, whether communities provide food and shelter for those who have neither, whether hospitals are stocked with essential human and medical resources, and whether and how the government supports development and distribution of a vaccine. In this sense, we analogize the pandemic to a famine, which Amartya Sen famously theorized as resulting not from crop failure or insufficient food supplies, but rather from institutional and legal decisions that, when based upon existing food entitlements, increase the likelihood of starvation by those who lack those entitlements.<sup>32</sup> That the pandemic has had a disproportion-

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30. See Abram L. Wagner, *What Makes A “Wave” of Disease? An Epidemiologist Explains*, CONVERSATION, <https://theconversation.com/what-makes-a-wave-of-disease-an-epidemiologist-explains-141573> (last visited Feb. 16, 2021) (explaining that use of the word “wave” is a way for the public “to make sense of what’s happening” during the pandemic); see also Lisa Lockerd Maragakis, *Coronavirus Second Wave? Why Cases Increase*, JOHNS HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus> (last updated Nov. 17, 2020) (discussing wave patterns associated with other virus pandemics).

31. David Runciman, *Too Early or Too Late?*, 42 LONDON REV. BOOKS 7, 9 (Apr. 2, 2020).

32. See AMARTYA SEN, *POVERTY AND FAMINE: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1981); see also Amartya Sen, *Ingredients of Famine Analysis: Availability and Entitlements*, 96 Q. J. ECON. 433, 462 (1981) (explaining that “law stands between food availability and food entitlement, and famine deaths can reflect legality with a vengeance”). Sen applied an “entitlement approach” that “concentrates on the ability of people to command food through the *legal means* available in [a particular] society (including the use of production possibilities, trade opportunities, entitlements

ately negative effect on Black, Brown, and poor communities, and that the Trump Administration's responses to COVID have exacerbated both wealth and racial inequalities is consistent with this theory. Our framing of the problem thus also draws indirectly from the work of Paul Farmer and others who have urged that the study of infectious diseases pay attention to the role of social inequalities in the dynamics of public health, and the way in which pre-existing inequalities shape decisions affecting funding, investigation, and policies.<sup>33</sup>

Consistent with this approach, we explore the impact of the White House as a constraint on the judiciary's initial responses to COVID. In our view, early containment of the COVID crisis required national leadership, national coordination, and national resources, which neither the White House nor Congress provided during the pandemic's critical first months or during the infection surge that coincided with the 2020 post-Presidential election holiday season.<sup>34</sup> In particular, President Trump failed to anticipate the crisis, failed to plan for the crisis, and failed to respond to the crisis even as its potentially deadly magnitude became clear. Before taking office, the Trump White House disdained participating in the usual transition activities of a new administration, failing to lay the groundwork for a proactive approach to COVID before it became a pandemic. Then, as the President became embroiled in the first of his two impeachment proceedings, he insisted in his tweets and public messaging that the virus was a hoax created by his enemies for partisan advantage and that it would

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vis-à-vis the state, etc)." *Id.* at 433. In a blog post for the American Philosophical Association titled "Crisis, COVID-19, and Democracy," Georgetown professor Olúfẹ̀mí O. Táíwò described the "historic debate about the relationship of famine to colonialism and democracy" and argued that COVID-19 presents a "political" "danger[ ]" and that the crisis's "size, scope, and longevity . . . will be largely decided by the institutional responses to these challenges and the power dynamics that structure them." Olúfẹ̀mí O. Táíwò, *Crisis, COVID-19, and Democracy*, BLOG AM. PHIL. ASS'N (June 2, 2020), <https://blog.apaonline.org/2020/06/02/crisis-covid-19-and-democracy>.

33. See, e.g., Paul Farmer, *Social Inequalities and Emerging Infectious Diseases, Perspectives*, 2 EMERGING INFECTIOUS DISEASES 259, 267 (1996) (emphasizing the need to recognize the importance of "social inequalities . . . in the contours of past disease emergence").

34. See *U.S. COVID-19 Holiday Wave Slowing*, YAHOO! NEWS (Jan. 28, 2021), <https://news.yahoo.com/u-covid-19-holiday-wave-051149180.html> (describing loosening restrictions as cases declined after a surge over the 2020 winter holidays); see also Jonathan Levin, *Latest Covid Surge Appears to Flame Out Even in Worst Hot Spots*, BLOOMBERG (Jan. 29, 2021, 2:13 PM), <https://www.bloomberg.com/news/articles/2021-01-29/latest-covid-surge-appears-to-flame-out-even-in-worst-hot-spots> ("Even in the most devastated U.S. counties, the latest Covid-19 surge is receding, buying authorities time as they attempt to vaccinate about 330 million people.").

“disappear” through miracle or magic.<sup>35</sup> Remarkably, the White House ridiculed medical guidelines,<sup>36</sup> encouraged the President’s supporters to defy social distancing mandates,<sup>37</sup> and held political rallies where individuals wore no masks and that are estimated to have put thousands of people at risk.<sup>38</sup> As infection and death rates rose, the President offered the nation no meaningful plan for containment, but rather a racialized paradigm of the disease, calling it the “China virus” and suggesting that Black and Brown Americans—at the time hardest hit by COVID because of prior social, economic, and health conditions—were drivers of the virus due to genetic inferiority and personal irresponsibility.<sup>39</sup>

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35. See Daniel Wolfe & Daniel Dale, “It’s Going to Disappear”: A Timeline of Trump’s Claims That Covid-19 Will Vanish, CNN (Oct. 31, 2020), <https://www.cnn.com/interactive/2020/10/politics/covid-disappearing-trump-comment-tracker/> (noting that Trump stated, among other things, “One day—it’s like a miracle—it will disappear.”).

36. See Christina Pazzanese, *Calculating Possible Fallout of Trump’s Dismissal of Face Masks*, HARV. GAZETTE (Oct. 27, 2020), <https://news.harvard.edu/gazette/story/2020/10/possible-fallout-from-trumps-dismissal-of-face-masks/> (discussing public health effects of President Trump’s “cavalier attitude toward key public health measures”); see also Paulina Villegas, *Trump Supporters Gathered in D.C. Dismiss Outdoor Mask Mandate*, WASH. POST (Jan. 5, 2021, 5:23 PM), <https://www.washingtonpost.com/nation/2021/01/05/coronavirus-covid-live-updates-us/#link-72DHHBIQVVC5HJ4UPEIGMO5IXY> (reporting that “maskless Trump supporters” protesting the Electoral College vote “gathered in D.C. . . . at a rally where some speakers made inflammatory speeches dismissing the severity of the pandemic”).

37. See, e.g., Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html> (“President Trump on Friday openly encouraged right-wing protests of social distancing restrictions in states with stay-at-home orders, a day after announcing guidelines for how the nation’s governors should carry out an orderly reopening of their communities on their own timetables.”).

38. See, e.g., B. Douglas Bernheim, Zach Freitas-Groff, Nina Buchmann & Sebastián Otero, *The Effects of Large Group Meetings on the Spread of COVID-19: The Case of Trump Rallies* (Stan. Inst. Econ. Pol’y Rsch. Working Paper No. 20-043, 2020), <https://siepr.stanford.edu/sites/default/files/publications/20-043.pdf> (concluding that President Trump’s 18 rallies “ultimately resulted in more than 30,000 incremental confirmed cases of COVID-19” and “likely led to more than 700 deaths (not necessarily among attendees)”).

39. See, e.g., Andrew Restuccia, *White House Defends Trump Comments on ‘Kung Flu,’ Coronavirus Testing*, WALL ST. J. (June 22, 2020, 8:04 PM), <https://www.wsj.com/articles/white-house-defends-trump-comments-on-kung-flu-coronavirus-testing-11592867688>; Sean Collins, *The Trump Administration Blames COVID-19 Black Mortality Rates On Poor Health. It Should Blame Its Policies*, VOX (Apr. 8, 2020, 4:26 PM), <https://www.vox.com/policy-and-politics/2020/4/8/21213383/coronavirus-black-americans-trump-administration-high-covid-19-death-rate>.

When President Trump at last supported a national COVID policy, his approach fully exemplified Sen's theory of famine as applied to pandemics: it relied upon existing entitlement structures that reinforced racial, class, and geographic distinctions and justified the withholding of assistance from states, localities, and individuals that faced the greatest health dangers. In particular, states and localities, traditionally the front-line providers of public health services in the United States, found themselves ill-equipped to plan for or to respond to virus-related social and economic dislocation, and were effectively abandoned and disparaged by the President. The intensity and duration of COVID—and the country's initial failure to distribute vaccines quickly and safely to the population—reflected in large part President Trump's inaction and misguided action, as he not only refused to take steps to contain and mitigate the crisis, but also irresponsibly continued to characterize the pandemic as “fake” and then simply ignored the crisis as he tried to overturn the election of his opponent as President.<sup>40</sup>

In Part I, we discuss the Trump Administration's inadequate response to the crisis—a response marked by what the Brookings Institution later called “massive failures”<sup>41</sup>—in which the White House denied the existence of the problem, delayed the development of a coherent containment policy, and deprived states and localities of critical resources. These failures generated a domino effect of problems outside the courthouse that indirectly affected the courts and provide the context for assessing and appreciating the judiciary's emergency responses taken in their wake. Although Congress eventually adopted massive legislation intended as an economic stimulus package, those funds failed to reach cities with the highest level of need, were withheld from Black-owned small businesses, and all-but dried up by late 2020.

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40. See, e.g., Morgan Gstalter, *Nevada Governor: “Unconscionable” For Trump To Suggest Reno's COVID-19 Surge Unit “Fake,”* HILL (Dec. 1, 2020, 3:06 PM), <https://thehill.com/homenews/state-watch/528203-nevada-governor-unconscionable-for-trump-to-suggest-renos-covid-19-surge>.

41. Philip A. Wallach & Justus Myers, *The Federal Government's Coronavirus Response—Public Health Timeline*, BROOKINGS (Mar. 31, 2020), <https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes/> (“[I]t is obvious to everyone seeking to understand the United States' response to the novel coronavirus (officially SARS-CoV-2) that there were massive failures to judgment and inaction.”); see also Greg Myre, *With Trump's Coronavirus Response, U.S. Forfeits Global Leadership Role*, NPR (April 30, 2020, 5:01 AM), <https://www.npr.org/2020/04/30/848179346/pandemic-fuels-debate-trumps-america-first-or-u-s-global-leadership>.

Part II shifts from the political branches to the state and federal courts, chronicling judicial efforts to continue providing an essential service—justice—while taking account of public health needs and constrained resources. Drawing from federal and state examples, we sketch the sequence and content of judicial responses to the pandemic and their reliance on elements of electronic practice to keep the courts open for civil matters on a remote basis. Our examples are illustrative and not intended to be comprehensive. In contrast to the White House, the courts worked quickly to devise emergency responses—we do not call them reforms—that by necessity were makeshift, but nevertheless impressive in their regard for collective decision making, public transparency, and reliance on medical expertise.

In Part III, we show how the judiciary's quick transition from traditional to virtual practice was facilitated by the courts' prior experience with technology, investments in electronic infrastructure, changes in legal education, and earlier amendments to procedural rules. Above all, the various judiciaries—unlike the White House—were willing to take responsibility, to assume accountability, and to look to best practices in their efforts to ensure that the civil process continued to be available to the American people. Although twentieth century civil procedure has tended to take a trans-substantive approach to litigation, the COVID crisis motivated courts to set case-specific priorities and to adapt court rules and practices for different kinds of cases and litigants—one size did not fit all.

Part IV turns to legal challenges brought by Black, Brown, and poor Americans whose lives were being brutally impacted by COVID. In particular, we examine lawsuits brought by voters who were blocked from casting absentee ballots; immigrants who were inhibited from seeking health care because of Executive policy; women who were obstructed from exercising reproductive choice because of state restrictions; and prison inmates who were prevented from accessing basic hygiene items such as soap as a safeguard against infection. Throughout the health crisis, the judiciary, recognizing that the pandemic presented life-threatening circumstances, devised responses in light of medical expertise to ensure the safety and health of those who worked or practiced in the courthouse. Yet in the cases we examine, the Supreme Court of the United States seemed to accord only limited deference to medical expertise, and instead withheld legal protection that left plaintiffs exposed to COVID's potentially fatal effects.

Part V takes stock and looks forward, focusing on the short-term impact of COVID on the courts and legal process, and sketching possible long-term consequences and principles to guide reform. The

courts built their emergency responses to COVID upon the nation's existing entitlement structure and did not seek to mitigate or eliminate resource gaps among litigants that negatively affect the delivery of civil justice. The pandemic has widened these gaps and made some of them more salient for policymakers. The after-effects of COVID will demand attention long after the pandemic has ended and the final death toll is known. But we emphasize: The deaths and disruption that resulted from the pandemic did not follow a fixed and preordained path, but rather were shaped and exacerbated by legal and institutional responses. During the pandemic and its aftermath, the courts undoubtedly will play a role in addressing some of these problems. However, problems that existed in the court system prior to the pandemic continue to need repair and reform, and there is no assurance that the courts' emergency response to COVID will prove to be the appropriate one for a post-COVID society.

## I.

### COVID-19 AND THE EXECUTIVE BRANCH RESPONSE

COVID-19 is a novel and highly contagious airborne virus that by the end of November 2020—a year after its first reported appearance in Wuhan, China<sup>42</sup>—had caused more than 1.53 million deaths worldwide.<sup>43</sup> In the United States, more residents as of that date had died of COVID than from five of the nation's major twentieth century military conflicts: World War I, Korea, Viet Nam, Afghanistan, and Iraq.<sup>44</sup> The United States apparently became aware of the virus a

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42. See Lixia Wang, Beibei Yan & Vigdis Boasson, *A National Fight Against COVID-19: Lessons and Experiences From China*, *AUSTL. & N.Z. J. PUB. HEALTH* (2020), <https://onlinelibrary.wiley.com/doi/10.1111/1753-6405.13042> (“The first suspected case was recognised in Wuhan Jinyintan hospital on 1 December 2019, according to an epidemiological review in the academic journal *Lancet*.”).

43. See *COVID-19 Coronavirus Pandemic*, *WORLDMETER*, <https://www.worldometers.info/coronavirus> (last visited Feb. 15, 2021) (reporting 1,533,653 deaths and 66,820,108 cases worldwide).

44. Matthew Brown, *Fact Check: Coronavirus Deaths Surpass Combined Battle Fatalities In Several US Wars*, *USA TODAY* (July 30, 2020, 7:11 PM), <https://www.usatoday.com/story/news/factcheck/2020/07/30/fact-check-us-covid-19-deaths-surpass-combat-fatalities-many-wars/5535450002/>; see also Gillian Brockell, *250,000 Lives Lost: How The Pandemic Compares To Other Deadly Events In U.S. History*, *WASH. POST* (Nov. 19, 2020, 1:35 PM), <https://www.washingtonpost.com/history/2020/11/19/ranking-covid-deaths-american-history>. Until the early twentieth century, fatalities from disease tended to outpace those from warfare. Nicole Jordan, a historian of the Third Reich, has chronicled a pattern which extends from the Thirty Years War (1618–48) until the Russo-Japanese War (1904–05), in which for the first time more soldiers died in combat than from disease. The American Civil War, fought without knowledge of the germ theory, conforms to this pattern. She also emphasized the “close, historical connection between epidemics and atrocity,” emphasizing the

month after its initial outbreak, and by January 2020, the President's Daily Brief had begun to include warnings about COVID's potentially cataclysmic impact.<sup>45</sup> That same month, the United States announced its first confirmed case, coinciding with the Chinese government's formal acknowledgment of virus-related deaths and the enforced quarantine of the eleven million residents of Wuhan. Around this time, medical experts began to recognize that asymptomatic carriers of the virus could infect others by human-to-human transmission.<sup>46</sup> Outside of the United States, nations began working briskly to try to contain the virus through such measures as mandatory or recommended quarantines and other forms of "social distancing," government acquisition of protective personal and medical resources (such as nose-and-mouth coverings) for health-care workers, investment in medical research, and the announcement (and in some countries a mandate) of safety protocols (such as the wearing of masks in public spaces).<sup>47</sup>

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fact that "disease engenders profound spiritual and political transformations, but is often preceded by and sometimes conducive to atrocity." In particular, Jordan argues that racialized concepts of medicine and disease provided an important but overlooked trigger for the Third Reich's "Final Solution." E-mail from Nicole Jordan, Assoc. Professor of Hist., Univ. of Illinois at Chicago, to authors (Feb. 3, 2021) (on file with the authors); quotations from Nicole Jordan, *War & Atrocity in the Balkans: Delousing ("Entlausungsanstalten")*, Part I (unpublished manuscript) (on file with the authors).

45. Information in this paragraph is largely drawn from Ryan Goodman & Danielle Schulkin, *Timeline of the Coronavirus Pandemic and U.S. Response*, JUST SECURITY (Nov. 3, 2020), <https://www.justsecurity.org/69650/timeline-of-the-coronavirus-pandemic-and-u-s-response/>.

46. See John Bacon, *5 US Coronavirus Cases Now Confirmed; Infection Can Spread Before Symptoms Show*, USA TODAY (Jan. 26, 2020, 9:16 AM), <https://www.usatoday.com/story/news/nation/2020/01/26/coronavirus-third-us-patient-diagnosed-california/4580804002/>.

47. See Roosa Tikkanen, Gabriella N. Abouafia & Reginald D. Williams II, *How The U.S. Compares To Other Countries In Responding To COVID-19: Populations At Risk, Health System Capacity, and Affordability of Care*, COMMONWEALTH FUND (April 7, 2020), <https://www.commonwealthfund.org/blog/2020/how-us-compares-other-countries-responding-covid-19-populations-risk-health-system>; see also Max Matza, *Coronavirus: Could The US Do What Italy Has Done?*, BBC NEWS (Mar. 11, 2020), <https://www.bbc.com/news/world-us-canada-51804664>. Through June 2020, European countries showed greater success than the United States in containing the pandemic. See, e.g., David Leonhardt, *Europe vs. The U.S.*, N.Y. TIMES: THE MORNING (June 17, 2020), <https://www.nytimes.com/2020/06/17/briefing/dexamethasone-india-china-john-bolton-your-wednesday-briefing.html> (noting the declining average deaths in Western Europe compared to the United States and crediting European nations with "us[ing] a combination of lockdowns, public health guidance, tests and contact tracing to beat back the virus"); Jason Douglas & Dasl Yoon, *As Countries Reopen, Many Avoid A Second Wave Of Covid-19 Cases—So Far*, WALL ST. J. (June 8, 2020, 5:20 PM), <https://www.wsj.com/articles/as-countries-reopen-many-avoid-a-second-wave-of-covid-19-cases-so-far-11591638007> (describing falling infection rates in Europe and Asia). During the summer, however, the infection rate in Europe

The United States, however, was slow to develop anything that could be called a national, coordinated response or even to accord significance to the virus.<sup>48</sup> Several factors were in play. Notoriously, the President—battling impeachment since December 2019<sup>49</sup>—treated COVID as a public relations stunt, dismissing medical warnings as fake news that he claimed had been concocted by opponents in the Democratic Party.<sup>50</sup> We emphasize, however, that even before COVID emerged, the White House had embraced policies that seriously undermined the country's preparedness for dealing with a pandemic.<sup>51</sup> These included a regulatory assault on scientific research,

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surged, as countries accelerated their economies' "reopening" and failed to implement contact-tracing systems. See Max Colchester & Jason Douglas, *How Europe's Fight Against Covid-19 Went Awry Over the Summer*, WALL ST. J. (Oct. 24, 2020, 5:48 AM), <https://www.wsj.com/articles/how-europes-fight-against-covid-19-went-awry-over-the-summer-11603531801> ("With the virus suppressed following months of intensive social restrictions last spring, European leaders quickly moved to accelerate the reopening of society to try to spur an economic recovery. But pockets of infection persisted, and few countries had put in place adequate systems to track and lock down local outbreaks. Making matters worse, in several regions infection rates never fell to a level where such systems could work effectively."). By contrast, countries in Asia kept infection rates down through consistent communications with residents and enforcement of social distancing protocols, testing, and contact tracing. See Tara John, *The West Is Being Left Behind As It Squanders Covid-19 Lessons From Asia-Pacific*, CNN (Oct. 13, 2020, 6:01 AM), <https://www.cnn.com/2020/10/12/europe/coronavirus-asia-pacific-west-intl/index.html> (describing Asia and Oceania's effective responses to the virus and correspondingly lower cases).

48. The national response could serve as an updated case study for Jared Diamond's *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED*. JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (Penguin Books rev. ed. 2011). Diamond identified four categories of factors that contribute to failures in group decision making: "failure to anticipate a problem"; "failure to perceive" a problem; "failure even to try to solve" a problem; and failure to solve the problem even with some effort. *Id.* at 421. In our view, the Trump Administration and Republican Congress manifested each of these failures.

49. The President later defended his inaction by stating that impeachment had "distracted" him from formulating policy. See David Jackson, *Trump Says Impeachment 'Probably' Distracted Him From Fighting Coronavirus*, USA TODAY (Mar. 31, 2020, 8:31 PM), <https://www.usatoday.com/story/news/politics/2020/03/31/coronavirus-trump-says-impeachment-distracted-him-coronavirus/5100694002/>. But see BOB WOODWARD, *RAGE* (2020) (revealing recordings of conversations with the President in which Trump admitted that even prior to the first American death he knew that COVID was "deadly stuff," but sought to diminish the importance of the crisis); see also *Trump Deliberately Played Down Virus, Woodward Book Says*, BBC (Sept. 10, 2020), <https://www.bbc.com/news/world-us-canada-54094559>.

50. See Maggie Haberman & Noah Weiland, *Inside the Coronavirus Response: A Case Study in the White House Under Trump*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/us/politics/kushner-trump-coronavirus.html>; see also Tracy Connor, *Trump: Democrats' Coronavirus Criticism a 'New Hoax,'* DAILY BEAST (Feb. 28, 2020, 9:07 PM), <https://www.thedailybeast.com/trump-calls-democrats-coronavirus-criticism-a-new-hoax> [<https://perma.cc/Q299-5BY9>].

51. See Goodman & Schulkin, *supra* note 45.

exemplified by the 2017 ban on the use of the terms “evidence-based” and “science-based” by the Centers for Disease Control (“CDC”);<sup>52</sup> the refusal to acknowledge or implement the so-called pandemic “playbook”—the National Security Council’s 2016 guidebook for “coordinating a complex United States Government response to a high-consequence emerging disease threat anywhere in the world”;<sup>53</sup> the elimination of \$1.35 billion in funding for the Prevention and Public Health Fund at the CDC,<sup>54</sup> on top of earlier budget cuts that reduced the government’s ability to protect against medical supply shortages;<sup>55</sup> the belittling and abandonment of the World Health Or-

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52. Jon Cohen, *CDC Word Ban? The Fight Over Seven Health-Related Words in the President’s Next Budget*, SCIENCE (Dec. 18, 2017, 2:40 PM), <https://www.sciencemag.org/news/2017/12/fight-over-seven-health-related-words-president-s-next-budget>.

53. Office of the President, *Playbook for Early Response to High-Consequence Emerging Infectious Disease Threats and Biological Incidents*, <https://assets.documentcloud.org/documents/6819268/Pandemic-Playbook.pdf> (marked “Not for Public Distribution”). A link to the document appeared in a tweet by Ronald Klain, who coordinated the Obama Administration’s response to Ebola, following Senator Mitch McConnell’s statement that the Trump Administration received no guidance about pandemics from the former Executive. See Victoria Knight, *Evidence Shows Obama Team Left a Pandemic ‘Game Plan’ for Trump Administration*, KAISER HEALTH NEWS (May 15, 2020), <https://khn.org/news/evidence-shows-obama-team-left-a-pandemic-game-plan-for-trump-administration/view/republish/>; Abigail Tracy, *How Trump Gutted Obama’s Pandemic-Preparedness Systems*, VANITY FAIR (May 1, 2020), <https://www.vanityfair.com/news/2020/05/trump-obama-coronavirus-pandemic-response>; see generally MICHAEL LEWIS, *THE FIFTH RISK: UNDOING DEMOCRACY* (2019) (discussing the Trump Administration’s refusal to participate in conventional transition activities and the adverse effects of that decision on high-risk events such as a pandemic).

54. Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2020); see Katie Keith, *New Budget Bill Eliminates IPAB, Cuts Prevention Fund, and Delays DSH Payment Cuts*, HEALTH AFFAIRS: FOLLOWING THE ACA (Feb. 9, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180209.194373/full/> (“Public health advocates and state and local officials have repeatedly raised concerns that cuts to the PPHF have significant negative effects on public health preparedness, the public health workforce, and core health programs that keep Americans safe and healthy.”).

55. See Yeganeth Torbati & Isaac Arnsdorf, *How Tea Party Budget Battles Left the National Emergency Medical Stockpile Unprepared for Coronavirus*, PROPUBLICA (Apr. 3, 2020, 10:42 AM), <https://www.propublica.org/article/us-emergency-medical-stockpile-funding-unprepared-coronavirus>.

ganization;<sup>56</sup> and the elimination of a federal public health position specifically designed to detect disease outbreaks in China.<sup>57</sup>

With grim effects, and at multiple stages in the outbreak, the Executive failed to invoke regulatory powers or to take emergency action that might have contained or at least curtailed the developing crisis.<sup>58</sup> Given the usual allocation of authority for social services in the United States, the states were the natural front-line defenders against COVID; of the more than 6,000 hospitals in the country, only about 200 are federal.<sup>59</sup> However, various federal institutions exist to deal with national emergencies that cross state boundaries, and lessons from ear-

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56. See Michael D. Shear, *Urged on by Conservatives and His Own Advisers, Trump Targeted the W.H.O.*, N.Y. TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/us/politics/trump-coronavirus-who.html> (“Mr. Trump’s decision on Tuesday to freeze nearly \$500 million in public money for the W.H.O. in the middle of a pandemic was the culmination of a concerted conservative campaign against the group.”); Katie Rogers & Apoorva Mandavilli, *Trump Administration Signals Formal Withdrawal From W.H.O.*, N.Y. TIMES (July 7, 2020), <https://www.nytimes.com/2020/07/07/us/politics/coronavirus-trump-who.html> (“Health experts widely condemned the departure, which brings an end to threats President Trump had been making for months.”). The negative effects of these activities were exacerbated by the President’s promotion of untested therapies that appear to have no or very little therapeutic value, or worse. See, e.g., Ariana Eunjung Cha & Laurie McGinley, *Antimalarial Drug Touted by President Trump Is Linked to Increased Risk of Death in Coronavirus Patients, Study Says*, WASH. POST (May 22, 2020, 9:17 AM), <https://www.washingtonpost.com/health/2020/05/22/hydroxychloroquine-coronavirus-study/>; William J. Broad & Dan Levin, *Trump Muses About Light as Remedy, But Also Disinfectant, Which Is Dangerous*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/health/sunlight-coronavirus-trump.html>.

57. See Isaac Scher, *The Trump Administration Cut a CDC Position in China Meant to Detect Disease Outbreaks Months Before the Coronavirus Pandemic*, BUS. INSIDER (Mar. 23, 2020, 10:51 AM), <https://www.businessinsider.com/us-cdc-cut-health-expert-job-china-months-before-coronavirus-2020-3>.

58. See Elaine Kamarck, *In a National Emergency, Presidential Competence Is Crucial*, BROOKINGS: FIXGOV (Mar. 20, 2020), <https://www.brookings.edu/blog/fixgov/2020/03/20/in-a-national-emergency-presidential-competence-is-crucial/>. Even after the World Health Organization declared COVID to be a “public health emergency,” the President continually downplayed the severity of the virus during his press briefings, interviews, and on his personal Twitter account. See JM Rieger & Jabin Botsford, *54 Times Trump Downplayed the Coronavirus*, WASH. POST (May 6, 2020, 12:59 PM), [https://www.washingtonpost.com/video/politics/the-fix/54-times-trump-downplayed-the-coronavirus/2020/03/05/790f5afb-4dda-48bf-abe1-b7d152d5138c\\_video.html](https://www.washingtonpost.com/video/politics/the-fix/54-times-trump-downplayed-the-coronavirus/2020/03/05/790f5afb-4dda-48bf-abe1-b7d152d5138c_video.html). During a rally in Michigan in January 2020, the President announced that “[the United States] ha[s] [coronavirus] very well under control. We have very little problem in this country at this moment – five. And those people are all recuperating successfully.” David Leonhardt, *A Complete List of Trump’s Attempts to Play Down Coronavirus*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html>.

59. See *Fast Facts on U.S. Hospitals, 2021*, AM. HOSP. ASS’N, <https://www.aha.org/system/files/media/file/2021/01/Fast-Facts-2021-table-FY19-data-14jan21.pdf> (last visited Feb. 19, 2021) [<https://perma.cc/G6EX-64DY>].

lier failures of the Federal Emergency Management Agency in the aftermath of Hurricane Katrina in 2005 made clear the importance of fact-gathering, preparedness, and coordination.<sup>60</sup> Nevertheless, the Executive did not learn from these prior mistakes and states did not receive the benefit of agency expertise or resources until later stages in the crisis.

The Executive's incompetence and apparent indifference in preparing for the pandemic went hand-in-hand with partisanship—indeed, loyalty to President Trump—as the main driver of national policy with respect to COVID. The virus more quickly circulated in densely populated urban hubs, and cities like New York and Los Angeles bore the early brunt of the infection, as medical supplies ran out, public health systems became overwhelmed, and grotesque make-shift morgues were set up in refrigerator trucks parked on streets.<sup>61</sup> Early-impacted states tended to be “blue states”—states where the majority of voters are aligned with the Democratic Party and more voters are Black or Brown—and COVID only later spread to the “red states” that formed the bulk of the President's electoral base.<sup>62</sup> Black, Brown, and low-income persons who worked in the health-care and service industries, jobs considered “essential,” continued to work throughout the pandemic even as others sheltered at home, and they frequently were not permitted by employers to socially-distance at work and did not have necessary protective gear.<sup>63</sup> As death rates disproportionately rose in some regions of the country, the President, together with the

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60. See Chris Edwards, *Hurricane Katrina: Remembering the Federal Failures*, CATO INST.: BLOG (Aug. 27, 2015, 2:56 PM), <https://www.cato.org/blog/hurricane-katrina-remembering-federal-failures> (posting that “Katrina exposed major failures in America's disaster preparedness and response systems,” including “[c]onfusion,” “[f]ailure to [l]earn,” “[c]ommunications [b]reakdown,” “[s]upply [f]ailures,” “[i]ndecision,” and “[f]raud and [a]buse”). These same problems impeded the federal COVID response, compounded by decisions made opportunistically for partisan political gain without regard to public health concerns.

61. Alan Feuer & William K. Rashbaum, *‘We Ran Out of Space’: Bodies Pile Up as N.Y. Struggles to Bury Its Dead*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/04/30/nyregion/coronavirus-nyc-funeral-home-morgue-bodies.html> (discussing use of refrigerator trailers in New York for lack of space in hospital morgues, funeral homes, cemeteries, and crematories).

62. See William H. Frey, *COVID-19 Continues Spreading into Counties with Strong Trump Support*, BROOKINGS: THE AVENUE (May 20, 2020), <https://www.brookings.edu/blog/the-avenue/2020/05/07/as-states-reopen-covid-19-is-spreading-into-even-more-trump-counties/> (providing demographic trends).

63. See John Eligon, Audra D.S. Burch, Dionne Searcey & Richard A. Opiel Jr., *Black Americans Face Alarming Rates of Coronavirus Infection in Some States*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html> (stating that public health experts explain disparate death rates as “the result of long-standing structural inequalities”).

leaders of the Republican-controlled Senate, consistently shifted responsibility and blame for the crisis onto “blue” states. Despite the worsening crisis, the federal government essentially abdicated responsibility and left each state to fend for itself in developing health care protocols, addressing business concerns, and acquiring personal protective equipment critical for basic safety in a process that resulted in each state bidding against the others and sometimes even against the federal government.<sup>64</sup>

In the first two months of 2020, the Executive took weak and ineffective actions to contain the virus, such as barring entry to visitors from China.<sup>65</sup> The World Health Organization declared COVID to be a pandemic on March 11, 2020, and two days later the White House took the important and symbolic step of declaring a national emergency,<sup>66</sup> but this step came six weeks after the United States Department of Health and Human Services had already declared a public health emergency under the Public Health Service Act.<sup>67</sup> The Presidential proclamation was unique in that it declared an emergency under two separate statutes for the same threat.<sup>68</sup> Nevertheless, assistance to states authorized through the Federal Emergency Management Agency (FEMA) was limited to what are known as emergency

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64. See, e.g., Andrew Jacobs, Matt Richtel & Mike Baker, ‘At War with No Ammo’: Doctors Say Shortage of Protective Gear is Dire, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html> (quoting President Trump stating that “[t]he federal government’s not supposed to be out there buying vast amounts of items and then shipping” and said that it was the job of governors to address the problem); Andrew Soergel, *States Competing in ‘Global Jungle’ for PPE*, U.S. NEWS & WORLD REP. (Apr. 7, 2020, 5:24 PM), <https://www.usnews.com/news/best-states/articles/2020-04-07/states-compete-in-global-jungle-for-personal-protective-equipment-amid-coronavirus>; see also Michael Greenberg, *Emergency Responder*, N.Y. REV. OF BOOKS (May 14, 2020), <https://www.nybooks.com/articles/2020/05/14/andrew-cuomo-emergency-responder> (reporting that the President “wouldn’t be distributing aid [to states] but meting out ‘favors’ based on his relationship with particular governors,” and calling the President’s response “a patronage system that required Molière-like flattery . . . with thousands of lives on the line”).

65. Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020).

66. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).

67. Alex Azar, Secretary, Health and Hum. Servs., Secretary Azar Delivers Remarks on Declaration of Public Health Emergency for 2019 Novel Coronavirus (Jan. 31, 2020).

68. ELAINE HALCHIN & ELIZABETH M. WEBSTER, CONG. RSCH. SERV., IN11264, PRESIDENTIAL DECLARATIONS OF EMERGENCY FOR COVID-19: NEA AND STAFFORD ACT (2020) [<https://perma.cc/6QFD-KZ4P>] (explaining the unprecedented simultaneous invocation of the National Emergencies Act, 50 U.S.C. §§ 1601 et seq., and the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 et seq., for the same emergency).

protective grants and did not include individual assistance grants.<sup>69</sup> Moreover, the award of grants was mired in unusual bureaucratic complexity; indeed, because one of the statutes that the President invoked had never been used to address a pandemic, regulations were not in place to carry out assistance, resulting in delay and confusion.<sup>70</sup>

Five days after issuing the emergency proclamation, on March 18, 2020, the President issued a separate Executive Order under the Korean War-era Defense Production Act.<sup>71</sup> On March 19, the President designated FEMA as the lead agency in the COVID emergency response efforts, a designation previously held by the Department of Health and Human Services. That week, the United States stock market “bottomed out,”<sup>72</sup> and more than 3 million Americans lost their jobs, with the number rising to 38 million unemployed by May<sup>73</sup>—14.7 percent of the workforce.<sup>74</sup> By then, the United States was deep into both a health crisis and an economic recession; limiting social contact was critical to contain the virus, but without federal support, the economy inevitably contracted as businesses shuttered and lay-offs

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69. *Compare Eligible Emergency Protective Measures*, FEMA (July 28, 2020), <https://www.fema.gov/fact-sheet/eligible-emergency-protective-measures> [https://perma.cc/S5Y6-4C4L], *with Programs to Support Disaster Survivors*, FEMA (Jan. 25, 2021), <https://www.fema.gov/assistance/individual/disaster-survivors#households> [https://perma.cc/FL5B-EL2Z].

70. *See President Trump Declares State of Emergency for COVID-19*, NAT'L CONF. OF ST. LEGIS. (Mar. 25, 2020), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/president-trump-declares-state-of-emergency-for-covid-19.aspx> (describing available relief and terms for access by the states).

71. Proclamation No. 13909, 85 Fed. Reg. 16227 (Mar. 18, 2020).

72. *See* Michael Steinberger, *What Is the Stock Market Even for Anymore?*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/interactive/2020/05/26/magazine/stock-market-coronavirus-pandemic.html>.

73. *Unemployment Rate Rises to Record High 14.7% in April 2020*, U.S. BUREAU OF LAB. STATS. (May 13, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm> [https://perma.cc/2TSU-YQXJ]. In May 2020, unemployment among white workers was 12.4%; among Black, 16.8%; among Latinx, 17.6%; and among Asian, 15.0%. A year prior the numbers were reported as 3.3% among white workers; 6.2% among Black workers; 4.2% among Latinx workers; and 2.5% among Asian workers. *See* Rakesh Kochhar, *Unemployment Rose Higher in the First Three Months of the COVID-19 Crisis Than it Did in Two Years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>; *The Economic Toll of the Coronavirus*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/interactive/2020/04/23/business/coronavirus-unemployment.html> (“[T]he number of jobs lost in five weeks is roughly the equivalent of the working populations of 25 states.”).

74. *See* Tony Romm, *Nearly Every State Had Historic Levels of Unemployment Last Month, New Data Shows*, WASH. POST (May 22, 2020, 6:47 PM), <https://www.washingtonpost.com/business/2020/05/22/state-unemployment-rate-april/>.

mounted.<sup>75</sup> Indeed, the President waited until April to exercise emergency powers under the Defense Production Act to address problems, despite a manifest shortage of medical equipment.<sup>76</sup> While the national government failed or refused to coordinate a response to COVID, states stepped into the breach and adopted their own pandemic plans. State plans took account of COVID's actual impacts,<sup>77</sup> addressing such matters as social distancing, limiting in-travel by out-of-state residents, issuing tax filing extensions, expanding capacity of healthcare facilities, and regulating business openings and closings.<sup>78</sup> The result was consistent with a deep-rooted tradition of federalism that accepted local variation, but produced a crazy quilt of fifty-state approaches lacking national coordination.

To be sure, the federal government eventually enacted three major relief packages to address some of the economic consequences of the pandemic—packages marked by extraordinarily high price tags, poor accountability, and assistance that in many respects was mismatched with the problem. The first package authorized about \$1 billion for state and local health responses; the second authorized \$40 billion in additional Medicaid funds; the third known as the CARES Act—The Coronavirus Aid, Relief, and Economic Security Act—authorized an unprecedented \$2.2 trillion.<sup>79</sup> Of that amount, the CARES

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75. See GRANT A. DRIESSEN, CONG. RSCH. SERV., R46298, GENERAL STATE AND LOCAL FISCAL ASSISTANCE AND COVID-19: BACKGROUND AND AVAILABLE DATA (2020) [<https://perma.cc/9STH-LTA4>] (stating that “[t]he sudden decline in economic output following the [COVID-19] outbreak has significantly altered the fiscal outlook for state and local governments” and “the COVID-19 economic shock will have a notable impact on state and local budgets”); see *COVID-19's Historic Economic Impact, in the U.S. and Abroad*, JOHNS HOPKINS U.: HUB (Apr. 16, 2020), <https://hub.jhu.edu/2020/04/16/coronavirus-impact-on-european-american-economies/>.

76. See generally Anshu Siripurapu, *What Is the Defense Production Act?*, COUNCIL ON FOREIGN REL. (Jan. 26, 2021, 7:00 AM), <https://www.cfr.org/in-brief/what-defense-production-act>; see also Jacobs et al., *supra* note 64.

77. See Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2021) (discussing localism and its shortfalls during the pandemic).

78. See STATESIDE, INTRODUCING STATE SNAPSHOT: A COVID-19 REPORT (updated Mar. 31, 2021), <https://www.stateside.com/blog/2020-state-and-local-government-responses-covid-19>.

79. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281 (2020). For an official summary by the United States Treasury Department, see *The CARES Act Works for All Americans*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/cares> (last visited Feb. 20, 2021); see also Erica Gellerman, *The CARES Act: A Simple Summary*, BENCH: BENCH BLOG (Aug. 12, 2020), <https://bench.co/blog/operations/cares-act/>. For information about federal judicial appropriations under CARES, see Jacqueline Thomsen, *Judiciary Prepares for Gradual Reopening During COVID-19, but Tells Courts to Heed Local Officials*, NAT'L L. J. (Apr. 27, 2020, 7:32 PM), <https://www.law.com/nationallawjournal/2020/04/27/judi>

Act created a \$150 billion Coronavirus Relief fund for states, localities, territories, and tribal governments. The Treasury Department issued guidance on the permissible uses of the funds,<sup>80</sup> and effectively barred states and localities from offsetting COVID-related revenue losses with CARES grants.<sup>81</sup> CARES also authorized targeted funds for education, mass transit, and childcare. However, the amounts allocated to states and localities were dwarfed by the fiscal implications of the pandemic, which surpassed the immediate additional costs of unbudgeted virus-related expenses.<sup>82</sup> Nor were the programs well managed. According to one think tank, the standards for distributing funds “generated significant confusion” because the administration failed from the outset to address the usual problems that result from overlapping jurisdictions.<sup>83</sup>

In addition, CARES directed assistance to individual workers and to certain tenants. Specifically, it authorized one-time payments of \$1,200 to taxpayers with adjusted gross income of up to \$75,000 and \$500 for each eligible child under the age of seventeen.<sup>84</sup> Other

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ciary-prepares-for-gradual-reopening-during-covid-19-but-tells-courts-to-heed-local-officials/.

80. For a summary of permissible uses, see *The CARES Act Provides Assistance for State, Local, and Tribal Governments*, U.S. DEP’T OF TREASURY, <https://home.treasury.gov/policy-issues/cares/state-and-local-governments> (last visited Feb. 20, 2021), which states that the payments are to be used to cover only expenses that:

1. Are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
2. Were not accounted for in the budget most recently approved as of March 27, 2020 (the date of enactment of the CARES Act) for the State or government; and
3. Were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

81. Michael Leachman, *How Should States, Localities Spend CARES Act’s Coronavirus Relief Funds?*, CTR. ON BUDGET & POL’Y PRIORITIES: BLOG (May 28, 2020, 4:00 PM), <https://www.cbpp.org/blog/how-should-states-localities-spend-cares-acts-coronavirus-relief-fund> (explaining that the bar on revenue offsets presents “a serious problem since state, local, and tribal revenues have dropped precipitously”).

82. See, e.g., Tracy Gordon & Richard C. Auxier, *Congress Must Do More to Help States and Localities Respond to COVID-19*, TAX POL’Y CTR.: TAXVOX BLOG (Mar. 30, 2020), <https://www.taxpolicycenter.org/taxvox/congress-must-do-more-help-states-and-localities-respond-covid-19> (detailing fiscal pressures on states and localities given reduced tax revenue, balanced budget requirements, and increased demand for social services).

83. Jared Walczak, *State and Local Funding Totals Under the CARES Act*, TAX FOUND. (Apr. 1, 2020), <https://taxfoundation.org/federal-coronavirus-aid-to-states-under-cares-act/> (explaining how the money is allocated and state-locality sharing formulas).

84. *Economic Impact Payment Information Center*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/economic-impact-payment-information-center-topic-a-eip-eligibility> (last visited Feb. 20, 2021). Distribution of the funds apparently was

CARES provisions were directed at unemployment and expanded eligibility and benefit levels for Unemployment Insurance, subject to time-limits and immigration restrictions. CARES extended federally funded unemployment insurance by thirteen weeks; it increased state benefits by \$600; and it authorized unemployment benefits for certified part-time, self-employed, and gig economy workers, despite their temporary employment status.<sup>85</sup> Relatedly, CARES authorized a 120-day moratorium on evictions of tenants who rent from owners with federally backed mortgages and required owners to provide thirty days' notice prior to eviction.<sup>86</sup>

CARES further directed new funding to different federal agencies to be distributed and used for COVID-related activities. For example, the United States Department of Justice received appropriations of \$850 million to respond to law enforcement activity

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held up to enable the checks to be embossed with the President's name. *See* Ariel Shapiro, *Mnuchin Says Putting Trump's Name on Stimulus Checks Was His Idea*, FORBES (Apr. 19, 2020, 11:10 AM), <https://www.forbes.com/sites/arielshapiro/2020/04/19/mnuchin-says-putting-trumps-name-on-stimulus-irs-checks-was-his-idea/#d320e7424fda> [<https://perma.cc/UL5C-ZRVN>] (reporting that the decision to put the President's name on the stimulus checks was "widely-criticized" for its potential to "delay their distribution").

85. Chad Stone, *CARES Act Measures Strengthening Unemployment Insurance Should Continue While Need Remains*, CTR. ON BUDGET & POL'Y PRIORITIES (June 9, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/6-9-20bud.pdf> [<https://perma.cc/M23J-DRX7>].

86. *See* MAGGIE MCCARTY & DAVID H. CARPENTER, CONG. RSCH. SERV., IN11320, CARES ACT EVICTION MORATORIUM (2020) [<https://perma.cc/LSU3-Z422>] (describing the provisions and raising questions about the scope of coverage, information gaps in tenant knowledge about the source of their landlord's mortgage, and whether fees continue to accrue during the moratorium). In September 2020, the CDC issued a new eviction moratorium scheduled to expire on December 31, 2020. Anna Bahney, *Evictions Are Halted: Here's What You Need to Know*, CNN (Sept. 2, 2020, 6:43 PM), <https://www.cnn.com/2020/09/02/success/cdc-control-eviction-moratorium/index.html>. In the December 2020 stimulus bill, Congress extended the eviction moratorium through January 2021, and upon taking office President Joe Biden issued an executive order extending the moratorium until March 31, 2021. Anna Bahney, *Biden Seeks to Extend Bans on Evictions and Foreclosures*, CNN (Jan. 20, 2021, 6:44 PM), <https://www.cnn.com/2021/01/20/success/biden-eviction-foreclosure-moratorium-executive-action/index.html>. The federal eviction moratorium was the subject of legal challenges. *See* *Terkel v. CDC*, No. 6:20-cv-00564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021); *Brown v. Azar*, 1:20-CV-03702-JPB, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020); *Chambliss Enters., LLC v. Redfield*, No. 3:20-cv-01455, 2020 WL 7588849 (W.D. La. Dec. 22, 2020); *KBW Investment Properties v. Azar*, No. 2:20-cv-4852 (S.D. Ohio Oct. 9, 2020), but remained in effect while the lawsuits were pending. *See also* *Federal Eviction Moratorium Remains in Effect, Despite Court Ruling*, NAT'L LOW INCOME HOUS. COAL. (Mar. 1, 2021), <https://nlihc.org/resource/federal-eviction-moratorium-remains-effect-despite-court-ruling>.

and the CDC received funding of \$4.3 billion, of which \$1.5 billion was committed for State and Local Preparedness Grants.<sup>87</sup>

Above all, CARES authorized stimulus payments and interest-free loans for businesses and non-profit organizations, referred to as the Paycheck Protection Program.<sup>88</sup> One condition was that the funds be used “to the greatest extent practicable” to preserve jobs, a provision that was called “toothless” by analysts with the Economic Policy Institute because the statute failed to include a meaningful enforcement measure.<sup>89</sup>

Undoubtedly, the enactment of CARES marked an important step in the country’s response to the pandemic. CARES provided federal funding at a time when the economy needed a boost, in part because the federal government had failed to prepare for the likely fiscal and employment effects of the pandemic earlier. Yet despite the size of the package, CARES functioned less as a stimulus and more as a relief bill,<sup>90</sup> while nevertheless containing critical gaps in the relief it provided. CARES omitted many economically vulnerable persons, such as those who lacked sufficient income in the prior tax year to qualify for assistance as an eligible taxpayer.<sup>91</sup> CARES also did not bridge the fiscal shortfalls that many states and localities faced in the wake of

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87. See *CARES Act Resource Center*, U.S. CONF. OF MAYORS, <https://www.usmayors.org/issues/covid-19/cares-act/> (last visited Feb. 20, 2021).

88. See Paycheck Protection Program Flexibility Act of 2020, Pub. L. 116-142 (June 5, 2020); see also *Paycheck Protection Program*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program> (last visited Mar. 11, 2021).

89. 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.: WORKING ECON. BLOG (Mar. 25, 2020, 2:13 PM), <https://www.epi.org/blog/despite-some-good-provisions-the-cares-act-has-glar-ing-flaws-and-falls-short-of-fully-protecting-workers-during-the-coronavirus-crisis>.

90. A *New York Times* analysis found that the CARES Act’s \$600 weekly unemployment payment was “a remarkably effective expansion of the safety net,” allowing workers to both spend and save more, but that when those payments abated in July, “workers quickly burned through the reserves that the aid had given them.” Emily Badger & Quoc Trung Bui, *Jobless Workers Built Up Some Savings. Then the \$600 Checks Stopped*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/upshot/stimulus-checks-unemployment.html> (reporting data that the median checking account owned by workers receiving CARES Act unemployment payments had twice as much money in July than January, but that account balances “swiftly dropped” once payments ended).

91. See Grace Enda, William G. Gale & Claire Haldeman, *Careful or Careless? Perspectives on the CARES Act*, BROOKINGS: UP FRONT (Mar. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/03/27/careful-or-careless-perspectives-on-the-cares-act/>.

COVID—estimated at \$765 billion through June 2022.<sup>92</sup> Budget shortfalls present special problems for states because they generally are required to balance their budgets yearly.<sup>93</sup> On top of these relief gaps, the package raised a host of administrative problems, not the least of which concerned possible corruption and partisan self-dealing: The Small Business Administration initially declined to disclose the identities and loan amounts of Paycheck Protection Program borrowers, and changed course only after a federal district court ordered it to do so.<sup>94</sup> Disclosure prior to the court’s order—and the information was limited—suggested a range of program irregularities, with funds granted to entities and individuals ineligible for assistance because not in need of relief<sup>95</sup> or because applications were supported by forged documents.<sup>96</sup> In addition, reports indicated extreme racial disparities

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92. Michael Leachman, *How Should States, Localities Spend CARES Act’s Coronavirus Relief Fund?*, CTR. ON BUDGET & POL’Y PRIORITIES (May 28, 2020, 4:00 PM), <https://www.cbpp.org/blog/how-should-states-localities-spend-cares-acts-coronavirus-relief-fund>.

93. See James Surowiecki, *The Financial Page: Fifty Ways to Kill Recovery*, NEW YORKER (July 20, 2009), <https://www.newyorker.com/magazine/2009/07/27/fifty-ways-to-kill-recovery> (“Nearly every state government is required to balance its budget. When times are bad, jobs vanish, sales plummet, investment declines, and tax revenues fall precipitously . . .”).

94. See Amara Omeokwe, *SBA Wins Temporary Delay of Order to Provide Details on PPP Borrowers*, WALL ST. J. (Nov. 13, 2020, 4:58 PM), <https://www.wsj.com/articles/sba-wins-temporary-delay-of-order-to-provide-details-on-ppp-borrowers-11605304678> (discussing litigation to compel the Small Business Administration to disclose borrower information under the Freedom of Information Act); see also Jonathan O’Connell, Andrew Van Dam, Aaron Gregg & Alyssa Fowers, *More Than Half of Emergency Small-Business Funds Went To Larger Businesses*, NEW DATA SHOWS, WASH. POST (Dec. 2, 2020, 6:55 PM), <https://www.washingtonpost.com/business/2020/12/01/ppp-sba-data/>.

95. Ryan Tracy, *Evidence of PPP Fraud Mounts, Officials Say*, WALL ST. J. (Nov. 8, 2020, 9:04 AM), <https://www.wsj.com/articles/ppp-was-a-fraudster-free-for-all-in-vestigators-say-11604832072> (discussing findings of the Small Business Administration’s Inspector General that “tens of thousands of companies . . . received PPP loans for which they appear to have been ineligible,” and “[t]ens of thousands of organizations also appear to have received more money than they should have based on their headcounts and compensation rates”); see also Joseph Foti & Norman Eisen, *A Missing Ingredient in COVID Oversight: Equity*, BROOKINGS: HOW WE RISE (Nov. 13, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/11/13/a-missing-ingredient-in-covid-oversight-equity/> (“Without accountability for misuse of funds, some companies applied for and received Paycheck Protection Program (PPP) loans despite having ready access to ample capital.”).

96. Stacy Cowley, *Spotting \$62 Million in Alleged P.P.P. Fraud Was the Easy Part*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/28/business/ppp-small-business-fraud-coronavirus.html> (reporting that the “Justice Department has made at least forty-one criminal complaints in federal court against nearly sixty people, who collectively took \$62 million from the Paycheck Protection Program by using what law enforcement officials said were forged documents, stolen identities and false certifications”).

in the government's distribution of funds. The loan applications of an estimated ninety percent of Black-owned small businesses were rejected,<sup>97</sup> and it took Black-owned businesses a longer period than white-owned businesses to receive aid.<sup>98</sup> Similarly, urban areas in New York and in the Bay Area, which had among the highest number of small businesses with the most severe revenue losses, received the lowest share of loans.<sup>99</sup>

COVID did not magically disappear as President Trump had announced and the economy did not quickly recover. Instead, by early 2020 the death toll rose and state tax revenues declined relative to 2019.<sup>100</sup> Some states responded by enacting austerity cuts to social programming, education, and health care, as well as by laying off workers, thereby exacerbating unemployment and worsening the recession.<sup>101</sup> Nevertheless, the Trump Administration refused to provide additional funding to states and localities,<sup>102</sup> and intensified problems

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97. See Rashawn Ray & Keon L. Gilbert, *Has Trump Failed Black Americans?*, BROOKINGS: HOW WE RISE (Oct. 15, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/10/15/has-trump-failed-black-americans>.

98. See Sifan Liu & Joseph Parilla, *New Data Shows Small Businesses in Communities of Color Had Unequal Access to Federal COVID-19 Relief*, BROOKINGS (Sept. 17, 2020), <https://www.brookings.edu/research/new-data-shows-small-businesses-in-communities-of-color-had-unequal-access-to-federal-covid-19-relief>.

99. See Joseph Parilla & Sifan Liu, *Across Metro Areas, COVID-19 Relief Loans Are Helping Some Places More Than Others*, BROOKINGS: AVENUE (July 14, 2020), <https://www.brookings.edu/blog/the-avenue/2020/07/14/across-metro-areas-covid-19-relief-loans-are-helping-some-places-more-than-others>.

100. See Leachman, *supra* note 92 (reporting decline in state tax revenue of 6.4% in the period March through August 2020 relative to same period in 2019).

101. Elizabeth McNichol & Michael Leachman, *States Continue to Face Large Shortfalls Due to COVID-19 Effects*, CTR. ON BUDGET & POL'Y PRIORITIES (June 15, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/6-15-20sfp.pdf> [<https://perma.cc/P72X-AY2W>] ("Federal Reserve economists project that unemployment — which averaged 14 percent in April and May according to the Bureau of Labor Statistics — will peak this quarter and still be at 6.5 percent at the end of 2021, a year and a half from now. CBO's projection is grimmer — unemployment will remain at 11.5 percent in the last quarter (October-December) of 2020 and stand at a still-quite-high 8.6 percent at the end of 2021, it says. Both economic projections take into account the aid that the federal government has already enacted for businesses, individuals, and state and local governments."). See Jeremy Pelzer, *Ohio Gov. Mike DeWine Will Freeze State Government Hiring, Seek Big Spending Cuts Amid Coronavirus Crisis*, CLEVELAND.COM (Mar. 23, 2020), <https://www.cleveland.com/coronavirus/2020/03/ohio-gov-mike-dewine-will-freeze-state-government-hiring-seek-big-spending-cuts.html>.

102. See Samuel Stebbins & Evan Comen, *Coronavirus Relief: How Federal Funding Failed to Match Each State's Coronavirus Crisis*, USA TODAY (June 15, 2020, 7:00 AM), <https://www.usatoday.com/story/money/2020/06/15/how-federal-funding-failed-to-match-each-states-covid-outbreak/111939982/>. The President's explanation was uncharacteristically clear: providing funding to states hit hardest by the pandemic would be unfair to Republicans "because all the states that need help — they're run

by urging supporters to protest shelter-in-place rules promulgated by Democratic governors and sowing doubt about their legality.<sup>103</sup> Partisan divisions in Congress associated with the President's re-election consistently blocked proposals for additional funding,<sup>104</sup> and new appropriations remained unavailable until the Biden Administration,<sup>105</sup>

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by Democrats in every case." Christina Wilkie, *Trump Says Coronavirus 'Bailouts' for Blue States are Unfair to Republicans*, CNBC (May 5, 2020, 3:56 PM), <https://www.cnbc.com/2020/05/05/coronavirus-trump-says-blue-state-bailouts-unfair-to-republicans.html>; see also Adam Edelman, *Trump: Government Shouldn't Rescue States and Cities Struggling Under Pandemic*, NBC NEWS (Apr. 27, 2020, 11:31 AM), <https://www.nbcnews.com/politics/donald-trump/trump-federal-govt-shouldn-t-rescue-states-cities-struggling-under-n1193351> (quoting the President as stating, "[w]hy should the people and taxpayers of America be bailing out poorly run states (like Illinois, as example) and cities, in all cases Democrat run and managed, when most of the other states are not looking for bailout help?").

103. See Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html> (quoting the President's tweet that individuals in Michigan and Minnesota should "LIBER-ATE" and protest stay-at-home orders); J. Edward Moreno, *Protesters, Anti-Quarantine Groups Call for End to Coronavirus Closures*, HILL (Apr. 14, 2020, 11:48 AM), <https://thehill.com/homenews/state-watch/492693-protesters-call-for-an-end-to-coronavirus-closures>; see generally JARED P. COLE, CONG. RSCH. SERV., RL33201, FEDERAL AND STATE QUARANTINE AND ISOLATION AUTHORITY (Oct. 9, 2014), <https://fas.org/sgp/crs/misc/RL33201.pdf>. Commentators later concluded that these state protests, which included riots and plans to kidnap Democratic elected officials, contributed to the unprecedented violent assault on the Capitol that took place on January 6, 2021, when Congress met to count the electoral votes for the Presidential Election and announce Biden as the new President. See, e.g., Ryan Goodman, Mari Dugas & Nicholas Tonckens, *Incitement Timeline: Year of Trump's Actions Leading to the Attack on the Capitol*, JUST SECURITY (Jan. 11, 2021), <https://www.justsecurity.org/74138/incitement-timeline-year-of-trumps-actions-leading-to-the-attack-on-the-capitol> (reporting that "Trump gave support and legitimacy to armed insurrectionists in states that had imposed pandemic restrictions" and that "[a]fter losing the election Trump . . . built toward the events that unfolded on January 6").

104. See Emily Cochrane & Nicholas Fandos, *House Democrats Unveil \$3 Trillion Pandemic Relief Proposal*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/us/politics/democrats-coronavirus-relief-proposal.html>; Richard Cowan & Susan Cornwell, *U.S. House Passes \$3 Trillion Coronavirus Aid Bill Opposed by Trump*, REUTERS (May 15, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-congress/house-passes-3-trillion-coronavirus-aid-bill-opposed-by-trump-idUSKBN22R1G9>. The negotiations remained at a standstill when the Senate recessed for Labor Day. See Manu Raju and Ted Barrett, *Congressional Action on New Relief Package Likely to Wait Until September — At Least*, CNN (Aug. 13, 2020, 7:38 PM), <https://www.cnn.com/2020/08/13/politics/congress-stimulus-delay-september/index.html>.

105. See Jim Tankersley & Emily Cochrane, *Biden Faces Challenge as Congress Drops State Aid to Secure Stimulus*, N.Y. TIMES (Dec. 17, 2021), <https://www.nytimes.com/2020/12/17/business/stimulus-state-local-aid.html> (noting that state and local funding was excised from the stimulus bill passed by Congress in December 2020). President Biden signed a new stimulus bill a few months into his administration. See Grace Segers, *Biden Signs \$1.9 Trillion American Rescue Plan*

even with unemployment mounting, jobs growth stunted, small businesses closing, and poverty and suffering deepening.<sup>106</sup> When a bipartisan bill finally was developed, President Trump initially tried to stop its enactment,<sup>107</sup> and signed it only after his delay put unemployment benefits into jeopardy and deprived unemployed Americans of needed cash support.<sup>108</sup>

Nor did the Trump Administration effectively support distribution of a vaccine notwithstanding a surge in infection rates. Although the White House announced “Project Warp Speed” and did encourage development of a vaccine,<sup>109</sup> unbeknownst to the public it apparently had refused to purchase sufficient quantities of the vaccine to assure universal access.<sup>110</sup> And despite a report to Congress detailing a strategy for distributing the vaccine,<sup>111</sup> the White House failed to carry out the plan, once again leaving states and localities completely on their own, this time in dealing with a delicate pharmaceutical that required expensive and often unavailable refrigeration.<sup>112</sup>

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*into Law*, CBS NEWS (Mar. 12, 2021), <https://www.cbsnews.com/news/biden-signs-covid-relief-bill-american-rescue-plan-into-law/>.

106. See Erica Werner & Jeff Stein, *Trump Cuts Off Stimulus Negotiations Until After Election, Upending Prospects for Aid*, WASH. POST (Oct. 6, 2020), <https://www.washingtonpost.com/us-policy/2020/10/06/trump-kills-stimulus-talks/>.

107. See Kelly Hooper, *Trump Takes Aim at Covid Stimulus Bill, Raising Specter of Veto*, POLITICO (Dec. 22, 2020, 9:05 PM), <https://www.politico.com/news/2020/12/22/trump-covid-stimulus-bill-450204>.

108. See Aaron Mak, *Trump’s Delay in Signing the Relief Bill Cost Unemployed Americans \$300*, SLATE (Dec. 28, 2020, 12:47 PM), <https://slate.com/news-and-politics/2020/12/trumps-delay-in-signing-a-relief-bill-cost-unemployed-americans-a-usd300-payment.html>.

109. See Press Release, U.S. Dep’t of Health and Hum. Servs., *Trump Administration Announces Framework and Leadership for ‘Operation Warp Speed.’* (May 15, 2020), <https://www.hhs.gov/about/news/2020/05/15/trump-administration-announces-framework-and-leadership-for-operation-warp-speed.html> [https://perma.cc/LD6X-E3JU].

110. See Molly Blackall, *First Thing: The White House Turned Down 100m Extra Pfizer Vaccine Doses*, GUARDIAN (Dec. 8, 2020, 6:33 AM), <https://www.theguardian.com/us-news/2020/dec/08/first-thing-the-white-house-turned-down-100m-extra-pfizer-vaccine-doses> (reporting previously undisclosed decision by the Trump Administration not to purchase “millions of additional doses of Pfizer’s coronavirus jab”).

111. See FROM THE FACTOR TO THE FRONTLINES: THE OPERATION WARP SPEED STRATEGY FOR DISTRIBUTING A COVID-19 VACCINE, U.S. DEP’T HEALTH & HUMAN SERVS. (2020).

112. See Peter Wade, *Governors Are “Angry,” Frustrated at Trump Administration’s Bungling of Vaccine Distribution*, ROLLING STONE (Oct. 16, 2020), <https://www.rollingstone.com/politics/politics-news/trump-administration-pfizer-vaccine-distribution-1106240/>; see also Eli Saslow, *Voices from the Pandemic: “The Truth Is, Nobody Told Us What to Be Ready for,”* WASH. POST (Jan. 9, 2021), <https://www.washingtonpost.com/nation/2021/01/09/covid-vaccine-rollout-florida-challenges> (reporting challenges faced by county manager in Lee County, Florida in “rolling out the vaccine”).

The federal judiciary was not immune from fiscal pressures. Before the pandemic, its funding for 2020 was mired in a politically contentious appropriations process that caused a government “shut down” and reliance on a series of temporary legislative agreements known as continuing resolutions.<sup>113</sup> The budget agreement finally reached in December 2019 appropriated \$8.29 billion for the federal judiciary, a mere .02 percent of the total federal budget.<sup>114</sup> We emphasize that the agreement did not resolve many important issues affecting the judiciary, including funding additional judgeships that the Administrative Office of the United States Courts considered critical to “the ability of the federal courts to administer justice in a swift, fair, and effective manner.”<sup>115</sup> CARES allotted a mere \$7.5 million to the federal judiciary and temporarily authorized judges to use video and teleconferencing for certain criminal and civil proceedings (the authorization lapses thirty days after the end of the crisis).<sup>116</sup> As the pandemic continued, the need for further funding requests became urgent. In late April 2020, the Judicial Conference of the United States asked Congress to appropriate an additional \$36.6 million to “address emergent needs such as enhanced cleaning of court facilities, health screening at courthouse entrances, [and] information technology hardware and infrastructure costs associated with expanded telework and

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113. See U.S. CTS., FUNDING/BUDGET—ANNUAL REPORT 2019 (2019), <https://www.uscourts.gov/statistics-reports/fundingbudget-annual-report-2019> (“After more than a month without new appropriations, the Judiciary had exhausted nearly all available resources and was poised for an orderly shutdown of operations.”).

114. BARRY J. McMILLION, CONG. RSCH. SERV., R45965, JUDICIARY APPROPRIATIONS, FY 2020 (2020), <https://fas.org/sgp/crs/misc/R45965.pdf>. As was typical, Justices of the Supreme Court appeared at public hearings before Congress to discuss funding for the courts. At the 2019 subcommittee hearing, members posed questions about providing video recordings of Supreme Court oral arguments to the public. *Id.* (citing *The Judiciary’s Budget Request for Fiscal Year 2022: Hearing Before the S. Comm of Financial Services and General Government*, 117th Cong. 1 (2019) (statement of Mike Quigley, Chairman, S. Comm of Financial Services and General Government)). Justice Samuel A. Alito expressed the view that public access should not come “at the expense of damaging the decision-making process.” *Id.* (citing *The Judiciary’s Budget Request for Fiscal Year 2022: Hearing Before the S. Comm of Financial Services and General Government*, 117th Cong. 1 (2019) (statement of Hon. Samuel A. Alito, U.S. Supreme Court Justice)). Justice Elena Kagan raised similar concerns about public misperceptions of the decisionmaking process. *Id.* (citing *The Judiciary’s Budget Request for Fiscal Year 2022: Hearing Before the S. Comm of Financial Services and General Government*, 117th Cong. 1 (2019) (statement of Hon. Elena Kagan, U.S. Supreme Court Justice)).

115. *Id.* at 22 (citing H.R. Rep. No. 116-122, at 41 (2019)).

116. See *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. CTS. (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

video conferencing.”<sup>117</sup> Although a relief bill passed in October 2020 by the Democratic-led House of Representatives allocated \$25 million to the judiciary, Congress ultimately did not include any of the requested \$36.6 million in its \$900 billion relief package or in a separate \$1.4 trillion measure to fund government operations through the end of the coming fiscal year.<sup>118</sup>

The Trump Administration’s response to COVID also willfully ignored and so exacerbated the racially disparate effects of the health crisis.<sup>119</sup> As infection rates mounted and deaths rose, analysts noted a persistent but clear trend: Black, Brown, and poor people unequally suffered the fatal or long-term damaging effects of the virus, measured by mortality rates,<sup>120</sup> unemployment rates,<sup>121</sup> rates of continued employment without personal protective equipment,<sup>122</sup> and the numbers of people who could not socially distance because of crowding in the workplace and inadequate housing or utter lack of housing.<sup>123</sup> The

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117. BARRY J. McMILLION, CONG. RSCH. SERV., IN11292, OVERVIEW OF RECENT RESPONSES TO COVID-19 BY THE JUDICIAL CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, AND SELECT COURTS WITHIN THE FEDERAL JUDICIARY 1–2 (2020), <https://crsreports.congress.gov/product/pdf/IN/IN11292> [hereinafter CONG. RSCH. SERV., OVERVIEW OF RECENT RESPONSES TO COVID-19].

118. See Madison Alder, *Judiciary Gets No Relief in Latest Pandemic Funding Package*, BLOOMBERG L. (Dec. 28, 2020), <https://news.bloomberglaw.com/us-law-week/judiciary-gets-no-relief-in-latest-pandemic-funding-package>.

119. See, e.g., Ray & Gilbert, *supra* note 97.

120. See Tiffany N. Ford, Sarah Reber & Richard V. Reeves, *Race Gaps in COVID-19 Deaths Are Even Bigger Than They Appear*, BROOKINGS: UP FRONT (June 16, 2020), <https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear> (discussing race gaps in mortality rates).

121. See, e.g., Michele Evermore, *Unemployment Insurance During COVID-19: The CARES Act and Role of UI During the Pandemic*, NAT’L EMP. L. PROJECT (June 9, 2020), <https://www.nelp.org/publication/unemployment-insurance-covid-19-cares-act-role-ui-pandemic> (reporting disproportionate impact of unemployment on Black and Brown individuals).

122. See, e.g., Annie Palmer, *‘They’re Putting Us All at Risk’: What It’s Like Working in Amazon’s Warehouses During the Coronavirus Outbreak*, CNBC (Mar. 26, 2020, 12:00 PM), <https://www.cnbc.com/2020/03/26/amazon-warehouse-employees-grapple-with-coronavirus-risks.html> (reporting lack of protective gear for warehouse workers); Jennifer Valentino-DeVries, Denise Lu & Gabriel J.X. Dance, *Location Data Says It All: Staying at Home During Coronavirus Is a Luxury*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/interactive/2020/04/03/us/coronavirus-stay-home-rich-poor.html> (“Concerns about getting infected have incited protests and strikes by workers in grocery stores, delivery services and other industries who say their employers are not providing them with enough protection or compensation to counter the increased health risks, even as their jobs have been deemed essential.”).

123. See, e.g., Josefa Velasquez, Ann Choi, Claudia Irizarry Aponte & Ese Olumhense, *COVID Sends Public Housing-Zone Residents to Hospitals at Unusually High Rates*, CTRY (May 14, 2020, 9:49 PM), <https://www.thecity.nyc/2020/5/14/21270844/covid-sends-public-housing-zone-residents-to-hospitals-at-unusually-high-rates> (“Public health researchers say longstanding disadvantages . . . made the city’s

CARES Act specifically excluded undocumented immigrants from assistance; indeed, it excluded anyone who lived in a household with a member who filed taxes using an Individual Taxpayer Identification Number rather than a Social Security number—estimated to include at least 8 million United States citizens, of which 5.9 million are citizen children.<sup>124</sup> Then, three months after the first-reported COVID-related deaths in the United States,<sup>125</sup> another death took place: that of an unarmed Black man, George Floyd, who was suffocated by police officers during a police stop.<sup>126</sup> The harrowing event, captured on video, highlighted a parallel pandemic—what the New York Times called “parallel plagues ravaging America: The coronavirus. And police killings of black men and women.”<sup>127</sup> Widespread protest followed in the wake of Floyd’s death, and the political—and multiple societal—con-

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roughly 400,000 public housing residents especially susceptible to the virus.”); GISELLE ROUTHIER & SHELLY NORTZ, COVID-19 AND HOMELESSNESS IN NEW YORK CITY: PANDEMIC PANDEMONIUM FOR NEW YORKERS WITHOUT HOMES (2020), <https://www.coalitionforthehomeless.org/wp-content/uploads/2020/06/COVID19HomelessnessReportJune2020.pdf> (“As of June 1st, the overall New York City mortality rate due to COVID-19 was 200 deaths per 100,000 people. For sheltered homeless New Yorkers, it was 321 deaths per 100,000 people – or 61 percent higher than the New York City rate. This means that many more homeless people have died from COVID-19 than would have been expected if they were dying at the same rate as all NYC residents.”). See generally David Nelken, Mathias Siems, Marta Infantino, Nathan Genicot, David Restrepo-Amariles & John Harrington, *COVID-19 and The Social Role of Indicators: A Preliminary Assessment* (EUI Dept. of L. Rsch. Paper No. 17 Nov. 6, 2020) (discussing the legal and ethical implications of social indicators in considering COVID and its effects).

124. See Whitney L. Duncan & Sarah B. Horton, *Serious Challenges and Potential Solutions for Immigrant Health During COVID-19*, HEALTH AFFAIRS BLOG (Apr. 18, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200416.887086/full/>; Shahar Ziv, *Stimulus Check Lawsuit Against Trump Administration Can Proceed*, FORBES (June 24, 2020, 9:51 AM), <https://www.forbes.com/sites/shaharziv/2020/06/24/stimulus-check-lawsuit-against-trump-administration-can-proceed> (reporting on lawsuit challenging denial of CARES funds to U.S. citizen minors whose parents are undocumented immigrants). For further information about the claims, see *R.V. v. Mnuchin*, No. 20-cv-1148, 2020 U.S. Dist. LEXIS 107420, at \*2 (D. Md. June 19, 2020) (denying motion to dismiss).

125. Thomas Fuller & Mike Baker, *Coronavirus Death in California Came Weeks Before First Known U.S. Death*, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-first-united-states-death.html> (reporting when first COVID death occurred in the United States).

126. Evan Hill, Ainara Tiefertäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (“Seventeen minutes after the first squad car arrived at the scene, Mr. Floyd was unconscious and pinned beneath three police officers, showing no signs of life.”).

127. Jack Healy & Dionne Searcey, *Two Crises Convulse a Nation: A Pandemic and Police Violence*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-protests-coronavirus.html>.

sequences have continued to unfold.<sup>128</sup> The White House, while initially expressing sympathies to the Floyd family, quickly pivoted to calling those who protested his death “thugs,”<sup>129</sup> and Black Lives Matter, a social movement protesting systemic racism,<sup>130</sup> a “symbol of hate.”<sup>131</sup>

By May 2020, and throughout the summer and fall, the President’s re-election campaign seemed to crowd out any energy for a coherent COVID containment plan. Indeed, the campaign had a perverse effect on Executive Branch policy, as the President tried to steer public attention away from the crisis and to claim that his Administration had succeeded—as he had claimed all spring—in defeating the virus.<sup>132</sup> On July 21, the President announced—after six months of delay and more than 142,000 deaths—that his administration would develop a plan to meet the pandemic.<sup>133</sup> Probably motivated by politi-

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128. See *A Timeline of the George Floyd and Anti-Police Brutality Protests*, AL JAZEERA (June 11, 2020), <https://www.aljazeera.com/news/2020/06/timeline-george-floyd-protests-200610194807385.html>. Significantly, a study of 315 U.S. cities to assess the impact of Black Lives Matter protests on COVID-related infection and death found no evidence five weeks following the onset of protests that these activities reignited COVID-19 infections or triggered an increase in fatalities, largely because the protestors wore masks, engaged in social distancing, and were outdoors. See Dhaval M. Dave, Andrew I. Friedson, Kyutaro Matsuzawa, Joseph J. Sabia & Samuel Safford, *Black Lives Matter Protests and Risk Avoidance: The Case of Civil Unrest During a Pandemic* (Nat’l Bureau of Econ. Rsch., Working Paper No. 27408 2020), <https://www.nber.org/papers/w27408>.

129. Maggie Astor, *What Trump, Biden and Obama Said About the Death of George Floyd*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/politics/george-floyd-trump-biden-obama.html>.

130. See Black Lives Matter, <https://blacklivesmatter.com>; see also Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (reporting that 15 to 26 million people demonstrated as part of Black Lives Matter’s protest of Floyd’s death).

131. Mark DeCambre, *President Trump Says George Floyd’s Death Was ‘Terrible’ but Says ‘More White People,’ Die at Hands of Police than Blacks in U.S.*, MARKETWATCH (July 15, 2020), <https://www.marketwatch.com/story/president-trump-says-george-floyds-death-was-terrible-but-says-more-white-people-die-at-hands-of-police-than-blacks-in-us-2020-07-14>.

132. See Tom Lutz & Martin Pengelly, *Trump Claims ‘Victory’ as US Sees Covid-19 Case Records in Multiple States*, GUARDIAN (July 4, 2020, 5:22 PM), <https://www.theguardian.com/us-news/2020/jul/04/us-coronavirus-cases-fourth-of-july-holiday>.

133. Kevin Breuninger, *Trump Says U.S. ‘in the Process’ of Crafting Coronavirus Strategy That Has ‘Developed as We Go Along.’* CNBC (July 21, 2020, 7:43 PM), <https://www.cnn.com/2020/07/21/coronavirus-trump-says-us-in-the-process-of-crafting-strategy.html> (“President Donald Trump said Tuesday that his administration is ‘in the process of developing a strategy’ to combat the coronavirus pandemic, adding that that plan of action has ‘developed as we go along.’”).

cal expediency,<sup>134</sup> the President admitted that the nation's COVID crisis would likely "get worse before it gets better" and endorsed the wearing of masks.<sup>135</sup> Unfortunately, the White House made containment of the virus more difficult by endorsing hydroxychloroquine as a treatment—as well as bleach and ultraviolet light—without any evidence that these treatments are effective.<sup>136</sup> Moreover, the President actively undermined the public's trust in medical guidelines, routinely disparaging health professionals, including Dr. Anthony Fauci, the renowned director of the National Institute of Allergy and Infectious Diseases,<sup>137</sup> and demoted scientists from government posts when they criticized the President's policies.<sup>138</sup> Relatedly, the Administration

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134. See Peter Baker, *Trump, in a Shift, Endorses Masks and Says Virus Will Get Worse*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/us/politics/trump-coronavirus-masks.html> (remarking on the "dawning realization" among the President's team "that the virus not only is not going away but has badly damaged his standing with the public heading into the election in November").

135. Nikki Carvajal, *Trump Says Coronavirus Pandemic Will Probably "Get Worse Before It Gets Better."* CNN (July 21, 2020, 6:30 PM), [https://www.cnn.com/world/live-news/coronavirus-pandemic-07-21-20-intl/h\\_7b4c14102421ee45dbbd2ea81b50bb01](https://www.cnn.com/world/live-news/coronavirus-pandemic-07-21-20-intl/h_7b4c14102421ee45dbbd2ea81b50bb01); see Andrew Naughtie, *Trump Promotes Masks as 'Patriotic' Before Mingling Without One at Event*, INDEPENDENT (July 21, 2020, 12:49 AM), <https://www.independent.co.uk/news/world/americas/trump-coronavirus-face-mask-patriotic-fundraiser-washington-a9629966.html>.

136. See Holly Baxter, *Trump Takes Hydroxychloroquine Every Day Because What Do Scientists Know Anyway?*, INDEPENDENT (May 18, 2020, 11:59 PM), <https://www.independent.co.uk/voices/donald-trump-hydroxychloroquine-coronavirus-treatment-bleach-covid-19-a9521221.html>; Matt Perez, *Trump Suggests Injecting Coronavirus Patients with Light or Disinfectants, Alarming Experts*, FORBES (Apr. 24, 2020, 12:20 PM), <https://www.forbes.com/sites/mattperez/2020/04/23/trump-suggests-injecting-coronavirus-patients-with-light-or-disinfectants-contradicting-experts>.

137. See, e.g., Scott Neuman, *Trump Hints He Might Fire Fauci After Election, as COVID-19 Cases Rise*, NPR (Nov. 2, 2020, 9:47 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/11/02/930273353/trump-hints-he-might-fire-fauci-after-election-as-covid-19-cases-rise> (reporting that on November 1, the President stated at a Florida campaign rally that he might fire Dr. Fauci, motivating rally goers to chant, "Fire Fauci," to which the President responded, "Don't tell anybody, but let me wait until a little bit after the election. I appreciate the advice.").

138. The termination of Rick Bright, former head of the Department of Health and Human Services' Biomedical Advanced Research and Development Authority (BARDA), is a case in point. Bright filed a whistleblower complaint with the Office of Special Counsel in which he alleged, among other things: (1) The Department of Health and Human Services resisted Bright's suggestion in January 2020 that it devote more resources for pandemic treatments and vaccines; (2) the Trump administration intended to stockpile hydroxychloroquine as a treatment without evidence that the treatment was effective; and (3) he was removed from his post at BARDA because he "prioritize[d] science and safety over political expediency." Sheryl Gay Stolberg, *Virus Whistle-Blower Says Trump Administration Steered Contracts to Cronies*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/us/politics/rick-bright-coronavirus-whistleblower.html>. In a May 2020 interview with the television program *60 Minutes*, Bright said, "We don't yet have a national strategy to respond fully to this

continued its assault on the constitutionality of the Affordable Care Act in litigation before the Supreme Court;<sup>139</sup> made it more difficult for indigent persons to obtain health care by defending work requirements for Medicaid eligibility, even as job opportunities plummeted;<sup>140</sup> and defended imposing additional work requirements on adults seeking benefits under the Supplemental Nutrition Assistance Program.<sup>141</sup>

A new chapter in the White House's response to COVID began on October 2, 2020, when the nation learned, through the President's

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pandemic. The best scientists that we have in our government who are working really hard to try to figure this out aren't getting that clear, cohesive leadership, strategic plan message yet." See Norah O'Donnell, *The Government Whistleblower Who Says the Trump Administration's Coronavirus Response Has Cost Lives*, CBS NEWS: 60 MINUTES (May 18, 2020), <https://www.cbsnews.com/news/rick-bright-whistleblower-trump-administration-coronavirus-pandemic-response/>. After being relocated to the National Institutes of Health, Bright resigned from the Administration in early October, saying that the Administration's response to the pandemic continued to be "reckless" and was "causing lives to be lost every day." See Sarah Fitzpatrick & Dareh Gregorian, *Whistleblower Rick Bright Says Trump Admin's Virus Approach is 'Dangerous'*, NBC NEWS (Oct. 6, 2020), <https://www.nbcnews.com/politics/politics-news/hhs-whistleblower-rick-bright-resigns-n1242357>.

139. See Sheryl Gay Stolberg, *Trump Administration Asks Supreme Court to Strike Down Affordable Care Act*, N.Y. TIMES, (Nov. 10, 2020), <https://www.nytimes.com/2020/06/26/us/politics/obamacare-trump-administration-supreme-court.html>.

140. The Centers for Medicare and Medicaid Services approved twelve state work requirements, and challenges to those waivers were brought in federal court. Both the district court and the appeals court invalidated approval of the waivers as arbitrary and capricious, see *Gresham v. Azar*, 950 F.3d 93 (D.C. Cir. 2020), cert. granted sub nom. *Arkansas v. Gresham*, — S. Ct. —, No. 20-38, 2020 WL 7086047 (2020). In February 2021, the Biden Administration requested that the Supreme Court cancel a hearing in these appeals. See *Motions to Vacate the Judgments of the Court of Appeals, To Remove the Cases from the March 2021 Argument Calendar, and To Hold Further Briefing in Abeyance*, *Cochran v. Gresham*, — S. Ct. — (Nos. 20-37 & 20-38) (2021). In March 2021, the Court entered a one-line order that removed the appeals from the calendar for the March 2021 argument session. See James Romoser, *Court Nixes Upcoming Argument on Medicaid Work Requirements*, SCOTUSBLOG (Mar. 11, 2021), <https://www.scotusblog.com/2021/03/court-nixes-upcoming-argument-on-medicaid-work-requirements/>.

141. See Bill Chappell, *Court Vacates Trump Administration Rule that Sought to Kick Thousands Off Food Stamps*, NPR (Oct. 19, 2020, 4:20 PM), <https://www.npr.org/2020/10/19/925497374/court-vacates-trump-administration-rule-that-sought-to-kick-thousands-off-food-s> ("The [United States Department of Agriculture's] rule change would have put new requirements on able-bodied adults without children, saying they should work at least 20 hours each week if they want to keep getting Supplemental Nutrition Assistance Program, or SNAP, benefits beyond a three-month limit."). A federal court invalidated the requirement as arbitrary and capricious. See *D.C. v. U.S. Dep't of Agriculture*, No. 20-CV-00119 (BAH), 2020 WL 6123104, at \*1–2 (D.D.C. Oct. 18, 2020).

overnight tweet, that he had tested positive for the virus.<sup>142</sup> The President was treated with a variety of experimental drugs and procedures that are not available in the usual course to most Americans;<sup>143</sup> his highly publicized recovery underscored the importance of high-quality medical care to a patient's prospects for survival.<sup>144</sup> These events did not, unfortunately, encourage the President to undertake a thoughtful reevaluation of his Administration's COVID policies, but rather seemed to induce in Trump a false sense of invincibility, even as the First Lady and other persons in his inner circle reported that they, too, had become infected.<sup>145</sup> Both in the lead-up to the 2020 Presidential Election and then to contest the election results, Trump convened rallies, without requiring social distancing or the wearing of masks by participants.<sup>146</sup> While putting thousands of Americans at risk of infec-

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142. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 2, 2020, 12:54 AM), <https://twitter.com/realDonaldTrump/status/1311892190680014849> ("Tonight, @FLOTUS and I tested positive for COVID-19. We will begin our quarantine and recovery process immediately. We will get through this TOGETHER!"). Twitter has permanently suspended Trump's account and the original tweet is deleted. See Twitter Inc., *Permanent suspension of @realDonaldTrump* (Jan. 8, 2021), [https://blog.twitter.com/en\\_us/topics/company/2020/suspension.html](https://blog.twitter.com/en_us/topics/company/2020/suspension.html). For an archive of tweets from the former President's personal account, see Trump Twitter Archive, <https://www.thetrumparchive.com>.

143. Reports at the time stated that the President manifested a high fever, cough, and oxygen saturation level at or below 94 percent, and that he was flown to Walter Reed National Military Medical Center, where he received "an experimental polyclonal antibody cocktail," remdesivir (an antiviral drug), dexamethasone (a steroid), and supplemental oxygen. Christina Morales, Allyson Waller & Marie Fazio, *A Timeline of Trump's Symptoms and Treatments*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/10/04/us/trump-covid-symptoms-timeline.html>. Information disclosed in January 2021 suggested that the President was more seriously ill than previously acknowledged and that consideration was given to placing him on a ventilator. See Noah Weiland, Maggie Haberman, Mark Mazzetti & Annie Karnie, *Trump Was Sicker Than Acknowledged with Covid-19*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/us/politics/trump-coronavirus.html>.

144. See Andrew Restuccia & Catherine Lucey, *Trump Is Improving, Doctors Say*, WALL ST. J. (Oct. 5, 2020), <https://www.wsj.com/public/resources/documents/x5q6CYCsHZNHTWi0xra-WSJNewsPaper-10-5-2020.pdf>.

145. See Peter Baker & Maggie Haberman, *Trump Leaves Hospital, Minimizing Virus and Urging Americans 'Don't Let It Dominate Your Lives,'* N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/2020/10/05/us/politics/trump-leaves-hospital-coronavirus.html>.

146. Upon his return to the White House on October 5, President Trump stood before the camera and dramatically removed his mask, telling Americans not to let the virus "dominate your lives." *Id.* In the weeks that followed, and in the lead-up to the election and after, the President held his signature rallies, maskless, delivering to largely maskless crowds remarks such as, "I will kiss everyone in that audience, I will kiss the guys and the beautiful women, I will give you a big fat kiss." Steve Holland, *Back on Campaign Trail, Trump Says He Feels 'Powerful' After COVID Recovery*, REUTERS (Oct. 12, 2020, 1:13 AM), <https://www.reuters.com/article/usa-election/back-on-campaign-trail-trump-says-he-feels-powerful-after-covid-recovery->

tion, the President and his administration failed to press for additional aid for states with high revenue losses,<sup>147</sup> for unemployed individuals in need,<sup>148</sup> or to small businesses in urban areas.<sup>149</sup> In addition, the Administration's mismanagement of "Project Warp Speed" during this period and the accompanying failure to coordinate state and local efforts contributed to the delayed and inadequate distribution of vaccines.<sup>150</sup>

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idINKBN26X0HB. On January 6, 2021, the President spoke to a large rally in Washington, D.C., after which many attendees stormed the Capitol Building. See Steve Holland, Jeff Mason & Jonathan Landay, *Trump Summoned Supporters to "Wild" Protest, and Told Them to Fight. They Did*, REUTERS (Jan. 6, 2021, 11:13 AM), <https://www.reuters.com/article/us-usa-election-protests/trump-summoned-supporters-to-wild-protest-and-told-them-to-fight-they-did-idUSKBN29B24S> (describing the rally and ensuing chaos).

147. Revenue losses across states and localities were not even, with California and New York experiencing among the worst "fiscal stress." See Louise Sheiner & Sophia Campbell, *How Much Is COVID-19 Hurting State and Local Revenues?*, BROOKINGS: UP FRONT (Sept. 24, 2020), <https://www.brookings.edu/blog/up-front/2020/09/24/how-much-is-covid-19-hurting-state-and-local-revenues/> ("Different states are also experiencing varying degrees of fiscal stress. States like Nevada, Washington, California, Florida, and New York show the largest revenue declines in 2020, while states like Kansas, New Hampshire, Mississippi, and Wyoming show the smallest."). Los Angeles projected a \$400 to \$600 million shortfall, with the city preparing for layoffs and "catastrophic service cuts" if it did not receive federal aid. David Zahniser, *L.A.'s Budget Crisis Worsens as Deficit Projections Climb to \$600 Million*, L.A. TIMES (Oct. 23, 2020, 6:04 PM), <https://www.latimes.com/california/story/2020-10-23/la-budget-crisis-600-million-deficit>.

148. As of December 2020, 7 million Americans were employed but had wage or hour cuts; 11.1 million were officially unemployed; 4.5 million had dropped out of the labor force; and 3.1 million had been misclassified as employed but were actually unemployed or not in the labor force. See *What Economy Will President-Elect Biden Inherit?*, ECON. POL'Y INST. (Dec. 9, 2020), <https://www.epi.org/multimedia/what-economy-will-president-elect-biden-inherit/>; see also Jason DeParle, *8 Million Have Slipped into Poverty Since May as Federal Aid Has Dried Up*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/2020/10/15/us/politics/federal-aid-poverty-levels.html>; Anneken Tappe, *Dow Swings 600 Points After Trump Rejects Stimulus Plan*, CNN BUS. (Oct. 6, 2020, 4:12 PM), <https://www.cnn.com/2020/10/06/investing/dow-stock-market-stimulus/index.html>.

149. See Jacob Pramuk, *McConnell and Pelosi Are Once Again at Odds Over the Size of a Coronavirus Stimulus Package*, CNBC (Nov. 6, 2020, 12:25 PM), <https://www.cnbc.com/2020/11/06/mcconnell-pushes-for-smaller-stimulus-as-.html>; Yuka Hayashi, *For Many Small Businesses with High Rents, Coronavirus Aid Falls Short*, WALL ST. J. (May 1, 2020), <https://www.wsj.com/articles/for-many-small-businesses-u-s-coronavirus-aid-falls-short-11588325404>.

150. See Mark Terry, *Operation Warp Speed Slow to Ramp Up COVID-19 Vaccine Distribution*, BIOSPACE (Dec. 30, 2020), <https://www.biospace.com/article/operation-warp-speed-currently-running-on-impulse-power> (reporting that the program succeeded in accelerating development of a COVID-19 vaccine, but "is failing in the early stages of distribution," administering only 2.1 million vaccines when the goal was 40 million by this date); see also Sharon LaFraniere, *Biden Got the Vaccine Rollout Humming, With Trump's Help*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2021/03/11/us/politics/biden-trump-vaccine-rollout.html>.

Our chronicle of Executive Branch activity ends with President Trump's decisive loss in the 2020 election. After the election, he refused to concede victory to his Democratic opponent and delayed the usual transition activities that would enable the new administration to deal forthrightly with the coronavirus crisis.<sup>151</sup> Rather, in repeated tweets and statements, former President Trump insisted that he had won the election, notwithstanding the actual vote count.<sup>152</sup> We do not discuss the extraordinary events that followed: the former President's unsuccessful efforts, through more than five dozen failed lawsuits and threatened coercion of state election officials, to overturn the popular vote in key "swing" states;<sup>153</sup> Republican-led challenges to the vote of the Electoral College;<sup>154</sup> the former President's supporters' violent

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[www.nytimes.com/2021/03/10/us/politics/biden-coronavirus-vaccine.html](https://www.nytimes.com/2021/03/10/us/politics/biden-coronavirus-vaccine.html) (explaining that "production of two of the three federally authorized vaccines has sped up in part because of the demands and directives of the new president's coronavirus team").

151. Maeve Reston, *As Trump Ignores Deepening Coronavirus Crisis, Biden Calls for Urgent Response*, CNN (Nov. 15, 2020, 11:06 AM), <https://www.cnn.com/2020/11/15/politics/joe-biden-donald-trump-coronavirus-transition/index.html>. On November 15, Dr. Fauci confirmed that the Trump Administration's coronavirus task force was prohibited from contacting Biden's team, noting that "[o]f course it would be better if we could start working with them." Roni Caryn Rabin, *Trump's Coronavirus Team Is Blocked from Working with Biden's—and That's a Problem, Fauci Says*, N.Y. TIMES (Nov. 15, 2020), <https://www.nytimes.com/live/2020/11/15/world/covid-19-coronavirus/trumps-coronavirus-team-is-blocked-from-working-with-bidens-and-thats-a-problem-fauci-says>.

152. See, e.g., Lisa Mascaro, Mary Clare Jalonick & Kevin Freking, *Trump Says He'll 'Fight Like Hell' to Hold on to Presidency*, ASSOCIATED PRESS (Jan. 4, 2021), <https://apnews.com/article/trump-congress-reverse-election-loss-e2a6fa060432bd19d92a142a0da5688e> (reporting President Trump's statements at a Georgia rally in January 2021 that Biden electors are "not gonna take this White House!" and that he won the election "by a lot"); see also Veronica Stracqualursi, *Former Trump Communications Director Says President Lied About 2020 Election and Should Consider Resigning*, CNN (Jan. 8, 2021, 10:32 AM), <https://www.cnn.com/2021/01/08/politics/alyssa-farah-trump-lied-resignation-cnntv/index.html> (quoting a former White House staffer who described the former President's mendacity).

153. See William Cummings, Joey Garrison & Jim Sergeant, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 5:01 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>. In January 2021, the press reported that the former President had considered firing Jeffrey A. Rosen, the Acting Attorney General, for failing to appoint a special counsel to investigate Dominion Voting Systems and refusing to send a letter to Georgia state lawmakers encouraging them to invalidate election results in that state. See Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html> (describing the turmoil at the Department of Justice).

154. See Benjamin Siegel, *Historic Showdown in Congress as GOP Members Challenge Biden's Electoral Vote Win*, ABC NEWS (Jan. 6, 2021, 5:00 AM), <https://>

breach of the Capitol resulting in several deaths<sup>155</sup> (an event with no precedent in the United States other than the burning of Washington, DC during the War of 1812);<sup>156</sup> and a second impeachment and trial before the Senate for high crimes and misdemeanors.<sup>157</sup> At the least, the former President’s rallying of supporters to come to the Capitol—whether or not intended to incite violence and insurrection—placed thousands of Americans at risk as a “superspreader” event in which large numbers of protestors appeared without masks and failed to maintain social distance.<sup>158</sup>

Counterfactual analysis allows the question: What could or would have been done to prepare for, to contain, and to mitigate COVID had different Executive leadership been in place during the critical early months of the crisis and through its later surges? To be sure, one can never know how different political choices would have affected the economy, public health, and social relations.<sup>159</sup> However, in our view, throughout these turbulent months, the White House re-

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abcnews.go.com/Politics/historic-showdown-congress-gop-members-challenge-bidens-electoral/story.

155. See *Watch: Donald Trump, Son and Team Party Moments Before Capitol Hill Riots*, INDIA TODAY (Jan. 8, 2021), <https://www.indiatoday.in/world/story/watch-donald-trump-son-and-team-party-moments-before-capitol-hill-riots-1757213-2021-01-08> (reporting that a “video has emerged” that “seems to be recorded before Donald Trump addressed the gathered crowd and urged them to ‘to fight’” minutes before the protestors breached the Capitol).

156. See Talia Lakritz, *The Last Time a Mob Stormed the Capitol Was During the War of 1812. Here’s What Happened When the British Invaded Washington.*, INSIDER (Jan. 7, 2021, 3:38 PM), <https://www.insider.com/capitol-storming-war-of-1812-2021-1> (reporting that a “pro-Trump mob stormed the Capitol building on Wednesday in a riot that left four people dead,” and “was the first mass breach of the Capitol since the War of 1812”).

157. *Day 1 Impeachment Trial Highlights: Senate Votes to Proceed with Trump’s Case After Constitutionality Debate*, N.Y. TIMES (Feb. 13, 2021, 7:59 AM), <https://www.nytimes.com/live/2021/02/09/us/trump-impeachment-trial>.

158. See Paulina Villegas, Rachel Chason & Hannah Knowles, *Storming of Capitol was Textbook Potential Superspreader, Experts Say*, WASH. POST (Jan. 8, 2021, 7:00 AM), <https://www.washingtonpost.com/health/2021/01/08/capitol-coronavirus>.

159. *Compare Neil Paine, Experts Think the Economy Would Be Stronger if COVID-19 Lockdowns Had Been More Aggressive*, FIVETHIRTYEIGHT (Sept. 22, 2020, 1:11 PM), <https://fivethirtyeight.com/features/experts-think-the-economy-would-be-stronger-if-covid-19-lockdowns-had-been-more-aggressive/> (reporting that in a poll of macroeconomists, “74 percent . . . said the U.S. would be in a better economic position now if lockdowns had been more aggressive at the beginning of the crisis. . . . [T]he most commonly cited reason was that early control over the virus would have allowed a smoother and more comprehensive return to economic activity later on[.]”), with Alexander D. Arnon, John A. Ricco & Kent A. Smetters, *Epidemiological and Economic Effects of Lockdown*, BROOKINGS (Sept. 23, 2020), <https://www.brookings.edu/bpea-articles/epidemiological-and-economic-effects-of-lockdown/> (reporting study finding that epidemiological and economic effects of three “non-pharmaceutical interventions”—stay-at-home orders, business closures, and school closures—that

mained partisan, counter-productive, and provocative in its response to the pandemic, making policy choices that left the nation and hundreds of thousands of Americans vulnerable to a deadly virus and its enormous toll.<sup>160</sup> The Executive's policies also skewed the distributional effects of the pandemic by race, class, and region,<sup>161</sup> and it exacerbated the country's trend toward extreme economic concentration and racial polarization.<sup>162</sup> Within this political context, the judiciaries of both the states and the United States monitored conditions and adapted emergency measures in an impressive effort to sustain a functioning system of civil process.

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targeted individual behavior were more effective at reducing COVID transmission "at lower economic cost" than interventions such as shutdowns that targeted business).

160. See Steffie Woolhandle, David U. Himmelstein, Sameer Ahmed, Zinzi Bailey, Mary T. Bassett, Michael Bird, Jacob Bor, David Bor, Olveen Carrasquillo, Merlin Chowkwanyun, Samuel L. Dickman, Samantha Fisher, Adam Gaffney, Sandro Galea, Richard N. Gottfried, Kevin Grumbach, Gordon Guyatt, Helena Hansen, Philip J. Landrigan, Michael Lighty, Martin McKee, Danny McCormick, Alecia McGregor, Reza Mirza, Juliana E. Morris, Joia S. Mukherjee, Marion Nestle, Linda Prine, Altaf Saadi, Davida Schiff, Martin Shapiro, Lello Tesema & Atheendar Venkataramani, *Public Policy and Health in the Trump Era*, 397 LANCET COMM'NS 705 (reporting the negative effects, including deaths, resulting from Trump's public health policies and failures during the pandemic).

161. Jhacova Williams, *Latest Data: Black-White and Hispanic-White Gaps Persist as States Record Historic Unemployment Rates in the Second Quarter*, ECON. POL'Y INST. (Aug. 2020), <https://www.epi.org/indicators/state-unemployment-race-ethnicity/>; see also Jessica Menton, *Unemployment Benefits: Racial Disparity in Jobless Aid Grows as Congress Stalls on Covid-19 Stimulus*, USA TODAY (Oct. 22, 2020, 11:10 PM), <https://www.usatoday.com/story/money/2020/10/22/stimulus-check-black-unemployment-rate-racial-disparity-coronavirus-trump-biden/3650844001/>. The former President's effort to salvage the economy through an executive memorandum that deferred payroll tax collection was expected to produce negligible economic results because few companies participated. See Jim Tankersley, *Trump's Payroll Tax 'Cut' Fizzles*, N.Y. TIMES (Sept. 11, 2020), <https://www.nytimes.com/2020/09/11/business/trump-payroll-tax-cut.html> ("Trade groups and tax experts say they know of no large corporations that plan to stop withholding employees' payroll taxes this fall. As a result, economic policy experts now say they expect the deferral to have little to no effect on economic growth this year.").

162. In August 2020, the New York Times reported that "the stocks of Apple, Amazon, Alphabet, Microsoft, and Facebook . . . rose 37 percent in the first seven months this year, while all the other stocks in the S&P 500 fell a combined 6 percent . . . . Those five companies now constitute 20 percent of the stock market's total worth, a level not seen from a single industry in at least 70 years." Peter Eavis & Steve Lohr, *Big Tech's Domination of Business Reaches New Heights*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/technology/big-tech-business-domination.html>; see also Jeanna Smialek, *Even as Americans Grew Richer, Inequality Persisted*, N.Y. TIMES (Sept. 28, 2020), <https://www.nytimes.com/2020/09/28/business/economy/coronavirus-pandemic-income-inequality.html> (noting that "[o]nly the richest 10 percent held more wealth in 2019 than on the eve of the 2007 to 2009 recession" and that wealthy families are more likely to benefit from the stock market's recovery than poor families on account of owning more value in stocks).

## II.

## FEDERAL AND STATE JUDICIAL RESPONSES TO COVID

The Trump White House failed to develop a timely, coordinated, and centralized plan to deal with COVID; failed to provide accurate information about the pandemic; failed to encourage the public to take low-cost measures like wearing face masks to contain the virus; failed to provide states and localities with sufficient funding to deal with the economic crisis that followed in the wake of the health crisis; and failed to support the courts with adequate, additional resources to ensure the proper functioning of a system of justice. Against this background, the judiciary's responses to COVID—even if imperfect—provide an important contrast to the “massive failures” of the Executive Branch.<sup>163</sup> To be sure, there was no single judicial response. Wide differences exist among local, state, and federal courts, as well as in the same type of court in different regions of the country. But courts at every level of jurisdiction offer an essential service—processes for civil justice—and collectively they devised ways to carry out this function, even as the pandemic made conducting legal activity in-person, the usual mode of operation, dangerous for litigants, lawyers, witnesses, court personnel, and judges.<sup>164</sup> In the space of this Article and given an ever-changing situation, we cannot present a comprehensive account of the thousands of court orders issued in response to the pandemic.<sup>165</sup> Rather, in this section we identify generally how courts prepared for the pandemic, devised responses to it, and developed

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163. Wallach & Myers, *supra* note 41.

164. See, e.g., *Coronavirus and the Courts*, NAT'L CTR. FOR ST. CTS. (last visited Feb. 24, 2021), <https://www.ncsc.org/newsroom/public-health-emergency> (quoting Tex. C.J. Nathan Hecht, Co-chair, Nat'l Pandemic Rapid Response Team) (“Since the onset of the pandemic, courts throughout the country have determined to stay open to deliver justice without faltering, no matter the adjustments and sacrifices demanded, but also to protect staff . . . and the public from the risks of disease. We are learning new technology and practices together.”) (ellipsis in original).

165. Our information is drawn from a number of sources but especially *Court Orders and Updates During COVID-19 Pandemic*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> (last visited Feb. 24, 2021) (providing daily updates about court orders in response of COVID, but cautioning that the situation in local courts may change rapidly and so the latest information may not be posted); *Coronavirus and the Courts*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Feb. 24, 2021) (providing updated website of state court responses to COVID). The National Science Foundation is supporting a study of all procedural changes in state courts during the pandemic, but we did not have access to its information base or results. See Alyx Mark, *RAPID: Procedural Changes in State Courts During COVID-19*, NAT'L SCI. FOUND., [https://www.nsf.gov/awardsearch/showAward?AWD\\_ID=2028981&HistoricalAwards](https://www.nsf.gov/awardsearch/showAward?AWD_ID=2028981&HistoricalAwards).

principles and guidelines to navigate very challenging circumstances. We also provide illustrative or important examples of these efforts.

*Preparing to Respond to the Threat*

No formal, centralized mechanism has ever existed in the United States to coordinate actions among the local, state, and federal courts. Nevertheless, regionally dispersed courts found ways to develop emergency plans for addressing the pandemic, working through or in tandem with established institutions that had longstanding and deep expertise about the judicial process. Cooperating with other government agencies and officials, courts devised coherent approaches to take account of local conditions, such as rates of infection. Some court systems already had “continuity of operations” and “pandemic/public health” plans addressing threats posed by terrorism, biohazards, and influenza.<sup>166</sup> Across systems, past practice emphasized the importance of leadership, planning, and proactive steps to deal with potential but known crises, as well as to maintain trust, capacity, and clear but flexible priorities. Relatedly, past practice highlighted the importance of communicating accurate and timely information to different stakeholders, including the public and litigants.<sup>167</sup> These lessons proved to be important guideposts for the judiciaries’ responses to COVID.

On the federal side, the judiciary worked with federal agencies to collect information, monitor developments, and design a plan of operations that aimed at maintaining the great tradition of “open courts,” as that term has been historically used, while nevertheless protecting health and safety. As early as February 2020, the Administrative Office of the United States Courts, which manages the functioning of the federal courts, organized a task force to ensure a steady and up-to-date exchange of COVID information pertinent to the judiciary; the task force membership expanded to include judges, court officials, and representatives of the General Services Administration, the United States Marshals Service, and the Federal Protective Service.<sup>168</sup> Likewise, the

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166. See R. ERIC PETERSEN, CONG. RSCH. SERV., RL31978, EMERGENCY PREPAREDNESS AND CONTINUITY OF OPERATIONS (COOP) PLANNING IN THE FEDERAL JUDICIARY (2005); see also NAT’L CTR. FOR STATE CTS., CONTINUITY OF COURT OPERATIONS: STEPS FOR COOP PLANNING (2007) (compiling state plans and setting out guidelines to develop a plan “if faced with an emergency that threatens continuation of normal operations”).

167. See generally Thomas A. Birkland & Carrie A. Schneider, *Emergency Management in the Courts: Trends After September 11 and Hurricane Katrina*, 28 JUST. SYS. J. 20 (2007).

168. See *Federal Judiciary Confronts Coronavirus Spread: Judicial Conference Acts on Court Administration Matters*, U.S. Cts. (Mar. 17, 2020), <https://www.uscourts.gov/news/2020/03/17/federal-judiciary-confronts-coronavirus-spread-judicial-confer>

Judicial Conference of the United States, comprised of the Chief Justice of the United States, the chief judge of each federal court of appeals, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit, played a leadership role in devising an emergency approach.<sup>169</sup> Many federal district courts likewise coordinated with state and local officials to keep current about the pandemic. At the state level, the National Center for State Courts, an information clearinghouse and research center on judicial administration, served as a resource.<sup>170</sup> In particular, the judiciary exercised initiative in developing protocols, thinking proactively, and sharing information.<sup>171</sup>

Overall judicial responses thus were decentralized, but best practices emerged that courts around the country adapted to individualized

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ence-acts-court. For a description of the Administrative Office, see *Judicial Administration*, U.S. Cts., [www.uscourts.gov/about-federal-courts/judicial-administration](http://www.uscourts.gov/about-federal-courts/judicial-administration) (describing the Administrative Office as “the agency within the judicial branch that provides a broad range of legislative, legal, financial, technology, management, administrative, and program support services to federal courts”).

169. See *About the Judicial Conference*, U.S. Cts., <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference>.

170. See *Mission & History*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/about-us/mission-and-history>.

171. For example, in April 2020, the Administrative Office of the United States Courts created a working group, made up of chief judges and court executives, “to develop protocols for how to safely resume grand jury and trial jury proceedings.” *See Courts Begin to Consider Guidelines for Reopening*, U.S. Cts. (Apr. 27, 2020), <https://www.uscourts.gov/news/2020/04/27/courts-begin-consider-guidelines-reopening>.

The Administrative Office, gathering information from other agencies and from the courts throughout the pandemic, distributed guidelines for reopening courthouses in order to facilitate local decision-making in light of local conditions, drawing from information gathered throughout the pandemic from courts and agencies. *See CONG. RSCH. SERV., OVERVIEW OF RECENT RESPONSES TO COVID-19*, *supra* note 117. Further, CARES directed the Judicial Conference and the Supreme Court to consider potential rule amendments to “address emergency measures that may be taken by the federal courts when the President declares a national emergency under the National Emergencies Act . . . .” *See Coronavirus Aid, Relief, and Economic Security Act of 2020*, Pub. L. No. 116-136, § 15002(b)(6). The Judicial Conference’s Committee on Rule and Practice sought public input regarding both state and federal courts on “challenges encountered during the COVID pandemic . . . by lawyers, judges, parties, or the public,” and especially wanted to know about “situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions.” *Public Input Received on Possible Emergency Procedures*, U.S. Cts. (June 4, 2020), <https://www.uscourts.gov/news/2020/06/04/public-input-received-possible-emergency-procedures>. The comment period closed on June 1, and, as we write, the Committee is determining whether amendments should be drafted and sent to the Judicial Conference. *Id.* Some of the comments focused on barriers faced by pro se litigants; on the need to open remote proceedings to the press; on the benefits of a uniform electronic platform to be used throughout the federal courts; and on securing equal access to electronic court filings through the PACER system. *Id.*

circumstances.<sup>172</sup> These practices, beginning around early March 2020, included, but were not limited to, closing courthouses to the general public, suspending jury trials, delaying filing requirements, adapting rules that normally apply to pro se litigants, hearing oral arguments and conducting judicial conferences by telephone or virtually, and suspending paper filing requirements.<sup>173</sup>

As the number of new infections and fatalities initially leveled off, courts eased these restrictions, but during the summer and with the fall surge, in-person operation in many regions again yielded to remote proceedings.<sup>174</sup> In November 2020, two dozen federal courts suspended jury trials as well as grand jury proceedings.<sup>175</sup> The decision by the Fifth Circuit Court of Appeals to hold in-person oral arguments in January 2021 was sufficiently unusual to be the focus of a legal news story.<sup>176</sup> Within any legal system or courthouse, the transition to remote proceedings required an extraordinary coordinated effort, involving large details and small, to reconfigure physical plans, install air filters, impose distancing rules, and become familiar with

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172. See Merrill Balassone, *Judicial Council Launches Working Group to Aid Courts in Pandemic Recovery*, CAL. CTS. NEWSROOM (May 12, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-launches-working-group-to-aid-courts-in-pandemic-recovery> (outlining efforts to assemble judicial best practices in dealing with the pandemic). State judiciaries likewise remained alert to conditions as they affected courthouse activity. As an example, as California began its plans to reopen, the California Judicial Council created the Pandemic Continuity of Operations Working Group, comprised of 23 volunteer judges and court executives, see Blaine Corren, *Council Working Group Releases Pandemic Recovery Resource Guide for Courts*, CAL. CTS. NEWSROOM (June 3, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-launches-working-group-to-aid-courts-in-pandemic-recovery>, and later released a guidance document setting out issues to consider and technical recommendations (such as screening methods and devising walking paths to ensure safe distancing). *Id.*

173. NAT'L CTR. FOR STATE CTS., *supra* note 164 (noting that five “of the most common efforts state courts are taking to combat the coronavirus” are suspending jury trials, generally suspending in-person proceedings, limiting physical access to courthouses, granting extensions for court deadlines, and encouraging or requiring teleconferences and videoconferences instead of in-person hearings).

174. See *Some Courts Slow Reopening Plans as COVID Cases Rise*, U.S. CTS. (July 16, 2020), <https://www.uscourts.gov/news/2020/07/16/some-courts-slow-reopening-plans-covid-cases-rise>.

175. See *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge> (reporting that two dozen federal courts suspended jury trials because of health concerns).

176. See Madison Alder, *Fifth Circuit Holds Rare In-Person Arguments Amid Pandemic*, BLOOMBERG L. (Jan. 6, 2021, 2:25 PM), <https://news.bloomberglaw.com/us-law-week/fifth-circuit-holds-rare-in-person-arguments-amid-pandemic> (reporting that “the Fifth Circuit held two in-person oral arguments in Houston for the first time since the start of the pandemic and scheduled two more”).

technological innovation—as the Chief Justice of the United States wrote in his year-end report, “Much of this work is not glamorous, but it is essential, and it got done.”<sup>177</sup>

### *The Federal Judicial Response*

On March 12, 2020, the federal court system made public its plan for “Judiciary Preparedness for Coronavirus (COVID-19).” The plan was provisional and flexible, and it went through different iterations as conditions changed.<sup>178</sup> Soon after, on March 17, the Northern District of California, which embraces San Francisco, became the first district to close federal courthouses to the public.<sup>179</sup> The judicial leadership declined to take a “one size fits all” approach, recognizing the varied pressures that different localities, states, and regions would face under threat of COVID. Nevertheless, decision makers in all federal courts received important information to guide their actions; on March 19, the Administrative Office of the United States announced guidelines with specific recommendations:

- Permit as many employees as is practicable to telework.
- Postpone all courthouse proceedings with more than 10 people, such as naturalization ceremonies.
- Conduct in-person court proceedings only when absolutely necessary. Utilize videoconferencing or audioconferencing capabilities where practicable.
- Conduct jury proceedings only in exceptional circumstances.
- Limit the number of family members who attend proceedings.
- Stagger scheduling of critical court proceedings to reduce the number of people in seating galleries, wells of courtrooms, conference rooms, and public waiting areas.
- Limit staff at critical courtroom proceedings to fewer than ten people and ensure that they are at least six feet apart.<sup>180</sup>

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177. JOHN G. ROBERTS, 2020 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2020).

178. CONG. RSCH. SERV., OVERVIEW OF RECENT RESPONSES TO COVID-19, *supra* note 117 (reporting that the Administrative Office of the U.S. Courts emphasized local option and flexibility in light of variation “across judicial districts in whether communities are experiencing a sustained downward trend in COVID-19 cases, the status of state or local orders related to individual movement and shelter-in-place, and whether there have been recent confirmed or suspected cases of COVID-19 in a court facility”).

179. *In re* Coronavirus Disease Public Health Emergency, No. 72-2 (N.D. Cal. Mar. 16, 2020).

180. *Judiciary Preparedness for Coronavirus (COVID-19)*, U.S. Cts. (Mar. 20, 2020), <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19>.

The Judicial Conference later updated its guidelines in light of ongoing developments, setting out a phased approach to operating virtually and reopening in real-time, and again taking account of local conditions and of guidance from the Centers for Disease Control.<sup>181</sup> These changes generated unexpected budgetary costs for the Article III courts: increased cleaning, information technology hardware, courthouse screening, and so forth. Although some funding for these expenses was available from moneys previously allocated for travel and conferences, now canceled, the Judicial Conference wrote to the House and Senate Appropriations Committees on April 28 detailing a budget gap of \$36.6 million to address “emergent needs” and explaining, “Like other institutions throughout the world, the operations of the federal courts have been significantly disrupted by the COVID-19 pandemic . . . .”<sup>182</sup>

#### *Supreme Court of the United States*

Looking first to the United States Supreme Court, the building has remained open throughout the pandemic, although it is closed to the public, and the Clerk’s Office has continued to operate with staff permitted to telework.<sup>183</sup> The Supreme Court’s initial announcement in response to the pandemic, on March 16, postponed oral arguments that were scheduled through April 1.<sup>184</sup> (Historical precedent supported postponement—similar action had been taken with respect to the Spanish flu epidemic in October 1918 and to yellow fever outbreaks in August 1793 and August 1798.)<sup>185</sup>

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181. See Memorandum from James C. Duff, Updated Guidance Regarding Judiciary Response to COVID-19 (Apr. 24, 2020).

182. Letter from John W. Lungstrum, Chair, Comm. on the Budget, Jud. Conf. of the U.S., to Chairwoman Nita Lowey, Chairman Mike Quigley, Reps. Kay Granger & Tom Graves (Apr. 28, 2020), [https://www.uscourts.gov/sites/default/files/judiciary\\_covid-19\\_supplemental\\_request\\_to\\_house\\_and\\_senate\\_judiciary\\_and\\_approps\\_committees.4.28.2020\\_0.pdf](https://www.uscourts.gov/sites/default/files/judiciary_covid-19_supplemental_request_to_house_and_senate_judiciary_and_approps_committees.4.28.2020_0.pdf); see also *supra* note 118 and accompanying text; *Judiciary Seeks Funding, Legislative Changes to Aid COVID-19 Response*, U.S. CTS. (May 5, 2020), <https://www.uscourts.gov/news/2020/05/05/judiciary-seeks-funding-legislative-changes-aid-covid-19-response>.

183. Guidance Concerning Clerk’s Office Operations from Scott S. Harris, Clerk of the Ct., Sup. Ct. of the U.S. Office of the Clerk (Apr. 17, 2020), [https://www.supremecourt.gov/announcements/COVID-19\\_Guidance\\_April\\_17.pdf](https://www.supremecourt.gov/announcements/COVID-19_Guidance_April_17.pdf).

184. Press Release, Sup. Ct. of the U.S., Press Release Regarding Postponement of March Oral Arguments (Mar. 16, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_03-16-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20).

185. *Id.* (“The Court postponed scheduled arguments for October 1918 in response to the Spanish flu epidemic. The Court also shortened its argument calendars in August 1793 and August 1798 in response to yellow fever outbreaks.”).

The March 16 order did not extend filing deadlines under Supreme Court Rule 30.1. However, three days later—coinciding with a forty percent uptick in COVID infections in the United States<sup>186</sup>—the Court adapted Rules 13.1 and 13.3, and extended the deadline to file a petition for a writ of certiorari 150 days from the date of the lower court judgment, the order denying discretionary review, or the order denying a timely petition for rehearing.<sup>187</sup> The Court clarified that motions for an extension of time under Rule 30.4 were to be “ordinarily . . . granted by the Clerk as a matter of course” if the grounds related to COVID-19 and the requests were “reasonable under the circumstances.”<sup>188</sup> Likewise, the Court ordered that notwithstanding Rules 15.5 and 15.6, the Clerk would “entertain” motions to delay filing a reply if the motion was received at least two days prior to the date for distributing the case’s briefs to the Justices, and that such a motion “ordinarily” would be granted if the delay resulted from “difficulties relating to COVID-19”; the length of the extension was to be “reasonable under the circumstances.”<sup>189</sup>

The Supreme Court made other significant changes to its traditional practices. In particular, on April 3, the Court postponed oral arguments scheduled for the April session, stating it would “consider a range of scheduling options and other alternatives if arguments cannot be held in the Courtroom before the end of the Term.”<sup>190</sup> The Court initially maintained its longstanding resistance to live cameras and audio recordings, eliciting strong criticism.<sup>191</sup> Ten days later, the Court announced that it would hear some of the previously postponed argu-

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186. Eliza Mackintosh & Nick Thompson, *What You Need to Know About Coronavirus on Thursday, March 19*, CNN (Mar. 19, 2020, 8:34 AM), <https://www.cnn.com/2020/03/19/world/coronavirus-newsletter-03-19-20/index.html>.

187. Order from Sup. Ct. of the U.S., 589 U.S. (Mar. 19, 2020), [https://www.supremecourt.gov/orders/courtorders/031920zr\\_d1o3.pdf](https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf).

188. *Id.*

189. *Id.*

190. Press Release, Sup. Ct. of the U.S., Press Release Regarding Postponement of April Oral Arguments (Apr. 3, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_04-03-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20).

191. See Janna Adelstein & Douglas Keith, *Initial Court Responses to Covid-19 Leave a Patchwork of Policies*, BRENNAN CTR. FOR JUST. (Apr. 14, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/initial-court-responses-covid-19-leave-patchwork-policies> (citing *Americans Want the Supreme Court to Function Remotely, and That Includes Hearing Arguments*, FIX THE CT. (Apr. 8, 2020), <https://fixthecourt.com/2020/04/americans-want-supreme-court-function-remotely-includes-hearing-arguments>) (reporting that the Court’s initial “lack of a decision on this matter sparked criticism from legal experts who believe that not only should the Court hold future arguments remotely, but that it should make these proceedings available to the public live,” and citing a poll in which 72 percent of respondents “were in favor of the Court convening virtually for the duration of the pandemic”).

ments by telephone, that it would provide a “live audio feed” to various news outlets (Fox News, the Associated Press, and C-SPAN), and that the transcript and audio of the arguments would be posted on the Court’s website.<sup>192</sup> The Court heard arguments telephonically and provided a live audio feed of oral arguments during the October sitting,<sup>193</sup> and announced on October 9 that it would continue this practice for the November and December sittings.<sup>194</sup> These deviations from what have been immutable practices, considered remarkable when announced, do not appear to have had untoward consequences.<sup>195</sup>

In a similar vein, the Supreme Court also adjusted its procedures regarding paper filings. Requiring paper filing posed significant health risks for lawyers and related personnel working in states with stay-at-home orders; it also put pressure on law offices trying to minimize the

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192. Press Release, Sup. Ct. of the U.S., Media Advisory Regarding May Teleconference Argument Audio (Apr. 30, 2020); see Greg Stohr, *Supreme Court Bows to Crisis With Arguments Via Telephone*, BLOOMBERG L. (Apr. 13, 2020, 1:00 PM), <https://news.bloomberglaw.com/us-law-week/supreme-court-to-hear-arguments-by-telephone-conference> (observing that “[i]t’s an extraordinary step for the tradition-bound court, whose arguments are normally steeped in ritual and devoid of all but the most basic technology”).

193. Press Release, Sup. Ct. of the U.S., Press Release Regarding October Oral Argument Session (Sept. 16, 2020) (“The Court will hear all oral arguments scheduled for the October session by telephone conference, following the same format used for the May teleconference arguments. In keeping with public health guidance in response to COVID-19, the Justices and counsel will all participate remotely.”).

194. Press Release, Sup. Ct. of the U.S., Press Release Regarding November and December Oral Argument Sessions (Oct. 9, 2020). As of this writing, the Supreme Court continues to hear arguments by telephone.

195. Adam Liptak, *Supreme Court Hears First Arguments via Phone*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2020/05/04/us/politics/supreme-court-coronavirus-call.html> (“Supreme Court oral arguments typically last an hour, but [the first virtual session] went over by about 15 minutes.”). The changed practice elicited two very different kinds of criticism. Lyle Denniston, widely regarded as the “Dean Emeritus” of the Supreme Court Press Corps, criticized the new format for trying to confine arguments to the standard 60 minutes, requiring the Justices to speak in order, and giving Chief Justice Roberts too much control over the flow of the argument. See Adam Liptak, *Were the Supreme Court’s Phone Arguments a Success?*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/politics/supreme-court-phone-arguments-lyle-denniston.html>. Professor Leah Litman raised gender concerns, and documented that the Chief Justice disproportionately limited the speaking time and average length of questions of the women Justices. See Leah M. Litman, *Muted Justice*, 169 U. PA. L. REV. ONLINE 134 (2020), [https://scholarship.law.upenn.edu/penn\\_law\\_review\\_online/vol169/iss1/8](https://scholarship.law.upenn.edu/penn_law_review_online/vol169/iss1/8); see also Margaret D. McGaughey, *Remote Oral Arguments in the Age of Coronavirus: A Blip on the Screen or a Permanent Fixture?*, 21 J. APP. PRAC. & PROCESS 163, 165–66 (2021) (describing transition to telephonic argument and Justice Breyer’s view that the remote format would not have a major impact on the Court’s decision making because oral argument is “a very small part of the entire proceeding”).

days that staff were required to work in-person.<sup>196</sup> Initially, the Court invited counsel to send paper copies by mail or private carrier, rather than by in-person delivery, announcing that all hand-delivered copies were to be “directed first offsite for screening” before being sent to the Clerk’s office; the Court also temporarily suspended the practice of allowing filings to be delivered in an open container.<sup>197</sup> With the pandemic continuing, the Court modified its paper-filing requirements on April 15.<sup>198</sup> Moreover, the Court encouraged parties to reach agreements to serve filings electronically to avoid the need for paper service.<sup>199</sup> The order distinguished between documents that, if filed through the Court’s electronic filing system, need not be filed in paper at all, and those that require submission of one paper copy (consistent with formatting requirements set out in the Court’s rules).<sup>200</sup>

#### *United States Courts of Appeals*

The federal courts of appeals for the different circuits devised separate responses to COVID, taking into account regional variation,<sup>201</sup> but their emergency plans bear important similarities.<sup>202</sup> As examples, we report on the Ninth Circuit Court of Appeals (with district courts in the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as the territories of Guam and the Northern Mariana Islands), and the Tenth Circuit

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196. See Marcia Coyle, *US Supreme Court Is Urged to Suspend Paper Filing Requirement*, NAT’L L. J. (Apr. 10, 2020, 2:20 PM), <https://www.law.com/nationallawjournal/2020/04/10/us-supreme-court-is-urged-to-suspend-paper-filing-requirement>.

197. Order from Sup. Ct. of the U.S., 589 U.S. (Mar. 19, 2020), *supra* note 187; see also *Delivery of Documents to the Clerk’s Office*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/deliveryofdocuments.aspx> (discussing open container rule).

198. Order from Sup. Ct. of the U.S., 589 U.S. (Apr. 15, 2020), [https://www.supremecourt.gov/orders/courtorders/041520zr\\_g204.pdf](https://www.supremecourt.gov/orders/courtorders/041520zr_g204.pdf). See also Guidance Concerning Clerk’s Office Operations from Scott S. Harris, Clerk of the Ct., Sup. Ct. of the U.S. Office of the Clerk (Apr. 17, 2020), [https://www.supremecourt.gov/announcements/COVID-19\\_Guidance\\_April\\_17.pdf](https://www.supremecourt.gov/announcements/COVID-19_Guidance_April_17.pdf). Filings that require no paper submission include motions for an extension of time under Rule 30.4, waivers of the right to respond to a petition under Rule 15.3, blanket consents to the filing of amicus briefs under Rules 37.2(a) and 37.3(a), and motions to delay distribution of a certiorari petition under the Court’s order of March 19, 2020.

199. Order from Sup. Ct. of the U.S., 589 U.S. (Apr. 15, 2020), *supra* note 198.

200. *Id.*

201. See Brad Kutner, *Regional Appeals Courts Differ in Responses to COVID-19*, COURTHOUSE NEWS SERV. (Mar. 12, 2020), <https://www.courthousenews.com/regional-appeals-courts-differ-in-responses-to-covid-19/>.

202. Federal court orders are collected in: *Court Orders and Updates During COVID-19 Pandemic*, U.S. CTS. (last updated Apr. 1, 2021, 5:30 PM), <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>.

Court of Appeals (with district courts in the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming). Both circuits are geographically large but contain district courts in states of very divergent demographics and economies. The states within them also so far have been differentially impacted by COVID.

California (in the Ninth Circuit) has the largest population of any state in the United States (more than 39.5 million), and the population is 36.5 percent white alone (not Latinx);<sup>203</sup> as of January 31, 2021, it reported 3,243,348 cases of COVID and 40,697 COVID-related deaths.<sup>204</sup> California declared a state of emergency on March 4, 2020, and on March 19, the Governor issued an executive order mandating that residents, other than essential workers, shelter in place;<sup>205</sup> on May 4, the Governor began lifting some of these restrictions;<sup>206</sup> and, as confirmed cases and deaths again began to rise, reinstated restrictions on public gatherings on July 13.<sup>207</sup> On August 28, California adopted a standardized system for guiding reopening decisions based on county-level conditions.<sup>208</sup> Additionally, on September 23, the

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203. *Quick Facts: California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/CA>.

204. The numbers of cases and deaths had doubled since mid-July. *See California Corona Map and Case Count*, N.Y. TIMES (last updated Apr. 5, 2021), <https://www.nytimes.com/interactive/2021/us/california-covid-cases.html>; *Tracking COVID-19*, CAL. DEPT. PUB. HEALTH (updated Apr. 4, 2021, 10:00 AM), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>. For the September 2020 data, see *California Corona Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/california-coronavirus-cases.html>. The number of cases and deaths in California now exceed 3.5 million and 49,000. *See id.* (Feb. 22, 2021); *see also* Rong-Gong Lin II, Luke Money & Jaclyn Cosgrove, *COVID-19 Deaths Hit 11,000 in L.A. County, as Surge Creates 'A Human Disaster'*, L.A. TIMES (Jan. 5, 2021, 6:35 PM), <https://www.latimes.com/california/story/2021-01-05/california-posts-single-day-record-coronavirus-cases-74000> (reporting that “L.A. County Supervisor Hilda Solis said Monday [January 4, 2021] that while it took 10 months for the county to accumulate 400,000 coronavirus cases, it took only about a month to record an additional 400,000.”).

205. Cal. Exec. Order No. N-28-20 (Mar. 16, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.16.20-Executive-Order.pdf>; *see also* Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> (extending the commercial eviction protections of Order No. N-28-20).

206. Cal. Exec. Order No. N-60-20 (May 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20.pdf>.

207. *See* Joshua Bote, *More Than Half of All States, Including California and Michigan, Pause Reopening or Take Steps to Halt the Spread of COVID-19*, USA TODAY (July 16, 2020, 7:58 AM), <https://www.usatoday.com/story/news/health/2020/07/16/covid-19-states-including-california-michigan-try-halt-spread/5444903002/>.

208. *See* Phil Willon, Taryn Luna & Colleen Shalby, *Newsom Unveils Sweeping New Coronavirus Reopening Rules for Businesses in California*, L.A. TIMES (Aug. 28, 2020), <https://www.latimes.com/california/story/2020-08-28/california-counties->

Governor signed an executive order authorizing local governments to halt evictions for commercial renters impacted by COVID effective through March 21, 2021.<sup>209</sup>

Throughout the summer and fall of 2020, California experienced a rapid surge in COVID cases, hospitalizations, and test positivity rates. In response, on December 3, the California Department of Public Health issued a regional stay-at-home order, prohibiting most gatherings of persons from different households in regions where the ICU—intensive care unit—bed capacity fell below fifteen percent.<sup>210</sup> The order made certain exceptions for outdoor religious or political gatherings, schools, and retailers.<sup>211</sup> Unexpectedly, the Governor lifted the order on January 25, 2021, relying on state modeling that projected ICU bed capacity would rise significantly above the fifteen percent threshold across the state within four weeks.<sup>212</sup> Some public health experts criticized the decision as premature based on current transmission rates and region-specific ICU bed availability,<sup>213</sup> while others questioned the data underlying the modeling, which the Governor refused to release.<sup>214</sup>

Wyoming (in the Tenth Circuit) has the smallest population of any state in the United States (less than 580,000), and the population is 83.7 percent white alone (not Latinx);<sup>215</sup> as of January 31, 2021, it reported 51,912 cases and 596 deaths.<sup>216</sup> On March 13, 2020, the

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new-reopening-plan-gavin-newsom-coronavirus (describing California’s “four-tier system in which counties must show consistent success in stemming the transmission of the coronavirus before allowing businesses greater flexibility to reopen and group activities to resume”).

209. Cal. Exec. Order N-28-20 (Mar. 16, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.16.20-Executive-Order.pdf>; Cal. Exec. Order N-80-20 (Sept. 23, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-80-20-COVID-19-text.pdf>.

210. CAL. DEPT. OF PUB. HEALTH, REGIONAL STAY AT HOME ORDER (2020), <https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf>.

211. *Id.*

212. Kathleen Ronayne, *California Lifts Virus Stay-At-Home Order and Curfew*, ASSOCIATED PRESS (Jan. 25, 2021), <https://apnews.com/article/california-lifts-stay-home-order-virus-1c298c67338a5914f7c3857cd167edcc>.

213. *See id.* (noting that Southern California, which accounts for over half of the state’s population, had an ICU bed capacity of zero percent at the time Newsom lifted the stay-at-home order).

214. *See id.* (discussing the view of a public health expert that believes “the state should be providing the public with more data on what’s causing coronavirus transmission and how they are modeling hospital capacity”).

215. *Quick Facts: Wyoming*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WY>.

216. *Wyoming Coronavirus Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/wyoming-coronavirus-cases.html> (last visited

Governor proclaimed a state of emergency, but resisted issuing a state-wide stay-at-home order,<sup>217</sup> while ordering temporary suspension of the administration of the state driving test in late March.<sup>218</sup> In July, the Wyoming Department of Health issued orders and guidance limiting public gatherings of certain sizes and requiring restaurants and other places of public accommodation offering food to enforce capacity and social-distance rules.<sup>219</sup> The state government renewed these guidelines at later points, most recently on February 25, 2021.<sup>220</sup>

The circuits also differed in their experience with court technology. The Ninth Circuit, which embraces Silicon Valley on the southern shores of San Francisco Bay, was an early adopter of electronic practices—in 2003, it began streaming oral argument audio to the public, and, in 2010, the circuit established a YouTube channel for oral arguments.<sup>221</sup> In contrast, the Tenth Circuit's first experiment with making argument recording available to the public came in January 2018, when it amended its court rules to provide that audio recording of oral arguments would be posted on the court's website within forty-eight hours; concurrently the circuit also was experimenting with oral argument by remote video transmission.<sup>222</sup>

### *Ninth Circuit Court of Appeals*

On the heels of the President's emergency proclamation, the Ninth Circuit immediately announced its response to the COVID crisis: On March 12, 2020, it informed the public that federal courthouses would operate with reduced personnel and that inquiries should

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Feb. 22, 2020); see also Maria L. La Ganga, *Think the Most Isolated Corners of the U.S. Are Safe from Coronavirus? Think Again*, L.A. TIMES (Mar. 19, 2020), <https://www.latimes.com/california/story/2020-03-19/coronavirus-wyoming-covid-19-casper-idaho> (reporting that Wyoming announced “its first COVID-19 case on the evening of March 11”); Lauren Leatherby, *The Worst Virus Outbreaks in the U.S. Are Now in Rural Areas*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/interactive/2020/10/22/us/covid-rural-us.html> (“Since late summer, per capita case and death rates in rural areas have outpaced those in metropolitan areas.”).

217. Wyo. Exec. Order No. 2020-2 (Mar. 13, 2020).

218. Wyo. Exec. Order No. 2020-4 (Mar. 24, 2020).

219. *COVID-19 Orders and Guidance*, WYO. DEPT. HEALTH, <https://health.wyo.gov/current-public-health-orders-extended-through-july-31/> (last visited Apr. 9, 2021).

220. *Id.*

221. Press Release, U.S. Cts. for the Ninth Cir., Tech Savvy Ninth Circuit Leading the Way During the COVID-19 Pandemic (May 1, 2020), [http://cdn.ca9.uscourts.gov/datastore/ce9/2020/05/01/Tech\\_Savvy\\_Ninth\\_Circuit\\_Leading\\_the\\_Way\\_During\\_COVID-19.pdf](http://cdn.ca9.uscourts.gov/datastore/ce9/2020/05/01/Tech_Savvy_Ninth_Circuit_Leading_the_Way_During_COVID-19.pdf).

222. See PRACTITIONER'S GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT (9th rev. 2019), <https://www.ca10.uscourts.gov/sites/default/files/clerk/2019PracGuideUpdateCorrected-3-12-2019.pdf>.

be by e-mail and not telephone.<sup>223</sup> Four days later, the circuit closed designated courthouses to the public; announced that public hearings, if any, would be livestreamed; encouraged litigants who were required to file paper copies to send them by mail or other delivery service, rather than by hand; authorized pro se litigants who did not have electronic access to send print copies by mail; and required that in-hand filings be done through a designated drop box at the courthouse during specified hours.<sup>224</sup> Recognizing that the pandemic was likely to cause disruptions, the circuit extended non-judicial filing deadlines automatically for sixty days (and, as conditions changed, on June 29, announced that automatic extensions would no longer be granted based solely on a Notice Request, and that requests would require a motion and a showing of cause).<sup>225</sup> As of October, the circuit was still conducting hearings remotely and had announced it would do so until further notice.<sup>226</sup>

#### *Tenth Circuit Court of Appeals*

The Tenth Circuit adopted many of the same emergency responses as already described—the courthouse was closed to the public, staff began teleworking, inquiries were to be by e-mail, and oral arguments were to be conducted remotely by telephone—but the pandemic also provided the occasion to experiment with technological approaches to courtroom practice. Thus, for example, on April 30, 2020, the Tenth Circuit announced that it would be “testing a method” to provide the public with access to telephonic oral arguments and would make recordings of them available on the courthouse website.<sup>227</sup> However, the Tenth Circuit resumed many pre-COVID activi-

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223. *Announcements*, U.S. CTS. FOR THE NINTH CIR. (Mar. 12, 2020), [https://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000001035](https://www.ca9.uscourts.gov/content/view.php?pk_id=0000001035); Alaina Lancaster & Ross Todd, *Address Coronavirus, 9th Circuit Offers Video Conferencing for Some Hearings, Postpones Others*, LAW.COM (Mar. 12, 2020, 3:41 PM), <https://www.law.com/therecorder/2020/03/12/9th-circuit-offers-video-conferencing-amid-coronavirus-concerns/>.

224. *Order*, U.S. CTS. FOR THE NINTH CIR. (Mar. 16, 2020), [http://cdn.ca9.uscourts.gov/datastore/general/2020/03/16/building\\_closure\\_order.pdf](http://cdn.ca9.uscourts.gov/datastore/general/2020/03/16/building_closure_order.pdf).

225. See Robert Loeb, Katie Kopp & Melanie Hallums, *The Federal Courts Begin to Adapt to COVID-19*, LAWFARE (Mar. 18, 2020, 1:29 PM), <https://www.lawfareblog.com/federal-courts-begin-adapt-covid-19>; *COVID-19 Update*, U.S. CT. OF APPEALS FOR THE NINTH CIR. (June 29, 2020), <http://cdn.ca9.uscourts.gov/datastore/general/2020/06/29/covid%20update%20june%2025.pdf>.

226. *COVID-19 Update*, U.S. CT. OF APPEALS FOR THE NINTH CIR., *supra* note 225.

227. *Remote Public Access to April 30, 2020 Oral Arguments*, U.S. CT. OF APPEALS FOR THE TENTH CIR., <https://www.ca10.uscourts.gov/clerk/news/remote-public-access-april-30-2020-oral-arguments>. Initially the recordings were made available through YouTube. See *Remote Public Access to May 5-7, 2020 Oral Arguments*, U.S. CT. OF

ties earlier than the Ninth Circuit. In particular, by an order adopted on June 12, the Tenth Circuit announced that as of June 15, the courthouse would reopen to those with pending business subject to restrictions governing building access, face coverings, and social distancing, and on July 1, the circuit opened the courthouse to the general public on the same terms.<sup>228</sup> Staff were still strongly encouraged to work remotely.<sup>229</sup> As an important marker of pre-COVID practice, the circuit reinstated rules about the submission of paper copies<sup>230</sup> and reopened the employee gym.<sup>231</sup> The court has scheduled oral arguments to be held by video conference through at least May 2021.<sup>232</sup>

### *District Courts*

In many ways, the federal district courts faced greater challenges than either the Supreme Court or the circuit courts in their adaptation to COVID. These challenges flow from the nature of first-instance courts: the frequency of motion practice, case management conferences, discovery, and trials—including one of the exceptional features of United States first-instance practice, the right to a civil jury trial in certain monetary damages cases.

The Central District of California (with courthouses in Los Angeles, Riverside, and Santa Ana), in the Ninth Circuit, is the most densely populated judicial district in the country.<sup>233</sup> In March 2020,

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APPEALS FOR THE TENTH CIR., <https://www.ca10.uscourts.gov/clerk/news/remote-public-access-may-5-7-2020-oral-arguments>; *Remote Access to Public Oral Arguments*, U.S. CT. OF APPEALS FOR THE TENTH CIR. (Aug. 25, 2020), <https://www.ca10.uscourts.gov/clerk/news/remote-access-public-oral-arguments>.

228. *Byron White Reopening Protocol*, U.S. CT. OF APPEALS FOR THE TENTH CIR. (effective June 15, 2020), <https://www.ca10.uscourts.gov/sites/default/files/clerk/Short%20BWCH%20Reopening%20Protocol%20%28Revised%20June%2015%2C%202020%29.pdf>.

229. To enter the building, staff were required to give prior notice to a unit executive, specifying the date and time, subject to standard restrictions of not having a temperature of above 100.4, not having exposure to someone with COVID-19, and wearing masks at all times. *See id.*

230. *Operational Response to the COVID-19 Pandemic*, U.S. CT. OF APPEALS FOR THE TENTH CIR. (Oct. 26, 2020), <https://www.ca10.uscourts.gov/clerk/news/operational-response-covid-19-pandemic>.

231. *Byron White Reopening Protocol*, *supra* note 228 (“Gym use will be limited to one person at a time. Employees must reserve gym time using the Outlook calendar and wipe down machines and/or weights before and after every use[.]”).

232. *May 2021 Term of Court*, U.S. CT. OF APPEALS FOR THE TENTH CIR., <https://www.ca10.uscourts.gov/calendar/event/january-2021-term-court>.

233. *See United States District Court for the Central District of California*, BALLOTEDIA, [https://ballotpedia.org/United\\_States\\_District\\_Court\\_for\\_the\\_Central\\_District\\_of\\_California](https://ballotpedia.org/United_States_District_Court_for_the_Central_District_of_California) (last visited Feb. 23, 2021) (“The court serves about seventeen million people in southern and central California, making it the largest federal judicial

the district took early action to limit entry into the courthouses, as well as to restrict access to probation and pretrial services offices, but otherwise proceedings were to continue as usual with the exception of a temporary suspension of jury service.<sup>234</sup> Entry-restrictions were placed on persons diagnosed, or in close contact with a person diagnosed, with COVID; persons who had been asked to self-quarantine by a hospital, doctor, or health agency; persons who had been in countries with high numbers of COVID-reported cases—at the time, China, Italy, Iran, Japan, and South Korea—during the preceding fourteen days; and persons with COVID-related symptoms, including shortness of breath, fever, or severe cough.<sup>235</sup> Additionally, jurors in both civil and criminal trials were provisionally not to be called until April 13 for service; courtroom proceedings and filing deadlines were to remain in place; judges were given the option of continuing to hold hearings, bench trials, and conferences; criminal matters before a Magistrate Judge were to continue as usual; and grand juries were to continue to meet.<sup>236</sup>

The district adopted more restrictive measures, initially effective March 23 through May 1, 2020, when it activated its Continuity of Operations Plan, which required the closing of all courthouses (other than for a few criminal proceedings); suspended all hearings other than on emergency civil matters, which were to proceed telephonically; called for the electronic filing of documents (with mailing instructions for pro se litigants without electronic access and attorneys required to file documents manually); and required telephonic hearings before the Bankruptcy Court.<sup>237</sup> By further measure, the district extended the courthouse closing to June 1, kept filing deadlines in

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district by population.”). The Central District of California covers Riverside, San Bernardino, Orange, Los Angeles, Santa Barbara, San Luis Obispo, and Ventura counties.

234. Press Release, U.S. Dist. Ct., Cent. Dist. of Cal., Protective Measures Taken in Response to Coronavirus in the Central District of California (Mar. 13, 2020), <https://www.cacd.uscourts.gov/news/protective-measures-taken-response-coronavirus-central-district-california>.

235. *Id.*; Notice from the Clerk: Visitor Restrictions, U.S. DIST. CT., CENT. DIST. OF CAL. (Mar. 12, 2020), <https://www.cacd.uscourts.gov/news/visitor-restrictions>.

236. Press Release, U.S. Dist. Ct., Cent. Dist. of Cal., Protective Measures Taken in Response to Coronavirus in the Central District of California, *supra* note 234. See CONG. RSCH. SERV., OVERVIEW OF RECENT RESPONSES TO COVID-19, *supra* note 117.

237. Press Release, U.S. Dist. Ct., Cent. Dist. of Cal., Activation of Continuity of Operations Plan (Mar. 19, 2020), <https://www.cacd.uscourts.gov/news/activation-continuity-operations-plan>.

place, held only video or telephone conferences, and did not call civil or criminal jurors to service.<sup>238</sup>

Then, on May 29, the district, by Amended General Order, announced a phased approach to the resumption of court activities: Phase 1, authorizing the return of certain staff for limited in-court hearings; Phase 2, to begin no earlier than June 22, calling for the reopening of the courthouse for limited in-person hearings; and Phase 3, authorizing the resumption of jury trials, “implemented at a date to be determined.”<sup>239</sup> On June 1, the Chief Judge ordered that generally all persons entering the courthouse “must wear face coverings in all spaces,” with exceptions for age and medical condition, and allowed individual judges to decide their own anti-virus policies for their chambers and courtrooms.<sup>240</sup>

The spike in COVID cases throughout the summer triggered a reevaluation of these responses, and on August 6, the district reimposed many of the measures employed under its earlier Continuity of Operations Plan. The district closed all courthouses to the public indefinitely; closed all federal pro se clinics in the district; required all civil cases to be heard remotely; suspended jury trials in both civil and criminal cases; adopted gating criteria to determine when courts may resume jury trials; and made a number of adjustments to its ordinary filing requirements.<sup>241</sup> On September 14, the district, relying on the gating criteria set out in its August General Order, reopened its Southern Division to persons with court business (requiring all visitors to wear facial coverings), but non-emergency civil matters continued to be conducted remotely and jury trials remained suspended until further notice.<sup>242</sup> The district renewed the Continuity of Operations Plan again on January 6, 2021. The plan extended through January 29, and

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238. Press Release, U.S. Dist. Ct., Cent. Dist. of Cal., Further Measures Taken in Response to COVID-19 Pandemic (Apr. 13, 2020), <https://www.cacd.uscourts.gov/news/further-measures-taken-response-covid-19-pandemic>.

239. Press Release, U.S. Dist. Ct., Cent. Dist. of Cal., Phased Resumption of Operations (May 29, 2020), <https://www.cacd.uscourts.gov/news/phased-resumption-operations>.

240. *Notice from the Clerk: Use of Face Coverings in Court Facilities*, U.S. DIST. CT., CENT. DIST. OF CAL. (June 1, 2020), <https://www.cacd.uscourts.gov/news/use-face-coverings-court-facilities>.

241. C.D. Cal. General Order No. 20-09 (Aug. 6, 2020), <https://www.cacd.uscourts.gov/sites/default/files/documents/Notice%20from%20the%20Clerk%20-%20GO%20No.%2020-09.pdf>. The “gating criteria” are designed “to determine local COVID-19 exposure risks based on 14-day trends of facility exposure, community spread, and community restrictions.” *Id.*

242. *Notice from the Clerk: Reopening of the Southern Division*, U.S. DIST. CT., CENT. DIST. OF CAL. (Sept. 11, 2020), <https://www.cacd.uscourts.gov/sites/default/files/documents/Notice%20from%20the%20Clerk%20-%20Reopening%20Southern>

limited operations resumed on February 1.<sup>243</sup> However, many of the restrictions on in-person appearances remained in place as of that date: all courthouses in the district remained closed; civil and criminal juries were postponed until further notice; all appearances in civil cases continued to be by video or telephone; and hearings in criminal proceedings likewise continued to be by video or telephone upon consent of the defendant.<sup>244</sup> The only exception was for grand jury proceedings, which were permitted to resume.<sup>245</sup>

On March 16, 2020, the District of Wyoming adopted many of the same restrictions as the California district courts, emphasizing “the significant number of identified and projected cases of COVID-19 in the surrounding states, and the severity of the risk posed to the public should local widespread community transmission occur.”<sup>246</sup> After the CARES Act became effective, the district authorized the use of video and telephone conferencing for certain criminal matters, and on June 26, the Chief Judge issued an administrative order continuing the use of video and teleconferencing for another ninety days.<sup>247</sup> On May 20, the district provided updated guidance announcing that in-person hear-

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%20Division.pdf (noting the reopening of the Southern Division as well as relevant conditions and describing under what conditions in-court hearings are permitted).

243. *Notice from the Clerk: Expiration of Continuity of Operations Plan*, U.S. DIST. CT., CENT. DIST. OF CAL. (Jan. 27, 2021), <https://www.cacd.uscourts.gov/sites/default/files/documents/2021-01-27%20Notice%20-%20Expiration%20of%20the%20COOP%20Plan.pdf>.

244. *Id.* (describing the “limited operations” scheduled to resume on February 1, 2021).

245. *Id.*

246. *In re Restrictions on Courthouse Entry During the Coronavirus (COVID-19)*, General Order No. 20-01 (D. Wyo. Mar. 16, 2020), <https://www.wyd.uscourts.gov/sites/wyd/files/EntryOrderCovid%20WY.pdf>.

247. *Extending and Reauthorizing Video and Teleconferences in Criminal Proceedings Under the CARES Act*, General Order No. 20-08 (D. Wyo. June 26, 2020), <https://www.wyd.uscourts.gov/sites/wyd/files/General%20Order%2020-08%20%20Extending%20%26%20Reauthorizing%20Video%20or%20Telephone%20For%20CR%20Proceedings.pdf>. The Chief Judge issued an order extending the use of video and telephone conferences for another ninety days on September 23. *Extending and Reauthorizing Video and Teleconferences in Criminal Proceedings Under the CARES Act*, General Order No. 20-10 (D. Wyo. Sept. 23, 2020), <https://www.wyd.uscourts.gov/sites/wyd/files/General%20Order%202020-10.pdf>. The order was extended again on December 17, *Extending and Reauthorizing Video and Teleconferences in Criminal Proceedings Under the CARES Act*, General Order No. 20-15 (D. Wyo. Dec. 17, 2020), <https://www.wyd.uscourts.gov/sites/wyd/files/General%20Order%202020-15.pdf>, and once more on March 21. *Extending and Reauthorizing Video and Teleconferences in Criminal Proceedings Under the CARES Act*, General Order No. 21-02 (D. Wyo. Mar. 21, 2021), <https://www.wyd.uscourts.gov/sites/wyd/files/General%20Order%202021-02.pdf>.

ings would resume June 1.<sup>248</sup> The courthouse would be open to the public, subject to some restrictions; judicial personnel would answer telephone calls; filings would be accepted electronically, by mail, and in person; and drop boxes for filing would be stationed outside the courthouse.<sup>249</sup> In addition, masks were required of any person (whether an attorney, litigant, witness, juror, or a member of the public) wanting to enter the courthouse and in the courtroom if social distancing was not possible.<sup>250</sup> The guidance further specified spatial rules for courtroom practice, including the requirement of masks at sidebar discussions, reducing the number of chairs at counsel's table to four, and limiting gallery seating.<sup>251</sup> In addition, the guidance laid out the protocol for the prescreening of jurors, jury selection, and seating of jurors.<sup>252</sup> The guidance gave particular attention to placement of hand sanitizer and to the cleaning of "high-touch surfaces" in the courthouse.<sup>253</sup>

#### *State Judicial Systems*

State judicial systems likewise had to find ways to conduct legal business while avoiding the face-to-face contacts that typically occur in courtroom activity. In many ways, the challenges faced by state judiciaries were even greater than those faced by the federal. State judiciaries include state-wide, local, and specialized courts (such as family, probate, and traffic courts); they handle exponentially more disputes than do the federal courts; and their resources are more lim-

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248. *Updated Notice Regarding District Court Clerk's Office Change in Operations Due to COVID-19*, U.S. DIST. CT., DIST. OF WYO. (May 20, 2020), [https://www.wyd.uscourts.gov/sites/wyd/files/Notice\\_to\\_Bar\\_May%2020.pdf](https://www.wyd.uscourts.gov/sites/wyd/files/Notice_to_Bar_May%2020.pdf).

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*; see also *In re Vacating of Civil Trials Prior to June 1, 2020, Due to Public Safety Concerns Caused by the Coronavirus (COVID-19)*, General Order No. 20-02 (D. Wyo. Mar. 20, 2020), <https://www.wyd.uscourts.gov/sites/wyd/files/general-orders/General%20Order%2020-02.pdf>. It bears emphasis that other district courts adopted additional changes once they reopened in order to maintain the safety of jurors, advocates, and court staff. For example, a number of judges modified their courtroom setups to comply with social distancing guidelines by spacing jurors apart in the back and side of the courtroom or by arranging for placement of plexiglass shields. Others required all staff and visitors to fill out online health surveys and clear digital temperature checks before entering the building. In August 2020, the District of Massachusetts pre-paid for parking in a nearby lot to obviate the need for court visitors to use public transportation, and the District of Idaho increased courtroom ventilation. See *As Courts Restore Operations, COVID-19 Creates a New Normal*, UNITED STATES CTS. (Aug. 20, 2020), <https://www.uscourts.gov/news/2020/08/20/courts-restore-operations-covid-19-creates-new-normal>.

ited. Moreover, state judiciaries are responsible for certifying admission to the Bar of their states.

### *California State Judiciary*

On the heels of the President's emergency order, California's Chief Justice announced a pandemic plan for the state's courts. The plan gave local courts authority to suspend or modify their operations, and many already had exercised discretion to extend certain filing deadlines.<sup>254</sup> Local courts also could petition the Chief Justice for specific relief measures (such as the extension of temporary restraining orders).<sup>255</sup> Emergency orders came in quick succession. The California Supreme Court suspended in-person oral arguments on March 16, but made clear that remote sessions would continue to be livestreamed to the public.<sup>256</sup> Two days later, it announced the expansion of electronic filing of documents,<sup>257</sup> and on March 20, it extended deadlines by thirty days for specified proceedings.<sup>258</sup> Three days later, the Chief Justice issued an order suspending all jury trials for sixty days, although it permitted trials at an earlier date upon a showing of good cause or through the use of remote technology.<sup>259</sup>

The California judiciary's response continued to unfold on an almost daily basis. By March 26, that state's Judicial Council had prepared and made public a draft revision of its 2006 plan, "Epidemics

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254. Peter Allen, *Chief Justice Issues Statement on Emergency Response in California Courts*, CAL. CTS. (Mar. 13, 2020), <https://newsroom.courts.ca.gov/news/chief-justice-issues-statement-emergency-response-california-courts>.

255. Merrill Balassone, *California Chief Justice Issues Guidance to Expedite Court Emergency Orders*, CAL. CTS. (Mar. 16, 2020), <https://newsroom.courts.ca.gov/news/california-chief-justice-issues-guidance-to-expedite-court-emergency-orders>; see also *Court Emergency Orders*, CAL. CTS., <https://newsroom.courts.ca.gov/covid-19-news-center/court-emergency-orders> (last visited Feb. 23, 2021) (collecting all local requests and emergency orders).

256. Order Suspending In-Person Oral Argument and Setting All Argument Sessions at the Court's San Francisco Headquarters, Admin. 2020-03-12 (Cal. Mar. 16, 2020), [https://newsroom.courts.ca.gov/internal\\_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/supreme%20court%20order.pdf](https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/supreme%20court%20order.pdf).

257. Merrill Balassone, *California Supreme Court Expands Electronic Filing in Response to COVID-19 Pandemic*, CAL. CTS. (Mar. 18, 2020), <https://newsroom.courts.ca.gov/news/california-supreme-court-expands-electronic-filing-in-response-to-covid-19-pandemic>.

258. *Order Extending the Deadline for any Action Required or Permitted Under the California Rules of Court in All Supreme Court Proceedings*, Admin. 2020-03-20 (Cal. Mar. 20, 2020), <https://beta.newsroom.courts.ca.gov/sites/default/files/newsroom/document/Supreme%2520Court%2520Order%25203.20.20.pdf>.

259. *Statewide Order by Hon. Tani G. Cantil-Sakauye, Chief Justice of California and Chair of the Judicial Council* (Mar. 23, 2020), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-09/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%203-23-2020.pdf>.

and the California Courts,” explicitly recognizing that epidemics are different from other disasters that may cause disruption “from weeks to months.” A pandemic, by contrast, had the potential to disrupt court operations “from months to several years,” necessitating a public health response in partnership with many different groups.<sup>260</sup> Two days later—by then, California had 5,000 confirmed cases and more than 100 deaths—the Chief Justice issued an order implementing actions approved by the Judicial Council and clarified that its prior order suspending jury trials for sixty days ran from the original trial date.<sup>261</sup>

April and May of 2020 saw additional activity, which we selectively describe to illustrate the range of issues that the state judiciary addressed with care and speed. The Judicial Council adopted new rules to lower the jail population (including zero bail for misdemeanors and lower-level felonies), to suspend evictions and suspend mortgage foreclosures;<sup>262</sup> to mandate electronic service in most civil cases;<sup>263</sup> to give judges discretion to make support orders effective upon mailing rather than filing with the court;<sup>264</sup> to extend the deadline to hold criminal trials by an additional sixty days (from an initial thirty-day extension order in March);<sup>265</sup> and to revise emergency rules

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260. JUDICIAL COUNCIL OF CAL., EPIDEMICS AND THE CALIFORNIA COURTS (Mar. 26, 2020), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0028/19387/redacted\\_epidemics\\_and\\_the\\_california\\_courts\\_handbook.pdf](https://www.ncsc.org/__data/assets/pdf_file/0028/19387/redacted_epidemics_and_the_california_courts_handbook.pdf).

261. *Statewide Emergency Order* by Hon. Tani G. Cantil-Sakauye, Chief Justice of California and Chair of the Judicial Council (Mar. 30, 2020), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/Statewide%2520Order%2520by%2520the%2520Chief%2520Justice-Chair%2520of%2520the%2520Judicial%2520Council%252030-2020.pdf>.

262. Blaine Corren, *Judicial Council Adopts New Rules to Lower Jail Population, Suspend Evictions and Foreclosures*, CAL. CTS. (Apr. 6, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-adopts-new-rules-to-lower-jail-population-suspend-evictions-and-foreclosures>. Emergency Rules 1 and 2, which suspended evictions and foreclosures, ended September 1. *Judicial Branch Emergency Actions*, CAL. CTS., <https://newsroom.courts.ca.gov/covid-19-news-center/judicial-branch-emergency-actions> (last visited Nov. 23, 2021).

263. Blaine Corren, *News Release: Judicial Branch of California, Judicial Council Mandates Electronic Service of Documents in Most Civil Cases*, CAL. CTS. (Apr. 17, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-mandates-electronic-service-of-documents-in-most-civil-cases>.

264. *Council Makes it Easier for Parties to Request Changes to Support Orders Amid Pandemic*, CAL. CTS. (Apr. 20, 2020), <https://newsroom.courts.ca.gov/news/council-makes-it-easier-for-parties-to-request-changes-to-support-orders-amid-pandemic>.

265. Merrill Balassone, *California Chief Justice Extends Criminal Trial Deadlines*, CAL. CTS. (Apr. 29, 2020), <https://newsroom.courts.ca.gov/news/california-chief-justice-extends-criminal-trial-deadlines>.

on statutes of limitations and statutes of repose.<sup>266</sup> By June, the Judicial Council, having convened a Pandemic Continuity of Operations Working Group in May, developed a seventy-five-page resource guide for courts on environmental matters such as screening visitors, spacing jurors, and placing glass screens between people. A week later, as California began to reopen, the Judicial Council and the Chief Justice announced the end of some emergency measures related to bail and arraignments.<sup>267</sup> However, as previously discussed with respect to federal judicial responses, California experienced a spike in COVID during the summer, and on July 13, the Governor reinstated social-distancing requirements and numerous closings, but judicial activity, including jury service, continued to be deemed essential.<sup>268</sup> With the reinstatement of the state's stay-at-home order in December 2020 (effective for any region determined to have less than fifteen percent ICU bed availability, with specified exceptions),<sup>269</sup> the California Supreme Court promulgated another round of emergency rules, authorizing individual courts to take additional measures based on local circumstances.<sup>270</sup>

#### *Wyoming State Judiciary*

Wyoming quickly put into place—on March 11, 2020, even before the President's emergency order—a Respiratory Disease Pan-

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266. Blaine Corren, *Judicial Council Revises Emergency Rule on Statutes of Limitations in Civil Cases*, CAL. CTS. (May 29, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-revises-emergency-rule-on-civil-filing-deadlines>.

267. Merrill Balassone, *Judicial Council, Chief Justice End Some Emergency Measures as California and Courts Expand Reopening*, CAL. CTS. (June 10, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-chief-justice-end-some-emergency-measures-as-california-and-courts-expand-reopening>.

268. See Allison Prang & Tawnell D. Hobbs, *California Pulls Back on Reopening Amid Surge in Coronavirus Cases*, WALL ST. J. (July 13, 2020), <https://www.wsj.com/articles/coronavirus-latest-news-07-13-2020-11594628843>. The first California state court jury trial apparently encountered some predictable logistical difficulties. Nonetheless, the remote jury was able to render a verdict. See Dorothy Atkins, *Calif. Jury Clears Honeywell in Zoom Asbestos Trial*, LAW360 (Sept. 3, 2020), <https://www.law360.com/productliability/articles/1307341>; Amanda Bronstead, *First Virtual Asbestos Trial Ends in Defense Verdict*, LAW.COM: THE RECORDER (Sept. 3, 2020), <https://www.law.com/therecorder/2020/09/03/first-virtual-asbestos-trial-ends-in-defense-verdict>; John O'Brien, *Honeywell Claims Victory in \$70M Asbestos Trial Held on Zoom*, LEGAL NEWSLINE (Sept. 3, 2020), <https://legalnewsline.com/stories/552825594-honeywell-claims-victory-in-70m-asbestos-trial-held-on-zoom>.

269. See About COVID-19 Restrictions, Regional Stay Home Order, CAL. ALL (Jan. 5, 2021), <https://covid19.ca.gov/stay-home-except-for-essential-needs/#regional-stay-home-order>. The governor lifted this order on January 25, 2021. See *supra* notes 212–62 and accompanying text.

270. California Courts, *California Court Services Status Due to COVID-19* (Feb. 20, 2021), <https://www.courts.ca.gov/court-status.htm>.

demical Plan, based on consultation with the Wyoming Department of Health. The plan sensibly distinguished a pandemic from other kinds of emergencies, such as a tornado or flood, given its “severity and longevity.” It carefully outlined levels of response—alert, standby, activate, deceleration, and resolution—as guidance for the different categories of courts within the state system with the goal of providing a protocol for “the most effective response based on where the pandemic is occurring.”<sup>271</sup> The Plan explicitly called for coordination between Wyoming’s Chief Justice and the Wyoming Department of Health to determine how best to activate the plan taking account of geography and the severity of the outbreak. It set out clear assumptions about the likely effects of COVID on court operations: that it would generate an increase in emergency matters and case filings related to “quarantine and isolation”; that only limited numbers of personnel—broadly construed to include clerks, jurors, counsel, judges, sheriffs, public health officials, and so forth—would be available to perform even “critical functions”; that face-to-face contact “[n]ecessary to perform mission critical functions may be dramatically limited or unavailable”; and that although judicial infrastructure would be physically undamaged, service would be “impacted by a lack of adequate staffing due to isolation or quarantine of necessary staff.”<sup>272</sup> The Plan also emphasized attention to “nonpharmaceutical interventions,” specifically recommending social distancing, the wearing of face masks, and regular cleaning of facilities and hands in all court activities.<sup>273</sup> In particular, the Plan directed judges to work remotely, to conduct no jury trials, and to suspend all in-person proceedings except for certain emergency measures; encouraged judges to grant continuances to parties; and advised parties to make use of a drop box, if possible, for filings.<sup>274</sup> As conditions changed, the court amended this order multiple times. Jury and bench trials generally remained sus-

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271. WYO. JUD. BRANCH, RESPIRATORY DISEASE PANDEMIC PLAN VERSION (Mar. 11, 2020), <https://www.courts.state.wy.us/wp-content/uploads/2020/03/Wyoming-Judicial-Branch-Interim-Pandemic-Plan-03.11.2020.pdf>.

272. *Id.* at 4.

273. *Id.* at 5.

274. *Id.*; *see also* Order Extending COVID-19 Emergency Order Adopting Procedures for Remote Administration of Oaths and Witnesses, Verification of Guilty Pleas, and for Paper Filings to December 15, 2020 (Wyo. Sept. 22, 2020), <https://www.courts.state.wy.us/wp-content/uploads/2020/09/Covid19-Order.Extending-ProceduralOrder-to-12.15.20-and-terminating-SC-Order.pdf>. Oral arguments were to be conducted through the use of Microsoft Teams, which required counsel to have e-mail, an Internet connection, and access to a camera and microphone. August Oral Argument Guidance (Wyo. July 2020), <https://www.courts.state.wy.us/wp-content/uploads/2020/07/August-Oral-Argument-Guidance.pdf>.

pended; in-person proceedings were permitted for certain emergency requests (for example, child protection, child support, abuse, and temporary restraining orders); and all civil trials, hearings, and motions were to be postponed and rescheduled unless the judge determined proceedings could be held telephonically or by video.<sup>275</sup>

The COVID-19 Operating Plan, adopted June 23, 2020, projected a phase-in of the Supreme Court's normal operations beginning June 29 but set no date for a resumption of in-person oral argument.<sup>276</sup> The Plan recommended that employees wear masks where social distancing of six feet was not possible, addressed staggered work schedules, and set rules for public access to the courthouse, including the requirement that all entrants sanitize hands before entering the building. The clerk's office continued operation on a reduced staff. The Plan, now in its third amended form,<sup>277</sup> was implemented through multiple orders addressing health risks and specific categories of cases.<sup>278</sup> For example, an order released on January 6, 2021 authorized postponement of all civil trials, hearings, and motions "unless the assigned judge finds the proceedings can be held through telephonic or video means and an adequate record can be made."<sup>279</sup>

#### *Admission to the Bar*

COVID upended traditional arrangements throughout the country for certifying admission to the Bar. Bar admission is through a decentralized process that each state regulates. Applicants must separately apply for admission to each state in order to practice in that state and each state has a board of examiners that sets standards for admission. In some states, the board is a part of the state's highest court, but in

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275. See Seventh Order Amending March 18, 2020 Temporary Plan to Address Health Risks Posed by the COVID-19 Pandemic (Wyo. Nov. 13, 2020), <https://www.courts.state.wy.us/coronavirus-covid-19-updates>.

276. Judicial Branch's Covid-19 Operating Plan (Wyo. June 23, 2020), [https://www.courts.state.wy.us/wp-content/uploads/2020/10/Covid-19-Operating-Plan-Supreme-Court-06.23.2020\\_Redacted.pdf](https://www.courts.state.wy.us/wp-content/uploads/2020/10/Covid-19-Operating-Plan-Supreme-Court-06.23.2020_Redacted.pdf).

277. Judicial Branch's First Amended COVID-19 Operating Plan (Wyo. Oct. 19, 2020), [https://www.courts.state.wy.us/wp-content/uploads/2020/10/Covid-19-Operating-Plan-Supreme-Court-AMD\\_1-10.19.2020\\_Redacted.pdf](https://www.courts.state.wy.us/wp-content/uploads/2020/10/Covid-19-Operating-Plan-Supreme-Court-AMD_1-10.19.2020_Redacted.pdf); Second Amended COVID-19 Operating Plan (Wyo. Nov. 5, 2020), [https://www.courts.state.wy.us/wp-content/uploads/2020/11/Covid-19-Operating-Plan-Supreme-Court-AMD\\_2-AG\\_NL\\_11.03.2020\\_Redacted.pdf](https://www.courts.state.wy.us/wp-content/uploads/2020/11/Covid-19-Operating-Plan-Supreme-Court-AMD_2-AG_NL_11.03.2020_Redacted.pdf); Third Amended COVID-19 Operating Plan (Wyo. Dec. 10, 2020), [https://www.courts.state.wy.us/wp-content/uploads/2020/12/Covid-19-Operating-Plan-Supreme-Court-AMD\\_3-12.10.2020.pdf](https://www.courts.state.wy.us/wp-content/uploads/2020/12/Covid-19-Operating-Plan-Supreme-Court-AMD_3-12.10.2020.pdf).

278. Eighth Order Amending March 18, 2020 Temporary Plan to Address Health Risks Posed by the COVID-19 Pandemic (Wyo. Jan. 6, 2021), <https://www.courts.state.wy.us/wp-content/uploads/2021/01/Covid19.EighthOrder.1.6.21.pdf>.

279. *Id.*

others it is a part of the state's bar association. Admission typically depends on meeting two broad sets of qualifications: legal competence and character and fitness. Competence is demonstrated by having achieved the required academic degree (most often, the Juris Doctor) and by securing a passing grade on a substantial special examination. The Bar examination in almost all states consists of an in-person written examination that spans two days. The trend in most states is to include questions that are state-specific, as well as so-called "multistate" topics (that cover seven areas—Civil Procedure, Constitutional Law, Contracts, Criminal Law, Evidence, Real Property, and Torts) and a separate examination on the rules governing professional responsibility.<sup>280</sup> Examinations throughout the country usually take place in February and in July, and most applicants sit for the July test a few months after their graduation from law school.

The need for social distancing as a viral containment policy created untold logistical problems for administering the summer 2020 Bar examination, especially in states that had large numbers of confirmed COVID cases and fatalities. Depending on local conditions, states considered different options for postponing the examination:<sup>281</sup> to hold the examination but to limit the number of test-takers; to develop an online remote examination;<sup>282</sup> to schedule additional but later sittings of the examinations; to grant "diploma privileges," meaning, to allow Bar admission to students who hold degrees from in-state or certain other law schools; and to allow temporary practice privileges (for example, if the applicant holds a J.D. and works under the supervision of an admitted attorney).<sup>283</sup>

In June, the National Conference of Bar Examiners (NCBE) announced it would provide states with an "emergency remote testing

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280. *Multistate Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/exams/mbe/preparing/> (last visited Feb. 25, 2021); *see also Bar Admissions Basic Overview*, AM. BAR ASSOC. (June 26, 2018), [https://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview/](https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/).

281. *See, e.g.*, Press Release, Massachusetts Supreme Judicial Court, Massachusetts Bar Examination Postponed (Mar. 30, 2020) (on file at: <https://www.mass.gov/news/massachusetts-bar-examination-postponed>).

282. The National Conference of Bar Examiners announced in June that it would provide an "emergency remote testing option" on October 5–6. Although the NCBE declared that the scores from the remote tests would not be portable to other jurisdictions, a number of states have entered into a reciprocity agreement for the portability of these scores. *See infra* notes 284, 288.

283. *See* Colleen Flaherty, *Law Schools and Coronavirus: Bar Exemptions and More*, INSIDE HIGHER ED (Apr. 8, 2020, 1:39 PM), <https://www.insidehighered.com/news/2020/04/08/law-schools-and-coronavirus-bar-exemptions-and-more>; *see also* Bradley G. Taylor, *Bar Exam Versus Diploma Privilege*, 50 COLO. LAW. 16 (2021).

option” on October 5–6.<sup>284</sup> A number of states canceled their in-person exam and instead administered the remote exam; others administered a remote exam in addition to the ordinary July exam; others still did not offer a remote exam, but instead rescheduled their original exam.<sup>285</sup> Although the NCBE declared that the scores from the remote test would not be portable to other jurisdictions,<sup>286</sup> a number of states—Kentucky, Maryland, Massachusetts, New Jersey, Vermont, Ohio, Connecticut, New Hampshire, Oregon, and Illinois, plus the District of Columbia—voluntarily entered into a reciprocity agreement.<sup>287</sup> All of these states, with the exception of Kentucky, ordinarily use the Universal Bar Examination (UBE).<sup>288</sup> Additionally, the NCBE announced plans to provide a remote option again in February 2021, citing continuing challenges related to COVID.<sup>289</sup> Relatedly, five jurisdictions—Louisiana,<sup>290</sup> Washington, D.C.,<sup>291</sup> Utah,<sup>292</sup> Oregon,<sup>293</sup>

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284. See NAT'L CONF. OF BAR EXAM'RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020 (2020), <https://www.wyomingbar.org/wp-content/uploads/NCBE-White-Paper-April-2020.pdf>; see also Stephanie Francis Ward, *In Lieu of an In-Person UBE, Some Jurisdictions with Online Bar Have Reciprocity Agreements*, ABA J. (Aug. 13, 2020, 2:40 PM), <https://www.abajournal.com/web/article/in-lieu-of-an-in-person-ube-some-jurisdictions-with-online-bar-have-reciprocity-agreements>.

285. *July 2020 Bar Exam: Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information> (last updated Sept. 24, 2020, 11:34 AM).

286. The NCBE's rationale was that the conditions under which the remote exam was administered were significantly different from those of a traditional exam, and so the scores earned on the remote exam are not comparable to those earned on a standard UBE exam. See Ward, *supra* note 284 (reporting that the president and CEO of the NCBE, Judith Gundersen, stated that “Remote testing is a significant departure from the conditions under which the [UBE] is administered, and scores earned on the remote test are therefore not comparable to those earned on a standard in-person administration of the UBE”).

287. See *id.*

288. See *Uniform Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube/> (last visited Feb. 25, 2020). The UBE consists of the Multistate Essay Examination, two Multistate Performance Test tasks, and the Multistate Bar Examination. UBE test results are portable and can be “transferred” to other jurisdictions that likewise use this mode of examination. *Id.*

289. *NCBE COVID-19 Updates*, NAT'L CONF. OF BAR EXAM'RS (Feb. 2, 2021, 4:00 PM), <https://www.ncbex.org/ncbe-covid-19-updates/>.

290. See Order (La. July 22, 2020), [https://www.lasc.org/COVID19/Orders/2020-07-22\\_LASC\\_BarExam.pdf](https://www.lasc.org/COVID19/Orders/2020-07-22_LASC_BarExam.pdf).

291. See *Committee on Admissions*, D.C. CTS., <https://www.dccourts.gov/court-of-appeals/committee-on-admissions> (last updated Apr. 2, 2021).

292. The Utah Supreme Court approved a temporary diploma privilege for “qualified candidates” who were scheduled to take the July Bar exam and who graduated from ABA-accredited law schools with a minimum first-time Bar passage rate of 86 percent. Qualified candidates need 360 hours of supervised practice by a licensed attorney who has practiced for at least seven years and at least two years in Utah. See

and Washington<sup>294</sup>—adopted some form of diploma privilege licensure as an emergency measure.<sup>295</sup> However, in December 2020, these states announced plans to use a remote Bar exam as of February 2021.<sup>296</sup>

California and Wyoming, like other states, traditionally have relied on a two-day, in-person, written examination to assess the legal competence of applicants. Both states took emergency measures that temporarily changed their approach to licensing. On April 27, the California Supreme Court ordered that the July sitting of the Bar examination be postponed until September 9–10 and directed that the state take steps to administer the test online.<sup>297</sup> However, on July 16, the California Supreme Court announced that the exam would be administered online on October 5–6 and permanently lowered the required

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Stephanie Francis Ward, *Utah is First State to Grant Diploma Privilege During Novel Coronavirus Pandemic*, ABA J. (Apr. 22, 2020, 11:05 AM), <https://www.abajournal.com/news/article/utah-first-state-to-grant-diploma-privilege-during-the-coronavirus-pandemic>.

293. The Oregon Supreme Court announced that it would grant a one-time diploma privilege to candidates who submitted complete applications for the scheduled July 2020 Oregon Bar exam and who either graduated in 2020 from one of Oregon's law schools or graduated in 2020 from an ABA-accredited law school with a minimum first-time Bar passage rate of 86 percent. Those who did not qualify could either take the scheduled July exam, whose passing score was reduced, or take the remotely administered October exam. Order Approving 2020 Attorney Admissions Process, Sup. Ct. Order No. 20-012 (Ore. June 30, 2020), [https://www.osbar.org/\\_docs/resources/SCO20-012Order2020BarExam.pdf](https://www.osbar.org/_docs/resources/SCO20-012Order2020BarExam.pdf).

294. The Washington Supreme Court issued an order granting a diploma privilege option to applicants that were registered for the July or September Bar exams and who received J.D. degrees from ABA-accredited law schools. Those who were not eligible had the option of taking the July or September exam. Order Granting Diploma Privilege and Temporarily Modifying Admission & Practice Rules, Order No. 25700-B-630 (Wa. June 12, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Order%20Granting%20Diploma%20Privilege%20061220.pdf>.

295. See Claudia Angelos, Sara J. Berman, Mary Lu Bilek, Carol L. Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith Welch Wegner, *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* (The Ohio State University Moritz College of Law, Legal Studies Working Paper Series, No. 537, 2020) <https://www.abajournal.com/files/barexamoptionsCOVID-19.pdf>.

296. See Stephanie Francis Ward, *Jurisdictions with COVID-19-Related Diploma Privilege Are Going Back to Bar Exam Admissions*, ABA J. (Dec. 10, 2020, 3:16 PM), <https://www.abajournal.com/web/article/jurisdictions-with-covid-related-diploma-privilege-going-back-to-bar-exam-admissions>.

297. Merrill Balassone, *California Supreme Court Orders Bar Exam Delayed, Administered Online*, CAL. CTS. (Apr. 27, 2020), <https://newsroom.courts.ca.gov/news/california-supreme-court-orders-bar-exam-delayed-administered-online>; see also Sahil Venkatesan, *Uncertainty and Delays Plague California Bar Examination*, STAN. DAILY (July 7, 2020), <https://www.stanforddaily.com/2020/07/07/uncertainty-and-delays-plague-california-bar-examination/>.

passing score.<sup>298</sup> The Court also directed the state Bar to create a “provisional licensure program” for law students who graduated in 2020.<sup>299</sup> The next Bar examination in California was administered remotely in February 2021, with accommodations for extenuating circumstances.<sup>300</sup> The Wyoming Supreme Court likewise took emergency steps to adjust professional licensing requirements because of the pandemic. On April 10, 2020, it issued an order temporarily authorizing those who had registered for the summer 2020 Bar examination and graduated from law school to practice pending admission to the Bar should the summer examination be postponed because of the pandemic.<sup>301</sup> The order allows an applicant to practice under the supervision of a licensed member of the Wyoming Bar while examination results are pending. The examination scheduled to take place in that state at the end of July was rescheduled for September 30 and October 1;<sup>302</sup> the 2021 Bar exam dates have been set for February and July.<sup>303</sup>

### III.

#### TECHNOLOGY AND THE JUDICIAL RESPONSE TO THE PANDEMIC

Without an effective and widely distributed vaccine—which was not available for most of the first year of the pandemic—containing COVID largely depended on the public’s willingness to take the basic precautions of wearing a mask in public areas, staying six feet apart from other people, hand washing after contact, and quarantining if exposed or infected. These forms of social distancing are incompatible with traditional law practice in open court or a judge’s chambers, which involves close contact for filing papers, discussion with clerks, oral argument, judge’s colloquy, witness examination, and so forth. In

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298. Merrill Balassone, California Supreme Court Lowers Bar Exam Passing Score, CAL. CTS. (July 16, 2020), <https://newsroom.courts.ca.gov/news/california-supreme-court-lowers-bar-exam-passing-score>.

299. *Id.*

300. *California Bar Examination*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination> (last visited Feb. 18, 2021).

301. Order Adopting Rule 203 of the Rules and Procedures Governing Admission to the Practice of Law (Wyo. Apr. 10, 2020), <https://www.courts.state.wy.us/wp-content/uploads/2020/04/BarAdmission-Rule-203.pdf>.

302. Supreme Court of Wyoming, Order Amending Rule 203 of the Rules and Procedures Governing Admission to the Practice of Law (July 17, 2020), <https://www.courts.state.wy.us/wp-content/uploads/2020/07/BarAdmission-Rule-203-Amendment-effective-July-2020.pdf>.

303. Wyoming State Bar, Admissions, *2021 Bar Exam Dates*, <https://www.wyomingbar.org/for-lawyers/admissions/>.

order to avoid a total shutdown of judicial operations, federal and state courts throughout the United States authorized counsel to practice remotely using computers and telephones. As the previous section detailed, courts issued orders permitting and mandating the electronic filing of papers, requiring oral argument by telephone or videoconferencing platforms, and allowing judicial personnel to work electronically from home.

Although the legal profession is known to be tradition-bound and slow to change, state and federal courts nevertheless made a quick transition to remote practice. Their ability to do so built on years of studying relevant technology, investment in infrastructure, and incremental changes to court practice.<sup>304</sup> Significantly, before the pandemic, the federal judiciary had engaged in a decades-long process of considering the best uses of technology for court practice; state judiciaries likewise had engaged with the question.<sup>305</sup> These prior efforts involved such mundane but essential developments as securing funding to upgrade courthouses to give them technological capacity, which allowed courts to do electronic research, to use closed-circuit television, to accept electronic filing, and to access audio or video recordings remotely. In some parts of the country, technological upgrades required courts to increase court fees to pay for the improvements.<sup>306</sup> In addition, law schools had adapted their curricula to train lawyers in certain forms of electronic practice, starting with basic research tools. And the courts had amended their rules of procedure to authorize—and in some instances even to mandate—counsel to use electronic rather than manual modes of practice.

#### *Judicial Technology Before COVID*

The judiciary's approach to technology prior to the COVID crisis was slow and careful, maturing with new information methodologies, and at times contentious. We trace some of these developments to pro-

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304. Michael Thomas Murphy, *Just and Speedy: On Civil Discovery Sanctions for Luddite Lawyers*, 25 GEO. MASON L. REV. 36, 36 (2017) (referring to U.S. lawyers as technological Luddites).

305. See, e.g., Brian C. Vick & Neil C. Magnuson, *The Promise of a Cooperative and Proportional Discovery Process in North Carolina: House Bill 380 and the New State Electronic Discovery Rules*, 34 CAMPBELL L. REV. 233 (2012) (discussing North Carolina rule revisions pertaining to ESI).

306. See, e.g., *Wyoming Raises Court Fees for Courtroom Technology Updates*, BILLINGS GAZETTE (Aug. 5, 2017), [https://billingsgazette.com/news/state-and-region/all/wyoming/wyoming-raises-court-fees-for-courtroom-technology-updates/article\\_17b7612e-0f87-57a9-a539-59a80a0a288b.html](https://billingsgazette.com/news/state-and-region/all/wyoming/wyoming-raises-court-fees-for-courtroom-technology-updates/article_17b7612e-0f87-57a9-a539-59a80a0a288b.html).

vide context for better appreciating the federal and state judiciary's emergency responses.

To start, consider the federal judiciary's system for filing, maintaining, and accessing court files. The National Archives house the federal judiciary's court records—almost 200 years of documents, and about 2.2 billion “textual pages” of court materials.<sup>307</sup> A switch to electronic filing required the establishment of electronic systems in courthouses that were not built to deal with the latest technological developments and, indeed, still depended on print libraries without access to electronic research. Cost-cutting was a major impetus for adapting the judicial process; technological upgrades were expected to reduce space needs and other upkeep costs.<sup>308</sup> In 1988, the Judicial Conference of the United States established a service known as PACER—Public Access to Court Electronic Records—and in the early 1990s, put in place an electronic case management system.<sup>309</sup> In 2001, the Federal Rules of Civil Procedure were amended to permit electronic filings upon consent of the parties.<sup>310</sup> In 2004, the Committee on Court Administration and Case Management requested that those Federal Rules (and other civil process rules) be amended on an expedited basis to authorize the adoption of local rules to mandate electronic filing, emphasizing attendant cost savings.<sup>311</sup> Bar associations and others opposed such an amendment, urging exceptions for parties who did not have access to personal computers, and the amended rule that the Judicial Conference recommended in 2005 ac-

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307. *National Archive Court Records*, NAT'L ARCHIVES, <https://www.archives.gov/research/court-records> (last visited Feb. 18, 2021).

308. *The Future of the Federal Courthouse Construction Program: Results of a Government Accountability Office Study on the Judiciary's Rental Obligations: Hearing Before the H. Subcomm. on Econ. Dev., Pub. Bldgs., and Emergency Mgmt. of the Comm. on Transp. and Infrastructure*, 109 Cong. 127 (2006) (reporting that “[m]any courthouses were built prior to the widespread use of electronic research for legal sources” and conversion from print to electronic research would reduce space needs).

309. *25 Years Later, PACER, Electronic Filing Continue to Change Courts*, U.S. CTS. (Dec. 9, 2013), <https://www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts> (recounting establishment of PACER and electronic case management).

310. Currently, FED. R. CIV. P. 5(b)(2)(E). *See generally* 4B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1147 (4th ed. 2020) (discussing amendments to Federal Rule 5(b) and changes in the manner of service).

311. *See generally* *Judiciary Continues Cost Savings, Closes Court Facilities*, U.S. CTS. (Sept. 11, 2012), <https://www.uscourts.gov/news/2012/09/11/judiciary-continues-cost-savings-closes-court-facilities> (“Cost containment, a Judiciary-wide initiative dating back to 2004, has resulted in a close examination of nearly every Judiciary function and activity to determine if it is necessary, and if so, how it can be done more efficiently and at less cost.”).

ted on this recommendation.<sup>312</sup> As a practical matter, by 2012, all federal courts accepted electronic filing.<sup>313</sup> In 2018, amendments to the Federal Civil Rules mandated electronic filing (unless good cause is shown or local rules allow otherwise) and eliminated the requirement of a certificate of service when papers are electronically filed through the court's system (a certificate of service "within a reasonable time after service" is required when paper is served "by other means").<sup>314</sup> Under pre-pandemic rules, unrepresented parties need permission to file electronically and may be required to do so by court order or local rule.<sup>315</sup>

The incorporation of technology into the courthouse thus occurred in tandem with the incorporation of technology into law-practice modalities and civil procedural rules. Consider the basic act of service of process, critical for the commencement of a lawsuit and giving notice of the initiation of an action. The traditional mode of service is, of course, handing the papers to the defendant personally or leaving them with a responsible person at the defendant's dwelling.<sup>316</sup> In 1983, the service-of-process rule was amended to permit service by first-class mail,<sup>317</sup> overcoming critics' concerns that process might be lost in the mail, discarded with "junk" mail or deliberately ignored by the defendant, or go astray because of typographical errors<sup>318</sup> (these concerns today are amplified by the precarious financial position of the United States Postal Service, which puts the quality of its service—and, indeed, its very existence—into jeopardy).<sup>319</sup> Amendments

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312. See REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 2-3 (Sept. 2005), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST09-2005.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST09-2005.pdf).

313. *All Federal Courts Now Accepting Electronic Filing*, U.S. CTS. (May 17, 2012), <https://www.uscourts.gov/news/2012/05/17/all-federal-courts-now-accepting-electronic-filing> ("The DC-based U.S. Court of Appeals for the Federal Circuit has begun accepting electronic filings via the judiciary's Case Management-Electronic Case Files (CM/ECF) system, joining every other federal appellate, district, and bankruptcy court in doing so.").

314. FED. R. CIV. P. 5(d)(1).

315. FED. R. CIV. P. 5(d)(3).

316. FED. R. CIV. P. 4(e).

317. FED. R. CIV. P. 4(d).

318. Ann Carnon Crowley, *Rule 4: Service by Mail May Cost You More Than a Stamp*, 61 IND. L.J. 217, 223 (1986).

319. Jory Heckman, *Postal Regulation Nominees: USPS Faces 'Very Real Threat' to Long Term Viability*, FED. NEWS NETWORK (July 17, 2019), <https://federalnewsnetwork.com/agency-oversight/2019/07/postal-regulation-nominees-usps-faces-very-real-threat-to-long-term-viability/>; see also Bill McAllister, *U.S. Postal Service Retreats from Dire Financial Forecast*, LINN'S STAMP NEWS (June 25, 2020), <https://www.linns.com/news/postal-updates/u.s.-postal-service-retreats-from-dire-financial->

adopted in 2001 permitted service by electronic means with the consent of the party served.<sup>320</sup>

Relatedly, in 1996, Federal Rule 43(a) was amended to deal with the admissibility of remote testimony.<sup>321</sup> The Advisory Committee note to that amendment emphasized that live testimony remained the presumption, and that remote testimony, facilitated by new forms of technology, should be permitted only in “compelling circumstances,” with “appropriate safeguards,” and not casually and as a matter of convenience.<sup>322</sup> Concerns about allowing remote testimony included prejudice to the opposing party, the inability of the court or jurors to assess demeanor testimony, the dangers of collusion, and the threat of lying.<sup>323</sup> Specific uses of remote testimony (particularly uses outside the scope of Federal Rule 43(a), as, for example, the use of closed-circuit arraignments in criminal proceedings) elicited further concern.<sup>324</sup> Since 1996, the quality of electronic forms of testimony has improved, judges and lawyers have more experience with technology, and courtrooms have been upgraded to permit transmission and viewing.<sup>325</sup>

Likewise, the Federal Rules pertaining to discovery have been amended to account for fax machines, e-mail, social media, and other

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forecast (reporting concerns by Democratic Representatives that the U.S. Postal Service could be financially disabled by March 2021).

320. Currently, FED. R. CIV. P. 5(b)(2)(E).

321. FED. R. CIV. P. 43(a) provides, “[a]t trial, the witnesses’ testimony must be taken in open court . . . [But for] good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”

322. FED. R. CIV. P. 43(a) advisory committee’s note to 1996 amendment. *See generally* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2414 (3d ed. 2002) (discussing the preference for oral testimony).

323. *See* Christopher Forbes, *Rule 43(a): Remote Witness Testimony and a Judiciary Resistant to Change*, 24 LEWIS & CLARK L. REV. 299, 321 (2020) (recognizing criticisms of testimony given remotely).

324. *See, e.g.*, Ronnie Thaxton, *Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court*, 79 IOWA L. REV. 175, 190 (1993) (arguing “that the use of closed-circuit television does not satisfy the constitutional requirement of ‘presence’”).

325. The impact of the pandemic and the use of technology on the rights of the criminally accused are beyond the scope of this article. We note only that technological advances do not by themselves resolve important constitutional questions of the right of the criminally accused not to be tried in absentia, *see* Eugene L. Shapiro, *Examining an Underdeveloped Constitutional Standard: Trial in Absentia and the Relinquishment of a Criminal Defendant’s Right to Be Present*, 96 MARQ. L. REV. 591 (2012), or whether they sufficiently protect the right of the criminally accused to a trial by jury. *See* Stephen A. Siegel, *The Constitution on Trial: Article III’s Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373 (2012).

nontraditional ways in which information is now exchanged and retained by individuals and businesses.<sup>326</sup> In 2006, the Federal Rules underwent a series of important revisions—more than a decade in the making—to incorporate “electronically stored information” (ESI) into the categories of information that are discoverable by the parties to a litigation,<sup>327</sup> updating language introduced in 1970 that permitted the discovery of information in the form of “data compilations from which information can be obtained.”<sup>328</sup> These changes in some ways codified best practices that had developed in the lower federal courts on a case-by-case basis.<sup>329</sup>

In addition to these specific rule changes, in 1998, the Administrative Office of the United States Courts began a pilot program for the establishment of an “Electronic Courtroom”; this re-imagined courtroom enabled access to the Internet, installed video-conferences, and placed document cameras and display monitors throughout the space.<sup>330</sup> As an early adopter, “Courtroom 575” of the United States District Court for the Northern District of Ohio, located in Akron, established a Digital Evidence Presentation System, described by its Chief Judge as allowing counsel “to switch from displaying exhibits, real-time transcripts, video recording or multi-media presentations with the push of a button.”<sup>331</sup> Proponents defended these trends as a

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326. The Judicial Conference gathered information about electronic discovery in 1996, began “intensive work” on the amendment process in 2000, and in 2004 published proposed amendments, reviewing comments from 250 individuals and groups. *See E-Discovery Amendments to the Federal Rules of Civil Procedure Go into Effect Today*, K&L GATES (Dec. 1, 2006), <https://www.ediscoverylaw.com/2006/12/e-discovery-amendments-to-the-federal-rules-of-civil-procedure-go-into-effect-today/>.

327. FED. R. CIV. P. 26(a)(1)(B).

328. *See* FED. R. CIV. P. 33(d) (permitting the production of ESI in response to an interrogatory given comparative costs to the parties); FED. R. CIV. P. 34(a) (permitting the requesting party to “test or sample” ESI); FED. R. CIV. P. 34(b) (permitting requesting party to specify the form for producing ESI); FED. R. CIV. P. 37(f) (creating a safe harbor so that sanctions may not be imposed on a party failing to produce ESI “lost as a result of the routine, good-faith operation of an electronic information system”); FED. R. CIV. P. 45 (conforming procedures for subpoenas to other discovery rules). *See generally* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2003.1 (3d ed. 2002) (discussing post-1970 amendments to the Federal Rules that relate to discovery).

329. Courts and commentators paid special attention to the trial court’s approach to electronic discovery in *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003), a highly publicized gender discrimination lawsuit.

330. *See* Nicole J. De Sario, *Merging Technology with Justice: How Electronic Courtrooms Shape Evidentiary Concerns*, 50 CLEV. ST. L. REV. 57 (2002–2003). For an overview of available technology during this period, see, for example, Donald F. Parsons, Jr. & Lisa K. W. Crossland, *Technological Tools for Civil Litigation*, 14 DEL. LAW. 33 (1996).

331. De Sario, *supra* note 330, at 57.

fair and effective way to deal with caseload concerns, achieve cost savings, and enhance jury participation.<sup>332</sup> Critics argued that this limited (although high profile) use of technology to present evidence contributed to “the deterioration of the trial system’s integrity.”<sup>333</sup>

Finally, changes in legal education should not be overlooked as a factor that enabled the judiciary’s quick adaptation to technology during the pandemic—lawyers asked to pivot from traditional to electronic practice were, in the colloquial phrase, “practice ready,” even if not experienced in the particular practice mode. These developments went hand-in-hand with an institutional commitment to experimenting with classroom technology through such projects and organizations as the Center for Computer-Assisted Legal Instruction, established in 1982,<sup>334</sup> and the Berkman Klein Center for Internet and Society at Harvard University.<sup>335</sup> Law schools now routinely provide students with training in electronic research. Professors increasingly assign casebooks that use digital formats, and even traditional lectures incorporate videos and other forms of digital information. Some schools integrate technology into clinical education, allowing for such experiential exercises as video recorded simulated arguments or depositions, which then are subject to critique by the instructor and other students.<sup>336</sup> Law schools quickly transitioned in the spring of 2020 to remote instruction in those states where shelter-in-place was mandated or encouraged because of the virus.<sup>337</sup> Admittedly, the American Bar Association, which accredits law schools in the United States, has

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332. See REPORT TO CONGRESS ON THE OPTIMAL UTILIZATION OF JUDICIAL RESOURCES, ACHIEVING SAVINGS AND EFFICIENCIES THROUGH AUTOMATION AND TECHNOLOGY 57-68 (1998).

333. See Jonathan D. Kissane-Gaisford, *The Case for Disc-Based Litigation: Technology and the Cyber Courtroom*, 8 HARV. J. L. & TECH. 471, 471 (1995) (noting idea that use of technology has negative impact on courtroom dynamics).

334. THE CTR. FOR COMPUTER-ASSISTED LEGAL INSTRUCTION, <https://www.cali.org/> (last visited Feb. 19, 2021).

335. BERKMAN KLEIN CTR. FOR INTERNET & SOC’Y AT HARV. U., <https://cyber.harvard.edu/> (last visited Feb. 19, 2021).

336. See, e.g., Brandon Lowrey, *How Tech Is Helping Courtroom Newbies Become Virtual Pros*, LAW360 (July 28, 2019, 8:02 PM EDT), <https://www.law360.com/access-to-justice/articles/1181735/how-tech-is-helping-courtroom-newbies-become-virtual-pros>; Marcus Smith, *Integrating Technology in Contemporary Legal Education*, 54 LAW TCHR. 209 (2020), <https://doi.org/10.1080/03069400.2019.1643647>.

337. See William Nash, *Legal Education and Remote Learning: Law Schools in the State of Pandemic*, U. RICH. J. L. & TECH. BLOG (Mar. 28, 2020), <https://jolt.richmond.edu/2020/03/28/legal-education-and-remote-learning-law-schools-in-the-state-of-pandemic/>. For a discussion of our own law school’s transition to remote learning to deal with COVID, see *Responding to COVID-19, NYU Law Community Continues Online*, N.Y.U. L. NEWS (Apr. 6, 2020), <https://www.law.nyu.edu/news/coronavirus-covid19-distance-learning-online>.

been reluctant to accept “virtual” law schools that provide instruction only online.<sup>338</sup> As a result, law schools had to seek temporary waivers of this rule to avoid shutting down during the pandemic.<sup>339</sup> Whether resistance to online education and the remote classroom will dissipate or increase given the extensive experience during the crisis remains to be seen.

### *Responding to the Crisis*

At the outset of the COVID crisis, the judiciary was able to draw from deeply informed, prior experience—including its years of studying technological innovation, investment in electronic infrastructure, revisions to procedural rules, and changes in legal education—in developing localized emergency responses that were critical for maintaining “open courts” on a virtual basis. As one example, Federal Rule 43(a) offered a ready-made procedural framework within which trial judges could endorse remote testimony on the view that the pandemic itself was an exceptional circumstance overcoming the presumption of live testimony. Thus, in *In re RFC & ResCap Liquidating Tr. Action*,<sup>340</sup> the defendant—learning that a witness had tested positive for COVID—requested on March 10, 2020 that the court reschedule the final two days of trial (recall that at this point the courts had not yet closed their doors to litigants or to the public). In response, the Minnesota district court ordered that the bench trial go forward by videoconference, noting that the uncertainty of the pandemic argued in favor of “the use of contemporaneous remote video testimony” over any delay in the scheduling and completion of the trial.<sup>341</sup> In *Vitamins Online, Inc. v. HeartWise, Inc.*,<sup>342</sup> the Utah district court likewise opted for expert testimony by videoconference, rather than postpone a trial scheduled to begin July 16, 2020, a month away (the action arose

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338. In 1997, the American Bar Association Accreditation Committee issued Temporary Distance Education Guidelines, expressing a “disfavor” for remote learning that was consistent with ABA Standard 304(g), which bars credit for “correspondence” study. See Anna Williams Shavers, *The Impact of Technology on Legal Education*, 51 J. LEGAL EDUC. 407, 410 (2001); see also Blake A. Klinkner, *Tech Tips: Will Online Law Degrees be the Future of Legal Education?*, 39 WYO. L. 48 (2016) (discussing reluctance of the American Bar Association to accredit online law schools that offer instruction only through remote instruction).

339. See, e.g., *NY State Court of Appeals grants NYU Law Request for Distance Learning Waiver, Students Maintain Bar Eligibility*, N.Y.U. L. NEWS (Mar. 20, 2020), <https://www.law.nyu.edu/news/distance-learning-waiver-students-bar-exam-coronavirus>.

340. 444 F. Supp. 3d 967 (D. Minn. 2020).

341. *Id.* at 971.

342. No. 2:13-CV-00982-DAK, 2020 WL 3452872, at \*8–9 (D. Utah June 24, 2020).

under the federal Lanham Act and had been ongoing for seven years). Rejecting the defendant's claim of prejudice, the court realistically found that the "COVID-19 pandemic constitutes 'good cause and compelling circumstances'" under Rule 43(a) to hold a bench trial through remote videoconference technology.<sup>343</sup> Pointing to the uncertainty of the pandemic's duration, the court emphasized that even after "court operations have resumed," and in-person trials became possible, "the court would potentially be required to postpone the bench trial even further in order to accommodate crucial criminal matters."<sup>344</sup>

By contrast, in *Graham v. Dhar*,<sup>345</sup> a district court in West Virginia denied defendant's motion to permit an expert's live testimony by remote electronic transmission. The expert was a Boston-based cardiologist and, as the defendant explained, was "currently dealing with a backlog of surgical cases" such that the doctor's "traveling from Boston to Charleston, West Virginia to testify at trial in late July" would be "extremely difficult" and would put his "patients at risk by further postponing" their surgical treatment.<sup>346</sup> The presiding judge relied on the Rules Advisory Committee's comment that remote testimony was to be exceptional and expressed his own "strong preference for live testimony."<sup>347</sup> In the court's view, the proffered showing was that of mere inconvenience and not compelling. To be sure, the judge observed, COVID has caused "difficulties" and put a "strain" on the nation's health care system; however, the decision by other courts to permit remote testimony rested on the showing of an additional unusual circumstance, such as an ongoing trial.<sup>348</sup> By contrast, defendant's expert, the court posited, had "adequate time," given a July 29

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343. The court relied on other district court cases reaching the same conclusion and emphasized that some of them involved complex patent issues and the trials were expected to run for at least three weeks. *See id.* at \*9 (citing *Argonaut Ins. Co. v. Manetta Enters., Inc.*, No. 19-CV-00482, 2020 WL 3104033 (E.D.N.Y. June 11, 2020) ("[T]he Court exercises its discretion under FRCP 43(a) to order that the bench trial in this matter be conducted via video-conference. However, in light of Defendant's concerns . . . and . . . to allow . . . additional time to prepare . . . , the Court adjourns trial until August 24, 2020."); *In re RFC*, 444 F. Supp. 3d 967 (discussed in text); *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, No. 2:18CV94, 2020 WL 3411385 (E.D. Va. Apr. 23, 2020) (concluding that the court would move forward with the bench trial being done exclusively by videoconference technology)).

344. *Vitamins Online, Inc. v. HeartWise, Inc.*, No. 2:13-CV-00982-DAK, 2020 WL 3452872, at \*9 (D. Utah June 24, 2020).

345. No. CV 1:18-00274, 2020 WL 3470507 (S.D. W. Va. June 25, 2020).

346. *Id.* at \*1.

347. *Id.* at \*2.

348. *Id.* at \*1.

trial date, to schedule his activities in light of the need to testify in person.<sup>349</sup>

The admissibility at trial of testimony generated electronically from a witness physically outside the courthouse is hardly the only deviation from traditional procedure adopted in response to the pandemic. Two others that have come into common practice are of particular interest because they are central to two of the most distinctive aspects of American civil procedure. The first is conducting depositions remotely through an electronic medium, such as FaceTime, Zoom, or closed-circuit television. This phenomenon obviously closely parallels the generation of remote trial testimony and usually is arranged by agreement among the lawyers in the case. The second is remotely conducting pretrial conferences, which are a critical element of the extensive pretrial judicial management that today is a basic characteristic of cases, particularly large or complex cases, in the federal courts. In many instances, the conference is centered in the judge's chambers with a dozen or more lawyers located in many different parts of the United States. Although these two procedures generally are executed without controversy these days, it is still far too early to apprise what long term effects they will have on how lawyers and judges perform their professional duties and on the nature of American civil litigation.<sup>350</sup>

#### IV.

##### THE SUPREME COURT, THE PANDEMIC, AND LIFE OUTSIDE THE COURTHOUSE

COVID has caused unprecedented disruption to American life and, not surprisingly, these disruptions have resulted in litigation. Just

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349. *Id.* Of course, every procedural ruling in a lawsuit is a mere snapshot and does not provide insight about prior party conduct or other aspects of the litigation. In a previous ruling, the court had denied plaintiff's request for a discovery sanction against the defendant but criticized its corporate representatives for their lack of preparation and failure to seek a protective order prior to refusing to answer questions. *See* *Graham v. Dhar*, No. CV 1:18-00274, 2019 WL 6999688 (S.D. W. Va. Dec. 19, 2019). On grounds unrelated to COVID, plaintiffs successfully moved to stay proceedings pending appeal on several issues. *Graham v. Dhar*, No. CV 1:18-00274, 2020 WL 8184344 (S.D. W. Va. Aug. 28, 2020).

350. *See, e.g.*, Porter Wells, *Virtual Depositions: Change Forced by Covid Aims to Stick*, BLOOMBERG L. (Dec. 29, 2020), <https://news.bloomberglaw.com/banking-law/virtual-depositions-change-forced-by-covid-aims-to-stick> (suggesting that virtual depositions, in part because they offer significant cost savings, will be incorporated, post-COVID, into "a hybrid semi-remote system"); Scott Dodson, Hon. Lee Rosenthal & Christopher L. Dodson, *The Zooming of Federal Civil Litigation*, 104 JUDICATURE 3 (2020) ("The days of multiple lawyers traveling cross-country—or even cross-town—for a conference with a judge are probably over.").

as Paul Farmer has urged that the study of infectious disease attend to social inequalities in the dynamics of public health, so, too, we urge that attention be given to whether and how these inequalities might have affected judicial decisions in cases implicating differential exposure to COVID, access to treatment, and personal wellbeing during the pandemic.<sup>351</sup> In its early guidance, the Judicial Conference, relying on medical expertise, recommended that the federal judiciary take steps to protect health and safety in the courts.<sup>352</sup> Courts throughout the nation took that advice seriously, and quickly devised emergency measures to keep those entering the courthouse—judicial staff, jurors, parties, and lawyers—from the risk of viral infection. Yet, in our view, the Supreme Court did not seem to accord comparable deference to medical expertise when deciding legal claims brought by voters, prisoners, and immigrants, many of whom were Black, Brown, or poor, seeking protection from the uncertain but predictable, and potentially fatal, effects of COVID exposure. What follows is not a comprehensive overview of the Court's decisions during the pandemic; critics of our account will present counterexamples and we hasten to acknowledge that the cases we discuss required a delicate balancing of public health concerns with other legal interests. Although our sample is small, we discuss these cases as a way to raise questions about the impact of racial and class inequalities on judicial decisions involving the constitutional rights of persons disproportionately harmed by the COVID pandemic.

#### *The Right to Vote*

The pandemic raised many questions about the safety of in-person voting in connection with the 2020 Presidential Election. Compounding the health concerns were serious doubts about the reliability—and even the independence—of the United States Postal Service to deliver absentee ballots on time. In Wisconsin, these dual concerns resulted in litigation. In particular, the dangers of in-person voting convinced many people to make timely requests for absentee ballots; at the same time, the Administration made cuts to the Postal Service that produced a delay and back-log in processing these re-

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351. See Farmer, *supra* note 33.

352. *Judiciary Preparedness for Coronavirus (COVID-19)*, U.S. CTS. (last updated June 3, 2020), <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19> (quoting James Duff, Director of the Administrative Office of the U.S. Courts).

quests.<sup>353</sup> Individual voters, community groups, and the Democratic National Committee and the Democratic Party of Wisconsin filed a federal action alleging that various state laws burdened the right to vote when considered in the light of the pandemic and the state's shelter-in-place orders.<sup>354</sup> The district court issued a preliminary injunction extending the deadline by which the state would be required to count absentee ballots (i.e., ballots mailed in, rather than placed by hand in the ballot box) received within six days after the scheduled primary election, even if not postmarked by the date of the election.<sup>355</sup> In *Republican National Committee v. Democratic National Committee*, a per curiam decision issued on April 6, 2020, the Supreme Court—sitting remotely to avoid exposure to COVID—granted a stay and overturned the preliminary injunction. The Court's order left voters with an unfortunate choice: vote by mail and face disenfranchisement, or vote in person and face the possibility of infection and death.<sup>356</sup> The racial impact of refusing to count the ballots was manifest: Black voters disproportionately were put in harm's way or potentially disenfranchised.<sup>357</sup> The Supreme Court's five-member majority emphasized that plaintiffs in their motion for a preliminary injunction had not sought the relief in the form ordered by the district court—relief that the district court devised in the context of the evolving health crisis and at a time when the federal courts themselves were adapting their rules of practice to meet the threat of a dynamic and uncertain emergency.<sup>358</sup>

After the election, a contact-tracing analysis by the Wisconsin Department of Health Services identified more than fifty confirmed

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353. See Michael D. Shear, Hailey Fuchs & Kenneth P. Vogel, *Mail Delays Fuel Concern Trump Is Undercutting Post System Ahead of Voting*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/07/31/us/politics/trump-usps-mail-delays.html> (discussing the political controversy surrounding the Postal Service during the lead-up to the election).

354. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020).

355. *Id.* at 1207.

356. See Jim Rutenberg & Nick Corasaniti, *How a Supreme Court Decision Curtailed the Right to Vote in Wisconsin*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/us/wisconsin-election-voting-rights.html> (reporting that “[w]hen the state released its final vote tallies on Monday, it was clear that the decision — arrived at remotely, so the justices would not have to brave the Covid-19 conditions — had resulted in the disenfranchisement of thousands of voters”).

357. Kevin Townsend, *Voter Suppression by Pandemic*, ATLANTIC (Apr. 11, 2020), <https://www.theatlantic.com/politics/archive/2020/04/the-ticket-coronavirus-voter-suppression/609883/> (discussing ballot rules in Wisconsin as having “its roots as a tool of white supremacy”).

358. *Republican Nat'l Comm.*, 140 S. Ct. at 1207 (stating “the plaintiffs themselves did not even ask for that relief[.]”).

COVID-19 cases associated with in-person voting, including among poll workers.<sup>359</sup> A later study by researchers at the University of Wisconsin and Ball State University found a 17.7 percent increase in positive infection rates due to in-person voting, equal to about 700 COVID-19 cases in Wisconsin during the relevant period, or about 7.7 percent of the total number of confirmed cases.<sup>360</sup> Lifting the lower court's stay at a minimum exposed voters to health risks that the judiciary deemed unacceptable to those within its own courthouses; it also put additional stress on an already over-extended public health system. It bears emphasis that during this period, the state judiciary mandated social distancing in its courthouses to curtail the spread of the virus.<sup>361</sup> In March 2020, the Wisconsin Supreme Court issued two administrative orders: the first, suspending most in-person hearings and ordering that they be held remotely (the order was extended with clarified exceptions on April 15, until further order); the second, limiting the number of persons in the courthouse, and temporarily suspending jury trials. On May 22, the Wisconsin Supreme Court extended these or-

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359. See Scott Bauer, *52 Who Worked or Voted in Wisconsin Election Have COVID-19*, COLUMBIAN (Apr. 29, 2020), <https://www.columbian.com/news/2020/apr/29/52-who-worked-or-voted-in-wisconsin-election-have-covid-19/> (discussing the number of coronavirus cases subsequent to the election on April 7, 2020).

360. Chad D. Cotti, Bryan Engelhardt, Joshua Foster, Erik Nesson & Paul Niekamp, *The Relationship Between In-Person Voting and Covid-19: Evidence from the Wisconsin Primary* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27187, 2020), [https://www.nber.org/system/files/working\\_papers/w27187/revisions/w27187.rev2.pdf](https://www.nber.org/system/files/working_papers/w27187/revisions/w27187.rev2.pdf).

361. The Court's refusal to protect Wisconsin voters is of a piece with its refusal, on July 16, 2020, to vacate a stay, pending appeal, entered by the Eleventh Circuit in a Florida action that had the effect of blocking thousands of otherwise eligible voters from registering to vote days before the state deadline. The Court gave no reasons for its decision. The lawsuit challenged Florida's law barring convicted felons who were no longer incarcerated from voting until they paid outstanding "financial obligations" to the state—so-called "pay to vote" rules. The district court had entered a preliminary injunction barring enforcement of the statute a year earlier, and, following an eight-day video trial in April and May 2020, declared the scheme unconstitutional. *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020). See S. POVERTY L. CTR., *In a Victory for Voting Rights, Federal Court Rules That Florida's Pay-to-Vote System Is Unconstitutional* (May 24, 2020), <https://www.splcenter.org/presscenter/victory-voting-rights-federal-court-rules-floridas-pay-vote-system-unconstitutional>. Justice Sotomayor, joined by Justice Ginsburg and Justice Kagan, dissenting from the denial to vacate the stay, drew a sharp contrast with the Court's Wisconsin ruling, and put the problem in plain terms: "This Court's inaction continues a trend of condoning disenfranchisement." *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (Sotomayor, J., dissenting); see also *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (granting stay of preliminary injunction that would stop enforcement of certain Alabama voting restrictions against voters who are at risk of becoming seriously ill or dying because of COVID-19).

ders.<sup>362</sup> Yet the United States Supreme Court apparently gave little weight to medical expertise when it placed Wisconsin voters, mostly Black citizens, on the horns of a dilemma: exercise the right to vote in person and face the risk of COVID infection or vote by mail and risk not having the vote counted.

#### *Prison Conditions*

At the outset of the pandemic, the federal prison system was operating at 12 percent over capacity, making these institutions a likely breeding ground for COVID exposure unless containment measures were put in place, including ways to maintain social distance between and among prisoners and staff, to provide face coverings, and to ensure basic hygiene. The demographics of the prison population compounded the risk of COVID infection; the scientific consensus pointed to greater vulnerability of people over age sixty, and many prisoners fall within this category.<sup>363</sup> Moreover, about 45 percent of the national prison population, about 172,000 persons, have underlying health conditions.<sup>364</sup> Concerns about health and safety triggered a lawsuit on behalf of inmates of a Texas geriatric prison. The district court ordered prison officials to provide such basic health items as masks, hand soap, hand sanitizer, and tissues for personal use, as well as bleach-cleaning supplies to disinfect prison spaces.<sup>365</sup> On appeal, the Fifth Circuit vacated the injunction on the ground of changed circumstances;<sup>366</sup> a concurring circuit judge wrote “to underscore that hold-

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362. See *In re* the Matter of the Extension of Orders and Interim Rule Concerning Continuation of Jury Trials, Suspension of Statutory Deadlines for Non-Criminal Jury Trials, and Remote Hearings During the Covid-19 Pandemic (Wis. May 22, 2020), <https://www.wicourts.gov/news/docs/jurytrials2.pdf>; *In re* the Matter of the Final Report of the Wisconsin Courts COVID-19 Task Force (Wis. May 22, 2020), <https://www.wicourts.gov/news/docs/taskforcefinalreport.pdf>; *In re* the Matter of the Extension of Orders Concerning Remote Administration of Oaths at Depositions, Remote Hearings in Appellate Courts, Filing of Documents in Appellate Courts, and Appellate Court Operations During the COVID-19 Pandemic (Wis. May 22, 2020), <https://www.wicourts.gov/news/docs/remotecoathshearingaccourt.pdf>.

363. World Health Org., *Older People & COVID-19*, <https://www.who.int/teams/social-determinants-of-health/covid-19> (last visited Feb. 20, 2021) (stating that older adults “are at [a] higher risk of developing severe forms of COVID-19”); see generally Rachel E. Lopez, *The Unusual Cruelty of Nursing Homes Behind Bars*, 32 FED. SENT. R. 264 (2020) (discussing disproportionate numbers of elderly inmates, their high risk of medical problems, and their low risk of criminality).

364. Nathan James & Michael A. Foster, CONG. RSCH. SERV., R46297, FEDERAL PRISONERS AND COVID-19: BACKGROUND AND AUTHORITIES TO GRANT RELEASE 4 (2020), <https://crsreports.congress.gov/product/pdf/R/R46297>.

365. *Valentine v. Collier*, No. 4:20–CV–1115, 2020 WL 1899274, at \*1 (S.D. Tex. Apr. 16, 2020).

366. *Valentine v. Collier*, 960 F.3d 707 (5th Cir. 2020).

ing these elderly, ill inmates jammed together in their dormitories, unable to socially distance as the virus continues to rapidly spread, is nothing short of a human tragedy.”<sup>367</sup> In a two-line opinion, the United States Supreme Court, still working remotely and subject to emergency rule changes, refused to vacate the stay during the pendency of the appeal.<sup>368</sup> On March 30, the prison had no reported COVID cases; on April 13, an inmate died (confirmed two days later to be due to COVID); within the month, positive cases increased to 267, with deaths rising to 18 two weeks later.<sup>369</sup> The Supreme Court issued its order on May 14.

The Court’s majority offered no explanation for refusing to vacate the stay; admittedly the standard for vacating a stay is high. Justice Sotomayor, in a “statement,” joined by Justice Ginsburg, pointed to a possible ground for the refusal: the failure of the prisoner-plaintiffs to have first sought administrative relief through the prison grievance system.<sup>370</sup> Exhaustion of administrative remedies is indeed a requirement of a prisoner’s filing suit in federal court. It also is recognized, even during ordinary times, to function as a significant barrier to judicial relief.<sup>371</sup> Under the Court’s precedents, exhaustion ought not to be treated as a jurisdictional bar, but rather as a claim processing rule that may be waived in appropriate circumstances.<sup>372</sup> In partic-

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367. *Valentine v. Collier*, 960 F.3d 707, 708 (5th Cir. 2020) (Davis, J., concurring).

368. *Valentine v. Collier*, 140 S. Ct. 1598 (2020).

369. *Valentine v. Collier*, No. 4:20–CV–1115, 2020 WL 3491999 (S.D. Tex. Apr. 16, 2020).

370. *Valentine v. Collier*, 140 S. Ct. at 1598. *See* Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a) (specifying that “[n]o action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted.”). In *Ross v. Blake*, 136 S. Ct. 1850, 1855 (2016), the Court held that the statute ousts courts of discretion to waive the administrative exhaustion requirement in “special circumstances,” but that a “prisoner need not exhaust remedies if they are not ‘available.’”

371. As one commentator observed in 2018, prior to the pandemic: “It is foolish to think that prisoners will abide by a procedural rule that they do not know exists.” Elana M. Stern, *Completely Exhausted: Evaluating the Impact of Woodford v. Ngo on Prisoner Litigation in Federal Courts*, 166 U. PA. L. REV. 1511, 1538 (2018) (attempting to explain uptick in prisoner filings of unexhausted claims despite supposed tightening of standards by citing “knowledge gap” between what is required of pro se prisoner litigants and legal awareness).

372. *See* 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & HELEN HERSHKOFF, FEDERAL PRACTICE AND PROCEDURE §§ 3654–55 (4th ed. 2020) (discussing the distinction). Lower courts are divided on whether the administrative exhaustion requirement is jurisdictional. *Compare* *United States v. Haney*, 454 F. Supp. 3d 316, 320, 322 (S.D.N.Y. 2020) (waivable claim-processing rule), *United States v. Connell*, No. 18-CR-00281-RS-1, 2020 WL 2315858, at \*3–4 (N.D. Cal. May 8, 2020) (same) and *United States v. Agomuo*, 461 F. Supp. 3d 626, 630 (E.D. Mich. 2020) (same), with *United States v. Johnson*, 451 F. Supp. 3d 436, 438 (D. Md. 2020) (non-waivable

ular, exhaustion is to be excused if a prison grievance procedure is not available to the prisoner, and there was no evidence in the district court's record showing that an emergency process to deal with COVID was in fact in place or offered to the inmates.<sup>373</sup> By contrast, the unrefuted record, grimly detailed in Justice Sotomayor's statement, demonstrated the life-threatening conditions to which the prisoner-plaintiffs remained exposed once the Court refused to vacate the stay of the trial court's interim order—an order that mandated the facility's simply taking basic health measures to contain a potentially fatal virus.<sup>374</sup>

### *Immigrants and Public Health Care*

In August 2019, almost six months before the emergence of COVID, the Trump Administration changed the national rule governing whether a non-citizen is “likely to become a public charge” and so ineligible for admission to the United States or for an adjustment of

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jurisdictional bar), *United States v. Roberts*, No. 18-CR-528-5 (JMF), 2020 WL 1700032, at \*2 & n.2 (S.D.N.Y. Apr. 8, 2020) (same) and *United States v. Alam*, 453 F. Supp. 3d 1041, 1043–44 (E.D. Mich. 2020) (same). Some lower federal courts have issued individual orders of compassionate release. See Def. Servs. Off., *Compassionate Release*, <https://www.fd.org/coronavirus-disease-2019-covid-19/compassionate-release> (last visited Feb. 21, 2021) (collecting cases). But others have refused to reach the merits of the request and instead denied relief because of a failure to exhaust administrative remedies. Thus, for example, in *United States v. Baye*, 464 F. Supp. 3d 1178 (D. Nev. 2020), the Nevada district court refused to grant compassionate release on the ground that the prisoner had not exhausted his administrative remedies, treating the requirement as a jurisdictional bar, and further requiring that the prisoner exhaust “each extraordinary and compelling reason,” even when the warden had “failed to recognize the disease as an extraordinary and compelling reason.” No consideration was given to the effects of COVID on prison staffing or the prison's ability to process a COVID-related complaint in a timely way. On the availability of compassionate release as relief in state court, see, e.g., *In re Von Staich*, 270 Cal. Rptr. 3d 128 (Cal. Ct. App. 2020) (ordering San Quentin prison to “release on parole or transfer to another correctional facility” more than 1,300 inmates).

373. *Valentine v. Collier*, 960 F.3d 707, 708 n.2 (5th Cir. 2020) (Davis, J., concurring). Subsequent to filing, plaintiff sought to exhaust the administrative process. The administrative claim was still pending as of June 5, 2020. See *Valentine v. Collier*, No. 4:2–CV–1115, 2020 WL 3491999, at \*6–7 (S.D. Tex. June 27, 2020) (finding that the prison grievance process “was ‘not capable of use to obtain some relief’ from COVID [because] . . . it did not fit the problem Plaintiffs were facing”).

374. *Valentine v. Collier*, 140 S. Ct. at 1599–1600. See *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020) (reversing preliminary injunctive habeas relief for a sub-class of medically vulnerable prisoners, despite evidence of bunking conditions that made social distancing impossible, and six deaths thus far); *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020) (vacating preliminary injunctive habeas relief despite evidence that infections were dramatically increasing and that social distancing was impossible and noting that the district court failed to consider the burdens “with which the injunction would saddle” prison officials, by having to comply with a judicial order).

status to be able to work in the United States.<sup>375</sup> In particular, the rule change redefined “public charge” to mean “an alien who receives one or more public benefits,” defining benefits to include Medicaid, subject to exceptions.<sup>376</sup> Public health advocates expressed concern that this change would discourage immigrants from seeking health care, leaving children without vaccines and families without essential treatment.<sup>377</sup> Indeed, immigrant individuals did refrain from seeking health benefits for which they were legally eligible, fearful that they would become ineligible to work in the United States.<sup>378</sup>

A number of states and advocacy groups challenged the legality of the rule change, filing suits in different jurisdictions across the United States, including one in the federal district court in New York City.<sup>379</sup> In October 2019, the New York district court issued a nationwide preliminary injunction barring the rule’s enforcement,<sup>380</sup> and the Trump Administration sought a stay of the order pending appeal, which the district court<sup>381</sup> and then the Court of Appeals for the Second Circuit denied.<sup>382</sup> However, later that month, the Supreme Court vacated the injunction, allowing the rule to be enforced.<sup>383</sup> COVID was only just appearing on the scene at this point, although we now know that at least one virus-related death already had taken place in the United States. In April, plaintiffs moved in the district court to

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375. See *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, and 248).

376. *Id.* For an overview of the public charge rule, see HELEN HERSHKOFF & STEPHEN LOFFREDO, *GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME* 400–401 (2019).

377. See Wendy E. Parmet, *Immigration Law as a Social Determinant of Health*, 92 TEMP. L. REV. 931, 940–42 (2018) (discussing the chilling effect that the public charge rule was likely to have on immigrant access to health care).

378. Hamutal Bernstein, Dulce Gonzalez, Michael Karpman & Stephen Zuckerman, *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019*, URB. INST. (May 18, 2020), <https://www.urban.org/research/publication/amid-confusion-over-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-2019>.

379. For a comprehensive list of all lawsuits challenging the legality of the public-charge rule, see Am. Immigr. Laws. Ass’n, *Featured Issue: Public Charge Changes at USCIS, DOJ, and DOS*, AILA Doc. No. 19050634 (Feb. 4, 2021), <https://www.aila.org/advo-media/issues/all/public-charge-changes-at-uscis-doj-and-dos>.

380. *New York v. U.S. Dep’t of Homeland Sec.*, 408 F. Supp. 3d 334 (S.D.N.Y. 2019).

381. *New York v. U.S. Dep’t of Homeland Sec.*, No. 19 CIV. 7777 (GBD), 2019 WL 6498250 (S.D.N.Y. Dec. 2, 2019).

382. *New York v. U.S. Dep’t of Homeland Sec.*, No. 19-3591, 2020 WL 95815 (2d Cir. Jan. 8, 2020).

383. *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020).

modify the stay, pointing to the health crisis,<sup>384</sup> and soon thereafter the Supreme Court was presented with an emergency motion.<sup>385</sup> On April 24, the Court issued a two-sentence order that denied the request to vacate the stay;<sup>386</sup> by May, New York's highest COVID-related death rates were in ten Brooklyn neighborhoods that are populated largely by Black, Brown, and immigrant households.<sup>387</sup> The Solicitor General's request for a stay pending appeal typically is treated as "extraordinary relief."<sup>388</sup> Justice Gorsuch, in a concurring opinion, criticized the lower court's entry of a nationwide injunction for its lack of judicial restraint; arguably, granting the request for a stay showed the Court's own lack of restraint in withholding deference from the expertise of health professionals on the importance of accessing medical care during a pandemic.<sup>389</sup>

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384. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction and Stay or Temporary Restraining Order Pending National Emergency, *New York v. U.S. Department of Homeland Security*, No. 1:19-cv-07777 (S.D.N.Y. Apr. 28, 2020). See *New York and Other States Request a Pause to Public Charge During COVID*, 22 No. 10 *Immigr. Bus. News & Comment NL* 22 (May 15, 2020).

385. Motion by Government Plaintiffs to Temporarily Lift or Modify the Court's Stay of the Orders Issued by the United States District Court for the Southern District of New York, *Dept. of Homeland Sec. v. New York*, 140 S. Ct. 2709 (2020) (No. 19A785).

386. *Dept. of Homeland Sec. v. New York*, 140 S. Ct. 2709 (2020).

387. See *Brooklyn ZIP Code Has N.Y.C.'s Highest Death Rate*, N.Y. TIMES July 22, 2020), <https://www.nytimes.com/2020/05/18/nyregion/coronavirus-new-york-up-date.html> (discussing areas of Brooklyn with highest infection rates).

388. *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3, 5 (2019) (Sotomayor, J., dissenting from grant of stay pending appeal) (quoting *Williams v. Zbaraz*, 442 U.S. 1309 (1979) (Stevens, J., in chambers)); see Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019) ("To take one especially eye-opening statistic, in less than three years, the Solicitor General has filed at least twenty-one applications for stays in the Supreme Court . . . . During the sixteen years of the George W. Bush and Obama Administrations, the Solicitor filed [an average of] one every *other* Term.").

389. *Dept. of Homeland Security v. New York*, 140 S. Ct. 599, 600 (Gorsuch, J., concurring) ("The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them."). On March 9, 2021, at the request of all parties, the Supreme Court dismissed the government's petition for certiorari pursuant to Rule 46.1. See *Dept. of Homeland Security v. New York*, 141 S. Ct. 1292 (2021); Amy Howe, *Cases Testing Trump's "Public Charge" Immigration Rule Are Dismissed*, SCOTUSBLOG (Mar. 9, 2021), <https://www.scotusblog.com/2021/03/cases-testing-trumps-public-charge-immigration-rule-are-dismissed>. Earlier, on February 2, 2021, President Biden signed an Executive Order calling for the "immediate review of agency actions on public charge admissibility." Executive Order 14012, *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, 86 Fed. Reg. 8277 (Feb. 5, 2021).

*The Census*

The pandemic coincided with the taking of the 2020 Census and made it substantially more difficult to collect data.<sup>390</sup> The Census Bureau extended the deadline for individuals to respond to the census and for census takers to track down non-respondents, from July 31 to October 31, 2020.<sup>391</sup> The Bureau also announced that it would not report census results to the President until April 30, 2021 (extending the deadline from December 31, 2020).<sup>392</sup> On July 21, the Trump White House announced plans to exclude undocumented persons from state-population counts—the number used to apportion the United States House of Representatives—a methodological change that would serve to under-represent states with high immigrant populations.<sup>393</sup> Less than two weeks later, on August 3, the Bureau reversed course and announced that it would stop collecting data on September 30.<sup>394</sup>

The National Urban League, in coalition with various counties, cities, advocacy organizations, and individuals, filed suit in the federal District Court for the Northern District of California, challenging the decision to truncate the data-collection period, and sought a temporary restraining order.<sup>395</sup> That court, finding that the Bureau's action likely was arbitrary and capricious, reinstated the original October 31 data

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390. See, e.g., Jonathan Rothbaum, *How Does the Pandemic Affect Survey Response: Using Administrative Data to Evaluate Nonresponse in the Current Population Survey Annual Social and Economic Supplement*, U.S. CENSUS BUREAU BLOG (Sept. 15, 2020), <https://www.census.gov/newsroom/blogs/research-matters/2020/09/pandemic-affect-survey-response.html> (reporting response rates for interviews conducted by telephone in March 2020 to be over 10 percent lower than in preceding months and in the same period in 2019); see also *Court Case Tracker: National Urban League v. Ross*, BRENNAN CTR. FOR JUST. (Nov. 25, 2020), <https://www.brennancenter.org/our-work/court-cases/national-urban-league-v-ross> (“The Covid-19 pandemic has substantially disrupted the 2020 Census, resulting in months of suspended operations and significant delays in crucial counting processes.”) (Hershkoff is a member of the Board of Directors of the Brennan Center for Justice, a non-partisan not-for-profit organization.).

391. *Ross v. Nat'l Urban League*, 141 S. Ct. 18, 19, 208 L. Ed. 2d 169, 170 (2020) (Sotomayor, J., dissenting).

392. *Id.* at 19 (citing 13 U.S.C. § 141(b) (2018)).

393. See Memorandum from President Donald Trump to the Sec'y of Commerce, Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44679 (July 21, 2020), <https://www.federalregister.gov/documents/2020/07/23/2020-16216/excluding-illegal-aliens-from-the-apportionment-base-following-the-2020-census>.

394. *Ross*, 141 S. Ct. at 19.

395. Complaint, *Nat'l Urban League v. Ross*, Complaint, No. 20-cv-5799, 2020 WL 4805007 (N.D. Cal. Aug. 18, 2020).

collection and December 31 reporting deadlines.<sup>396</sup> The Ninth Circuit Court of Appeals affirmed.<sup>397</sup> However, the Supreme Court stayed the injunction, effectively cutting off any further data collection.<sup>398</sup>

Justice Sotomayor dissented. As she explained, in granting the stay, a majority of the Justices must have believed that the government's asserted harm—failing to meet a statutory deadline during a pandemic that made in-person counting in certain communities difficult if not impossible<sup>399</sup>—outweighed the harms of an inaccurate population count that will disproportionately affect hard-to-count rural and tribal communities, immigrants, and poor people.<sup>400</sup> As a result, members of disadvantaged communities—already disproportionately endangered by the pandemic—now face a decade of adverse legal consequences, including federal underfunding and political underrepresentation.<sup>401</sup> The Court might have disagreed with these factual arguments,<sup>402</sup> or thought the statutory deadline of paramount importance. However, the one-paragraph unsigned order that it issued provides no insight, accords no weight to medical expertise, and manifested little concern for the pandemic's effect on those who live and work outside a safe electronic compass.<sup>403</sup>

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396. Ross, 141 S. Ct. at 19–20; *see also* Nat'l Urban League v. Ross, No. 20-CV-05799-LHK, 2020 WL 5739144 (N.D. Cal. Sept. 24, 2020), order clarified by No. 20-CV-05799-LHK, 2020 WL 5876939 (N.D. Cal. Oct. 1, 2020).

397. Nat'l Urban League v. Ross, 977 F.3d 770 (9th Cir. 2020) (holding the government was not entitled to a stay pending appeal of the preliminary injunction barring implementation of accelerated data collection deadline, but was entitled to a stay to the extent that the order required the government to ignore the statutory deadline for completing the population count).

398. Ross v. Nat'l Urban League, 141 S. Ct. 18, 18 (2020).

399. Ross v. Nat'l Urban League, 141 S. Ct. 18, 20 (2020) (Sotomayor, J., dissenting). This justification is unpersuasive, as it seems that the Bureau would have failed to meet the deadline in any event.

400. *Id.* at 19.

401. *Id.* at 21.

402. There was some basis for doing so in the record. *See id.* at 21 n.2 (addressing the Bureau's claim that the count would not be inaccurate).

403. In all of the cases discussed in this section, the Court either offered no rationale or declined to give weight to the adverse health consequences of COVID on vulnerable members of discrete communities. In Roman Catholic Diocese of Brooklyn, N.Y. v. Cuomo, 141 S. Ct. 63 (2020), the Court, per curiam, enjoined the New York Governor's Executive Order placing ten and twenty-five person occupancy limits on the religious groups that challenged its constitutionality under the First Amendment. Justice Gorsuch provided a lengthy concurrence in which he considered the effect of COVID on members of the religious community, *see id.* (relying on the fact that applicants showed no outbreaks among their churches or congregations notwithstanding group assemblies), but nowhere considered the effect of transmission from religious gatherings to the secular community in which the church or congregation is located. *See id.* (Sotomayor, J., dissenting from grant of injunction) (emphasizing that the concurring opinion of Gorsuch, J., did not address "the conditions medical experts

## V.

JUDICIAL ADAPTATION, PROCEDURAL REFORM, AND  
QUESTIONS STILL TO ASK

The crisis precipitated by COVID presents a dynamic situation—our analysis of its impact on court procedure and the legal profession can, at best, be only provisional and tentative. By mid-May 2020, there seemed to be light at the end of the tunnel; every state that had

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tell us facilitate the spread of COVID-19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time”). See generally Amy Jamieson, *The Safe and Unsafe Ways People Are Worshipping During COVID-19*, HEALTHLINE (Aug. 3, 2020), <https://www.healthline.com/health-news/the-safe-and-unsafe-ways-people-are-worshipping-during-covid-19> (identifying health dangers to congregants and non-congregants from in-door group worship); Alexandra Sifferlin, *Church and Coronavirus Is a Dangerous Combination*, MEDIUM CORONAVIRUS BLOG (May 29, 2020), <https://coronavirus.medium.com/church-and-coronavirus-is-a-dangerous-combination-39d98170f4a2> (discussing church choirs and religious services “as clusters of spread of the coronavirus”); Isaac Ghinai, Susan Woods, Kathleen A. Ritger, Tristan D. McPherson, Stephanie R. Black, Laura Sparrow, Marielle J. Fricchione, Janna L. Kerins, Massimo Pacilli, Peter S. Ruestow, M. Allison Arwady, Suzanne F. Beavers, Daniel C. Payne, Hannah L. Kirking & Jennifer E. Layden, *Community Transmission of SARS-CoV-2 at Two Family Gatherings*, 69 MORBIDITY & MORTALITY WEEKLY REP. 446 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6915e1-H.pdf> (discussing “widespread community transmission” in the United States because of nonhousehold contacts, and focusing, e.g., on transmission after family gathering at funeral); Allison James, Lesli Eagle, Cassandra Phillips, D. Stephen Hedges, Cathie Bodenhamer, Robin Brown, J. Gary Wheeler & Hannah Kirking, *High COVID-19 Attack Rate Among Attendees at Events at a Church*, 69 MORBIDITY & MORTALITY WEEKLY REP. 632 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6920e2-H.pdf> (discussing infection rate among 92 attendees of rural Arkansas church).

After submission of our manuscript, the Court decided three cases that further illustrate the limited weight it has given to COVID’s impact on vulnerable populations outside the courthouse. In *FDA v. Am. Coll. of Obstetricians and Gynecologists*, 141 S. Ct. 578 (2020), the Court stayed a district court’s order suspending in-person pickup requirements for abortion medication. Justices Sotomayor and Kagan dissented. *Id.* at 579. In *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020), the Court stayed a preliminary injunction requiring Barnes, the Orange County Sherriff, to implement certain safety measures to protect inmates at the Orange County jail from COVID. Justices Sotomayor and Ginsburg dissented. *Id.* And in *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), the Court enjoined the State of California from enforcing capacity limitations on indoor worship services. Justice Kagan, joined by Justices Breyer and Sotomayor, dissented, and wrote:

I fervently hope that the Court’s intervention will not worsen the Nation’s COVID crisis. But if this decision causes suffering, we will not pay. Our marble halls are now closed to the public, and our life tenure forever insulates us from responsibility for our errors. That would seem good reason to avoid disrupting a State’s pandemic response. But the Court forges ahead regardless, insisting that science-based policy yield to judicial edict.

*South Bay United Pentecostal Church v. Newsom*, 141 St. Ct. at 723 (2021) (Kagan, J., dissenting).

imposed a shelter-in-place recommendation or mandate had taken steps to lift the restriction and “open up” daily life.<sup>404</sup> And state and federal courts seemed to share that sense of optimism. Yet, just two months later, the United States confronted record-breaking numbers of new cases and deaths—on one day, 75,600 new cases.<sup>405</sup> On December 9, 2020, daily COVID-related deaths reached more than 3,000 persons, “the highest number in a single day seen so far in the pandemic both nationwide and anywhere else in the world”—and more than the deaths caused by the 9/11 attacks.<sup>406</sup> One month later, on January 9, 2021, notwithstanding the roll-out of a vaccination program,<sup>407</sup> the daily death toll reached 3,261.<sup>408</sup> Judicial efforts to resume in-person proceedings halted as participants tested positive for the virus<sup>409</sup> and infection rates spiked within a region.<sup>410</sup>

As the legal profession considers how the pandemic has affected law and courts—and whether those changes offer a basis for reform of American civil process—it will be difficult to disentangle COVID from the social, economic, and legal problems that the health crisis has

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404. See Alaa Elassar, *This Is Where Each State Is During Its Phased Reopening*, CNN (May 27, 2020), <https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/> (providing overview of approaches on state-by-state basis).

405. *U.S. Reports More Than 70,000 New Coronavirus Cases for the Second Time*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/world/coronavirus-updates.html>.

406. See Isabel Togoh, *More People Died from COVID-19 in the U.S. on Wednesday than During 9/11 Attacks*, FORBES (Dec. 10, 2020, 5:56 AM), <https://www.forbes.com/sites/isabeltogoh/2020/12/10/more-people-died-from-covid-19-in-the-us-on-wednesday-than-during-911-attacks>.

407. See *Demand Overwhelms Some U.S. Vaccine Registration Sites*, N.Y. TIMES (Jan. 11, 2021, 4:25 PM), <https://www.nytimes.com/live/2021/01/09/world/covid-19-coronavirus>.

408. *Coronavirus in the U.S.: Latest Map and Case Count – Total Deaths January 9, 2021*, N.Y. TIMES (last visited Apr. 2, 2021), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

409. See, e.g., Madison Alder, *More Positive Tests as Covid Disrupts Federal Trial in Texas*, BLOOMBERG L. (Nov. 13, 2020), <https://news.bloombergtax.com/daily-tax-report-state/more-positive-tests-as-covid-disrupts-federal-trial-in-texas> (reporting a two-week postponement of a trial in Texas federal court after a juror and a lawyer tested positive for COVID); see also Twenty-Ninth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9135 (Tex. 2020), <https://www.txcourts.gov/media/1450050/209135.pdf>.

410. See COVID Data Tracker, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>. In November 2020, federal courts issued more than two dozen orders suspending jury trials. *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge>; see also Twenty-Ninth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9135 (Tex. 2020), <https://www.txcourts.gov/media/1450050/209135.pdf>.

put into full relief and, in our view, demand attention.<sup>411</sup> Nor can discussions about how state and federal courts will operate after the pandemic recedes be detached from the lingering effects of former President Trump's consistent rhetorical assaults on democratic institutions and judicial legitimacy.<sup>412</sup> If the nation had two plagues before 2021—COVID and racism—now the United States must confront a third: an extreme right-wing terrorist movement that, left unattended, puts the nation's constitutional governance at peril.<sup>413</sup> The election of Joseph Biden as President presents an opportunity to mitigate some of the problems that antedated the pandemic and to restore some political balance.<sup>414</sup>

Taking stock, therefore, is vital. The judiciary's protective emergency measures, devised as short-term solutions for an immediate and life-threatening situation, offer a starting point for discussion. Although they may not be the appropriate basis for meaningful procedural reform, they offer important information, lessons, and guidance. That the courts were able to pivot quickly from proceedings in bricks-and-mortar courthouses to virtual settings, and continue to enforce law and to protect rights, highlights the importance of planning, funding, and cross-disciplinary expertise in the design and management of judicial systems. Meeting the disruptions caused by the pandemic required careful and coordinated deliberation, investigation, and policy innovation—in short supply, both by the former President and in Congress during decades of dysfunction.<sup>415</sup>

We drew earlier from Amartya Sen's theory of famine to explain why the Administration's approach to the pandemic, relying as it did

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411. See, e.g., BRADLEY L. HARDY & TREVOR D. LOGAN, *RACIAL ECONOMIC INEQUALITY AMID THE COVID-19 CRISIS* (2020).

412. See Michael J. Klarman, *Foreword: The Degradation of American Democracy – and the Court*, 134 *HARV. L. REV.* 1 (2020) (analyzing former President Trump's manipulation of an "authoritarian playbook" to avoid losing power and his attack on democratic institutions).

413. See Tim Snyder, *The American Abyss*, *N.Y. TIMES* (Jan. 8, 2021), <https://www.nytimes.com/2021/01/09/magazine/trump-coup.html> (discussing the risks to American democracy brought into focus by the Capitol riot).

414. See, e.g., Ayanna Alexander, Andrew Kreighbaum & Paige Smith, *Biden's Racial Equity Challenge: Act Solo to Reverse Trump Moves*, *BLOOMBERG L.* (Dec. 29, 2020, 5:30 AM), <https://news.bloomberglaw.com/social-justice/bidens-racial-equity-challenge-act-solo-to-reverse-trump-moves> (discussing the various ways President Biden can encourage racial equality, including reinstating consent decrees with police departments, rolling back adverse housing regulations, enforcing civil rights, combating discriminatory lending, and prioritizing environmental justice).

415. See, e.g., Raquel Aldana, *Congressional Dysfunction and Executive Lawmaking During the Obama Administration*, 91 *CHI.-KENT L. REV.* 3 (2016).

on the existing entitlement structure, was counter-productive.<sup>416</sup> Although the judiciary based its emergency responses on expert information and best practices, it too worked within the existing procedural system and its general acceptance of market entitlements—and its responses thus may prove insufficient as a basis for post-COVID reforms. Trade-offs accepted during the pandemic involving such issues as jury rights and privacy may not be appropriate if litigation is to retain democratic significance and courts are to function as educative institutions.<sup>417</sup> Indeed, sustaining a commitment to “Equal Justice Under Law” may require reevaluation of long-held assumptions such as the principle of formal rather than functional equality in the design of procedural rules;<sup>418</sup> the reliance on the market for the distribution of legal representation;<sup>419</sup> and the standards for the licensing and regulation of lawyers.<sup>420</sup> However, we hasten to add that procedural reform likewise may require not revision, but reinvigoration of foundational principles given their erosion even before 2016, when President Trump began his massive rhetorical assault on truth and the rule of law.<sup>421</sup> Caution also is in order; crises of any sort can become arguments opportunistically raised in support of policies that are partisan, unfair, and even unconstitutional. So, too, analysis of procedural reform after COVID must incorporate new conditions; the pandemic has generated new legal disputes, new legal problems, and new pressures for lawyers, and their numbers and nature are still taking shape.<sup>422</sup> Like the judiciary’s emergency measures, which remain in flux, this section offers only a starting point for discussion, suggesting guideposts in considering whether some of the courts’ specific

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416. See Sen, *supra* note 32 and accompanying text.

417. See Alan Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993 (2012).

418. See, e.g., Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633 (2017).

419. See, e.g., FREDERICK WILMOT-SMITH, *EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD* (2019); see also Myriam Gilles & Gary Friedman, *Book Review: Examining the Case for Socialized Law*, 129 YALE L.J. 2078 (2020).

420. See, e.g., Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931 (2020).

421. See, e.g., Thomas O. Main & Stephen N. Subrin, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

422. See, e.g., Gary F. Lynch, *Federal Multidistrict Litigation: Recent Trends and the Impact of COVID-19*, 23 LAWS. J. 1, 14 (2021) (discussing COVID-related federal litigation); Pete Sherman, *Looking Past COVID-19*, 109 ILL. B.J. 18 (2021) (discussing decrease in client matters among Illinois lawyers and increase in professional stress); John E. Taylor, *The Pandemic-Ready Law School*, W. VA. LAW. (2020) (discussing unexpected costs of law school adaptation to the pandemic).

COVID-related changes can support long-term reform and raising questions still to be asked.<sup>423</sup>

*Courts as an Essential Public Good*

Above all, our discussion of procedural reform post-COVID takes account of courts as a public good that is both essential and democratic.<sup>424</sup> An important but unsettling legal trend even before the Trump presidency has been an increasing skepticism—what Professor Judith Resnik more than three decades ago called “failing faith”<sup>425</sup>—about the importance of public courts and litigation, and the special role of both in democratic life. The Constitution establishes the federal court system to “establish Justice,”<sup>426</sup> and every state in the nation likewise has constituted a public court system as part of a republican system of government. Of course, public courts do not have a monopoly on legal decision making. In particular, they share adjudicative

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423. We acknowledge the working groups and task forces formed to study, evaluate, and assess the pandemic and its broader implications for court reform. Among the law groups that have been convened, the American Bar Association established the ABA Coronavirus (COVID-19) Task Force, headed by the former Director of the Legal Services Corporation and composed of 20 members with diverse expertise. *See The ABA Coronavirus (COVID-19) Task Force*, A.B.A., <https://www.americanbar.org/advocacy/the-aba-task-force-on-legal-needs-arising-out-of-the-2020-pandem/> (last visited Feb. 25, 2021) (“The task force includes experts in disaster response; health law; insurance; legal needs of families to protect basic human needs such as food, shelter, medical and employment benefits; criminal justice; domestic violence; civil rights and social justice.”). The Task Force has identified a range of issues that require attention, including access to courts, limitations on remote access, trial delay, and delay in other proceedings. *See* AM. BAR ASS’N, SUMMARY REPORT: SURVEY REGARDING LEGAL NEEDS ARISING FROM THE COVID-19 PANDEMIC (2020). Using survey data, the Task Force so far has identified judicial accessibility as a major concern (twenty percent of the 449 survey respondents to a question asking “What legal needs have you seen arising from the COVID-19 pandemic?” pointed to procedural issues that impact access to courts). State professional organizations also have created working groups to study the impact of COVID on the legal profession and legal needs. The Connecticut Bar Association, for example, established the 2020 COVID-19 Pandemic Task Force comprised of judges, lawyers, and other professionals to address the legal issues that have arisen as a result of the pandemic, touching on executive-legislative power; the judiciary; state and federal judicial liaison; legal aid; “the public at large”; the legal profession, especially the financial impact of COVID on practice; technology; and law students and legal education. *See 2020 COVID-19 Pandemic Task Force*, CONN. BAR ASS’N (last visited July 12, 2020), <https://www.ctbar.org/members/sections-and-committees/task-forces/2020-covid-19-pandemic>.

424. *See* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 513–14 (2011) (explaining the concept of courts as a public good).

425. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

426. U.S. CONST. preamble; U.S. CONST. art. III, § 1.

authority with non-judicial actors that include public entities (such as administrative agencies) and private actors (especially arbitration panels and mediators). But we see no constitutional equivalence between public courts and these other legal decision makers. Administrative law judges are subject to political and other pressures.<sup>427</sup> Private decision makers lack authoritative power to declare the law and to use state power to enforce the law;<sup>428</sup> they work in private, behind closed doors, using secret information, and without any mandate to develop information for the public.<sup>429</sup>

Throughout the pandemic, policy makers recognized that public courts provide an essential service and tried to make them available as a public good; courts were required to remain “open” and to adapt quickly to ensure a functioning system of civil process. To be sure, the “day in court” ideal took on new meaning as litigants found themselves outside the public space of a brick-and-mortar courthouse and instead required to participate remotely in electronic proceedings.<sup>430</sup> The shift to a virtual process facilitated the continued operation of the courts, but these emergency adaptations come at a cost: courts are designed to be open and accessible, with their very architecture symbolic of democratic value.<sup>431</sup> Remote proceedings held through Zoom function in a closed and private environment, assigning each participant a discrete space on a video screen. Participation in open proceedings often is seen as fundamental to the creation of institutional trust. Whether Zoom proceedings can sustain or will diminish this process is an important question to ask. More broadly, the transition, and decisions to continue in this mode, or even just to retain aspects of it, raises concerns about how to secure for adjudication its public-facing role in creating public information, in educating the people, in securing public trust, and in providing meaningful opportunities for democratic participation.

Virtual proceedings could have a destabilizing effect on these public goals. Consider the civil jury. Trial by jury in civil cases has

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427. See Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39 (2020).

428. See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1835–38 (2014).

429. See Davis & Hershkoff, *supra* note 424; see also Lissa Griffin, *Judging During Crises: Can Judges Protect the Facts?*, 50 LOY. U. CHI. L.J. 857 (2019).

430. See Miller, *supra* note 4.

431. See JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (Yale Univ. Press 2011); see also Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275 (2020).

been on the decline over the last half century, with not even two percent of cases resolved by trial today.<sup>432</sup> Health risks posed by COVID resulted in a complete, although temporary, suspension of civil jury trials, further jeopardizing a fragile constitutional right.<sup>433</sup> The transition to remote trials also raises significant questions about how the jury will function if that modality should continue after the pandemic ends. Jurors who are expected to deliberate in person will now be required to confer and collaborate remotely; lawyers who are tasked with selecting jurors and examining and cross-examining witnesses—two of the most important aspects of the jury trial process—must learn to do so mediated through technology and not face-to-face contact. At the least, questions about how best to retain the jury as an integral part of democratic governance need to be openly addressed.

#### *Technology, Security, and Privatization*

The judiciary's increased use of technology for virtual trials and other legal proceedings puts into the forefront questions about how best to protect individual rights and to maintain institutional integrity. We see these concerns as intertwined. The Constitution guarantees everyone "a fair trial in a fair tribunal."<sup>434</sup> Remote procedures are thus constitutionally suspect if they create a "probability of unfairness."<sup>435</sup> More concretely, many statutes protect interests in privacy and confidentiality of both personal and commercial information, which virtual legal proceedings might inappropriately expose to unwanted view or illegal disclosure.<sup>436</sup> The extent to which virtual proceedings impact individual privacy raises obvious questions that require collective attention. But the judiciary's reliance on technology raises separate institutional concerns about the court system's increasing dependence upon private corporations that license the technological platforms needed to carry out the judiciary's public functions. In the rush to

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432. See Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 *LA. L. REV.* 119, 122 (2020).

433. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1132 (1991) (discussing the role of the jury "to create an educated and virtuous electorate").

434. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); see also U.S. CONST. amends. V, XIV; see, e.g., Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 *CORNELL L. REV.* 1, 9–15 (1983); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 *HARV. L. REV.* 427 (1991).

435. *In re Murchison*, 349 U.S. 133, 136 (1955).

436. See, e.g., Marcus, *supra* note 434; Miller, *supra* note 434 (discussing the value of confidentiality in pretrial proceedings).

adapt to the pandemic, courts—like law offices and universities—not surprisingly turned to private Internet servers, private telephone service providers, and private communication apps (like “Zoom”). From the private perspective, the pandemic did not create the “Zoom bomb,” but it has multiplied the number of virtual interactions that are vulnerable to uninvited interlopers and the kinds of security breaches to which legal proceedings have been exposed, all of which put institutional integrity at risk.<sup>437</sup> These cyber breaches are serious. In December 2020, the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency issued an emergency directive addressing a significant network compromise that was said to pose “unacceptable risks to the security of federal networks.”<sup>438</sup> The cyberattack on the courts apparently put financial and competitive information, including trade secrets, at risk; it also highlights critical questions about national security. In January 2021, the federal judiciary issued a statement directing the use of additional cybersecurity measures and new procedures for filings considered to be “highly sensitive documents.”<sup>439</sup> At a minimum, questions need to be asked about how courts are to determine which filings are to be considered “highly

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437. See Kristin Setera, *FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic*, FBI BOSTON (Mar. 30, 2020), <https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic> [https://perma.cc/Y9SA-ZASF]; Jon Brodtkin, *Zoombomber Crashes Court Hearing on Twitter Hack with Pornhub Video*, ARSTECHNICA (Aug. 5, 2020, 3:20 PM), <https://arstechnica.com/tech-policy/2020/08/zoombomber-crashes-court-hearing-on-twitter-hack-with-pornhub-video> [https://perma.cc/DF6Y-52F4]; Kate O’Flaherty, *Beware Zoom Users: Here’s How People Can “Zoom-Bomb” Your Chat*, FORBES (Mar. 27, 2020, 11:19 AM), <https://www.forbes.com/sites/kateoflahertyuk/2020/03/27/beware-zoom-users-heres-how-people-can-zoom-bomb-your-chat> [https://perma.cc/2KEW-HZHH] (advising how to prevent uninvited guests from joining video conferences). Of course, disruptions can happen in physical courthouses, too. See, e.g., *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (describing one such incident). The Internet’s speed and anonymity make this type of attack much easier.

438. DEP’T OF HOMELAND SEC. CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, EMERGENCY DIRECTIVE 21-01: MITIGATE SOLARWINDS ORION CODE COMPROMISE (2020); see Kari Paul & Lois Beckett, *What We Know – And Still Don’t – About the Worst-Ever U.S. Government Cyberattack*, GUARDIAN (Dec. 19, 2020, 2:57 PM), <https://www.theguardian.com/technology/2020/dec/18/orion-hack-solarwinds-explainer-us-government> [https://perma.cc/QJ8C-5G86]. As with the pandemic, the White House again attempted to minimize the scope and significance of the problem. See Martin Pengelly, *Trump Downplays Government Hack After Pompeo Blames It on Russia*, GUARDIAN (Dec. 19, 2020, 1:35 PM), <https://www.theguardian.com/us-news/2020/dec/19/mike-pompeo-we-can-say-pretty-clearly-russia-behind-hack-us-agencies> [https://perma.cc/6RUB-999K].

439. *Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records*, U.S. CTS. (Jan. 6, 2021), <https://www.uscourts.gov/news/2021/01/06/judiciary-addresses-cybersecurity-breach-extra-safeguards-protect-sensitive-court>.

sensitive” and how best to balance security with access and autonomy.<sup>440</sup> State courts likewise have found themselves impacted by cyber breaches and will need to address related issues in cases that range from family disputes and the interests of children, to commercial disputes and sensitive financial information.<sup>441</sup>

We urge, therefore, that in devising post-COVID judicial process, significant attention be paid not only to the institutional effects of technology, but also to the appropriate extent of privatization and the private sector’s indirect control over judicial functions. Privatization and contracting out are not new issues. Certainly, during the pandemic, contracting for technological service may have been urgent. But clichés about privatization, especially its assumed cost savings for government, need to be assessed in the light of evidence that too often points to the contrary, especially when the quality of service is held constant.<sup>442</sup> Moreover, outsourcing creates new opportunities for corruption and self-dealing; forms of public oversight would have to be

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440. Madison Alder, Perry Cooper & Lydia Wheeler, *Corporate Secrets at Risk in Hack of U.S. Courts Documents*, BLOOMBERG L. (Jan. 7, 2021, 3:35 PM), <https://news.bloomberglaw.com/us-law-week/corporate-secrets-at-risk-in-hack-of-u-s-courts-documents> (reporting that the cyberhack of the federal courts has put at risk “a range of highly sensitive competitive and financial information and trade secrets, including companies’ sales figures, contracts, and product plans”).

441. See Tim Starks, *The Cyberthreat to U.S. Courts*, POLITICO (July 13, 2020, 10:00 AM), <https://www.politico.com/newsletters/weekly-cybersecurity/2020/07/13/the-cyberthreat-to-us-courts-789121> [<https://perma.cc/JH9D-FPSC>] (discussing cyber breach to Texas state judiciary); see also Angela Morris, *Texas Appellate Courts Almost Back Online After Ransomware Attack*, LAW.COM (July 10, 2020), <https://www.law.com/texaslawyer/2020/07/10/texas-appellate-courts-almost-back-online-after-ransomware-attack>; Stewart Bishop, *Use of “Hackable” Devices by NY Courts Raises Alarms*, LAW 360 (Feb. 2, 2021, 7:37 PM), <https://www.law360.com/newyork/articles/1351320/use-of-hackable-devices-by-ny-courts-raises-alarms> (citing Technology Working Group of the Commission to Reimagine the Future of New York’s Courts, *Initial Report on the Statewide Judicial Survey of Remote Judging*, LAW 360 (Jan. 2021), <https://www.law360.com/articles/1351320/attachments/0>) (reporting concerns about cyberattacks from state judges’ use of personal electronic devices)).

442. See, e.g., Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2214 (2014) (reporting that cost savings from privatization “[o]ften come at the expense of service quality”); Dru Stevenson, *Privatization of State Administrative Services*, 68 LA. L. REV. 1285, 1312 (2008) (reporting that at the local level privatization has not consistently yielded cost savings); Darrell A. Fruth, *Economic and Institutional Constraints on the Privatization of Government Information Technology Services*, 13 HARV. J.L. & TECH. 521 (2000) (positing that “privatizing public information technology will likely not generate the costs savings governments expect”). Related concerns have been raised about the use of private prisons. See Exec. Order No. 14006, 86 Fed. Reg. 7,483 (Jan. 26, 2021) (explaining that to reduce the “costs and hardships,” as well as the levels, of incarceration, the Federal Government must “reduce profit-based incentives to incarcerate”).

devised to safeguard institutional integrity and to avoid conflicts of interest.<sup>443</sup> If nothing else, CARES's insufficient accountability mechanism should not be seen as a roadmap for future upgrades to the courts' technological capacity or the best or even an appropriate balance of public and private interests. At the same time, discussions of post-COVID reform need to consider both the advantages and disadvantages of government-controlled technology systems and cannot ignore the problems they potentially pose for undue surveillance and censorship.

#### *Virtual Proceedings and Decisional Outcomes*

We further urge that attention be given to the ways in which virtual proceedings have impacted and will impact the fairness of judicial decision making in terms of decisional accuracy. Virtual practice can be predicted to affect different categories of litigants in different ways. Likewise, virtual proceedings will impact lawyer conduct in ways that can be expected to affect the court's fact finding. At the least, technology is itself not yet sufficiently advanced to substitute seamlessly for in-person interaction.

Whether to expand reliance on remote proceedings requires the consideration of multiple issues involving basic details of trial practice. For example, jurors, lawyers, and judges must learn to assess demeanor testimony when witnesses are uncomfortable or inexperienced with the tele-mode,<sup>444</sup> or transmission problems intrude.<sup>445</sup> Virtual trials likely will alter the ways in which jurors and judges perceive witnesses and assess testimony, and perhaps should prompt the legal community to reexamine some old ideas about the traditional weight given to demeanor evidence and its role in credibility determi-

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443. See Davis & Hershkoff, *supra* note 424 (raising questions, in the context of contractual procedure, whether privatization produces "faithless agents whose interests are misaligned with public goals").

444. For example, Chief District Judge Rodney Gilstrap in the Eastern District of Texas issued a Standing Order for his civil cases stating that "depositions of witnesses may need to be conducted remotely with all participants separated," even as it acknowledged that the process "especially for first-time witnesses unfamiliar with the process, may be an uncomfortable experience." See Standing Order Regarding Pretrial Procedures in Civil Cases Assigned to Chief District Judge Rodney Gilstrap During the Present COVID-19 Pandemic (E.D. Tex. 2020), [www.txed.uscourts.gov/sites/default/files/judgeFiles/COVID19%20Standing%20Order.pdf](http://www.txed.uscourts.gov/sites/default/files/judgeFiles/COVID19%20Standing%20Order.pdf) [<https://perma.cc/JWV3-DFWS>].

445. See Fredric I. Lederer, *The Potential Use of Courtroom Technology in Major Terrorism Cases*, 12 WM. & MARY BILL RTS. J. 887, 919 (2004) (discussing concerns of assessing demeanor when remote testimony is used).

nations.<sup>446</sup> Further, decisional accuracy is put into question when English is not the primary language of the parties or witnesses and time lags in translation generate misperceptions and misunderstanding.<sup>447</sup> Indeed, the pandemic may provide an important opportunity to take stock of the role of implicit racial, gender, and other impermissible biases in evaluating demeanor testimony,<sup>448</sup> and to improve and devise new procedures—such as jury instructions—to mitigate the problem.<sup>449</sup> One study already has found that litigants in remote immigration proceedings are generally more likely to be deported.<sup>450</sup> So, too, the use of remote proceedings will affect perceptions of lawyer skills as advocacy is mediated through a video screen or telephone and faces the ever-present problem that the telephone will disconnect or the video monitor will crash.<sup>451</sup> New concerns are presented for

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446. This effort would be reinforced by research in cognitive psychology that “casts significant doubt on the core assumption behind the weight given to demeanor evidence in making credibility determinations.” Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1339 (2015) (quoting Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJs*, 20 J. NAT’L ASS’N ADMIN. L. JUDGES 1, 3–4 (2000)); see also Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Testimony in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1201 (1993) (“Observers can actually be misled and fooled into making significantly less accurate judgments as to a speaker’s deceit when they watch a witness’ behavior.”).

447. See, e.g., Emily Ngo, *How City Courts Are Operating Remotely During the Pandemic*, NY1: SPECTRUM NEWS (Apr. 14, 2020, 7:49 AM), <https://www.ny1.com/nyc/all-boroughs/news/2020/04/14/city-courts-operating-remotely-during-pandemic> [<https://perma.cc/Y46R-UGLA>] (discussing technological barriers to simultaneous translation).

448. See Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1 (2000) (evaluations of demeanor are subject to substantial racial bias).

449. See James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 936 (2000) (discussing recommendation that “jury instructions be amended in order to focus attention on those physical clues that have been shown by empirical research to be reliable indicators of deceit”); Bennett, *supra* note 446, at 1373–75 (proposing such an instruction).

450. See Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 937 (2015) (“[W]hen compared with similar detained in-person cases, detained televideo cases exhibited depressed engagement with the adversarial process. Televideo litigants were less likely to retain counsel, pursue an application for permission to remain lawfully in the United States (known as relief), or seek the right to return voluntarily (known as voluntary departure).”).

451. See Hon. Mark A. Drummond (Ret.), *Advocacy Through the Computer Screen: Best Practices for Effective Remote Advocacy*, A.B.A. (May 2, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/advocacy-through-computer-screen> (providing tips for how lawyers can adapt to practicing remotely); Alaina Lancaster, *‘I Kind of Prefer it Now’: Lawyers Say Virtual Civil Trial Might Be More Efficient*, RECORDER (July 17, 2020), <https://www.recorder.com/news/technology/virtual-civil-trial-might-be-more-efficient>.

professional ethics; lawyers out of the court's view must resist the urge to coach witnesses for desired answers that impact the court's ultimate merits decision.<sup>452</sup> Moreover, it is important to consider the ways in which remote proceedings may block the court from ever reaching the merits—for example, by generating procedural defaults and forfeitures if technological snafus are counted against time, similar to those imposed on information exchanged through depositions.<sup>453</sup> Above all, we underscore the importance of examining whether technology impacts—negatively or positively—courts' determinations of the merits. Questions about courtroom practice, professional ethics, and decisional accuracy are all implicated in this discussion.

### *Technology and Constitutional Doctrine*

Any shift from in-person to remote proceedings will not only affect courtroom practice but also legal doctrine. Indeed, a basic theme in the development of American procedure concerns the impact of changing technology upon concepts of judicial federalism and due process.<sup>454</sup> In our view, maintaining remote proceedings, or making more use of virtual courtrooms, will put into question some of the most fundamental assumptions of United States civil procedure. Concerns about “distant forum abuse,” for example, motivate much of personal jurisdiction doctrine.<sup>455</sup> But remote proceedings make it less

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www.law.com/therecorder/2020/07/17/i-kind-of-prefer-it-now-lawyers-say-virtual-civil-trial-might-be-more-efficient (reporting that “[t]he first 15 minutes or so of San Mateo County Superior Court’s second virtual bench trial got off to a bit of a rocky start, technologically speaking”).

452. See Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 217 (2000) (discussing witness coaching, and concluding that “[b]y giving the competing attorneys free rein to present remote witnesses in a manner that serves their clients’ self-interests, unregulated videoconferencing can serve the values of adversarialism,” assuming “the fact finder will have the opportunity to evaluate the credibility of a remote witness based on the demeanor evidence each party chooses to emphasize”).

453. The Illinois Supreme Court amended Supreme Court Rule 206 to facilitate remote depositions. The deponent is no longer required to be physically present in the same place as the officer administering the oath and recording the deposition, and “[t]ime spent at a remote electronic means deposition in addressing necessary technology issues shall not count against the time limit for the deposition . . . .” *In re Ill. Cts. Response to COVID-19 Emergency/Impact On Discovery*, Misc. Rec. No. 30370 (Ill. Apr. 29, 2020).

454. See, e.g., JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, *CIVIL PROCEDURE: CASES AND MATERIALS* 88 (12th ed. 2018) (discussing the indirect effect of the automobile upon personal jurisdiction doctrine).

455. See Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multi-state Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 52–53 (1986); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 & n.10, 102 S. Ct. 2099, 2104, 72 L. Ed. 2d 492 (1982). This idea has also

inconvenient to be sued in a distant forum.<sup>456</sup> Similarly, forum non conveniens and venue transfer rules reflect the idea that a forum might be inconvenient because documents and witnesses are located in a different state, country, or district.<sup>457</sup> Jurisdictional barriers traditionally fixed by geography lose their import when technology can hurdle them—necessitating a profound rethinking about choice of law and the extra-territorial effect of legislation.<sup>458</sup> These are questions that cannot be considered casually, but rather require focused research and attention and involve multiple legal actors in the state and federal systems.

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animated much of the Court's recent "general jurisdiction" jurisprudence. *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117, 126–28, 131–32, 138, 134 S. Ct. 746, 753–55, 756–58, 761, 187 L. Ed. 2d 624, 632–34, 635–37, 640 (2014) (general jurisdiction appropriate only where company is "at home").

456. This is of course not to say that the personal jurisdiction requirements should be abandoned. Existing law makes clear that it protects weighty interests other than that of the defendant in limiting where it can be sued. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92, 100 S. Ct. 559, 564 (1980) (requirement of minimum contacts both protects defendant and "ensure[s] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); *J. McIntyre Mach., Ltd., v. Nicastro*, 564 U.S. 873, 883, 131 S. Ct. 2780, 2789, 180 L. Ed. 2d 765, 776 (2011) ("[J]urisdiction is in the first instance a question of [sovereign] authority rather than fairness."). There are also good reasons to think that defendants will still be burdened by defending remote proceedings in distant forums; the problems with remote proceedings identified elsewhere in this Article are an obvious example.

457. The doctrine of forum non conveniens allows a court with power to decline jurisdiction when adjudication in another forum would better serve the convenience and interests of the courts and the parties. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 41 (1981) (assessing convenience in terms of the location of evidence and witnesses and the competing interests of the original forum and the alternative forum). Technological changes already have chipped away at this idea—many courts think, for example, that the location of records and documents "is entitled to relatively little weight" in transfer and forum non conveniens analysis "in the modern era of faxing, scanning, and emailing documents." *Dickerson v. Novartis Corp.*, 315 F.R.D. 18, 30 (S.D.N.Y. 2016); *accord Ford Motor Co. v. Ryan*, 182 F.2d 329, 330–31 (2d Cir. 1950) (Frank, J.) (denying transfer in part because the relevant records had been copied and could be easily moved); *CBS Interactive Inc. v. Nat'l Football League Players Ass'n*, 259 F.R.D. 398, 410 (D. Minn. 2009).

458. The diminishing importance of geographic barriers gives special credence to calls for transnational adjudication. *See, e.g.*, Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 *CORNELL L. REV.* 1 (2008) (proposing that commercial disputes from countries with poorly functioning court systems be decided in better functioning foreign courts); *see also* Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 183–86 (1994) (describing existing transnational legal processes); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 *NOTRE DAME L. REV.* 1057, 1063 (2009) (suggesting revision of the way in which states employ "extraterritoriality [concepts] as they have evolved in choice-of-law principles and in legislation").

*Technology and Professional Licensing*

The pandemic and its use of technology have further raised many questions about continued reliance upon the traditional bar examination as the best way to license lawyers and to regulate lawyer practice. These questions are not new, but the health crisis has made the matter more urgent as new law graduates find themselves unable to sit for an in-person multiple-day examination.<sup>459</sup> In January 2021, the National Conference of Bar Examiners, after three years of study by its Testing Task Force,<sup>460</sup> announced plans to remodel the traditional examination and substitute an assessment method that emphasizes legal skills rather than legal knowledge.<sup>461</sup> Some have argued that a diploma privilege model, under which individuals seeking admission to the bar are granted licensure upon graduation from law school, would be the more appropriate way forward. Moreover, if competence is to be based upon skill and not comprehensive knowledge, questions must be asked about the continued role of the states in controlling access to the profession. In this vein, Rule 5.5 of the American Bar Association Model Rules of Professional Conduct largely prohibits the practice of law by lawyers who are not licensed to do so by the jurisdiction.<sup>462</sup> Some

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459. Certainly during the pandemic, in-person examinations pose a health risk to test takers, especially those with pre-existing conditions; postponing exams would cause some individuals to delay beginning their jobs, which would burden low-income individuals or those with significant student loans; and a remote exam, like the one ultimately offered in 2020 by the NCBE, would disadvantage test takers who do not have access to a stable Internet connection or whose living situation would not allow them to sit for a two-day exam without distraction. See Donna Saadati-Soto, Pilar Margarita Hernández Escontrías, Alyssa Leader & Emily Croucher, *Why This Pandemic Is a Good Time to Stop Forcing Prospective Lawyers to Take Bar Exams*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/> [https://perma.cc/Y9LJ-TCML]; see also *Strict Scrutiny: Diploma Privilege*, STRICT SCRUTINY PODCAST (July 13, 2020), <https://strictscrutinypodcast.com/podcast/diploma-privilege>; Sam Skolnik, *'Serious Reexamination' of Bar Exam Looms as Grads Sit for Test*, BLOOMBERG L. (Oct. 6, 2020, 5:51 AM), <https://news.bloomberglaw.com/business-and-practice/serious-reexamination-of-bar-exam-looms-as-grads-sit-for-test> (noting that the failures of several states to administer bar exams adequately has led to serious criticisms of the traditional bar exam model). We do not address related questions about remote instruction and legal education, but acknowledge the importance of this topic.

460. See Karen Sloan, *Bar Exam Overhaul Plans Go Public. So Long, MBE*, LAW.COM (Jan. 4, 2021, 2:15 PM), <https://www.law.com/texaslawyer/2021/01/04/bar-exam-overhaul-plans-go-public-so-long-mbe> (discussing process of review).

461. See NAT'L CONFERENCE OF BAR EXAM'RS TESTING TASK FORCE, OVERVIEW OF PRELIMINARY RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION (2020), <https://testingtaskforce.org/research/preliminary-recommendations-for-next-generation-bar-examination> [https://perma.cc/LW28-Q9DP].

462. MODEL RULES OF PROF'L CONDUCT R. 5.5 (AM. BAR ASS'N 2020).

commentators have begun to question the continued justification for this ban given a shift to remote proceedings.<sup>463</sup> In December 2020, the ABA Standing Committee on Ethics and Professional Responsibility released a formal opinion stating that remote cross-jurisdictional work is unproblematic so long as “a lawyer practicing remotely from a local jurisdiction [does] not state or imply that the lawyer is licensed to practice law in the local jurisdiction.”<sup>464</sup> Even still, the Committee’s determination would not supersede a state ruling that such cross-jurisdictional work is prohibited.<sup>465</sup> At the least, further attention to the issue is warranted.

### *Technology and Equal Access to Law*

The pandemic has exposed wide economic gaps in American society, closely associated with race and ethnicity, and these gaps raise questions about the fairness of relying on electronic proceedings when litigants do not have equal access to technology.<sup>466</sup> Questions about America’s “justice gap” of course preceded the pandemic.<sup>467</sup> Ameri-

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463. Richard J. Rosensweig, *Unauthorized Practice of Law: Rule 5.5 in the Age of COVID-19 and Beyond*, A.B.A. (Aug. 12, 2020), <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2020/unauthorized-practice-of-law-rule-55-in-the-age-of-covid-19-and-beyond> [<https://perma.cc/8TNV-GQ2J>] (“Due to COVID-19, the desire to work in a safe place that happens to be on the wrong side of a border may further entice lawyers to ignore that border. However, what Rule 5.5 permits and forbids is uncertain in many such situations and can vary from jurisdiction to jurisdiction.”).

464. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 495 (2020); David L. Hudson Jr., *What Are Ethics Issues for Lawyers Practicing Remotely from a Different State During the Pandemic?*, A.B.A. J.: DAILY NEWS (Dec. 16, 2020, 2:45 PM), <https://www.abajournal.com/news/article/aba-ethics-opinion-495-lawyers-working-remotely>.

465. Hudson, *supra* note 464 (“[I]f a particular jurisdiction had by statute, rule, or judicial opinion determined that a lawyer working remotely while physically located in that particular jurisdiction constitutes the unauthorized practice of law, then Model Rule 5.5(a) would prohibit such conduct.”).

466. See *#Disconnected: COVID-19 & The Digital Divide*, ASPEN INST., <https://www.aspeninstitute.org/events/disconnected-covid-19-the-digital-divide/> (last accessed Feb. 17, 2021) [<https://perma.cc/5HFF-CC3C>].

467. See, e.g., William H. Neukom & Elizabeth Anderson, *COVID-19 and the Access-to-Justice Crisis*, 37 GPSOLO 36 (2020):

Even before the COVID-19 pandemic struck, the U.S. justice system was failing people. Research published by WJP in 2019 found that 66 percent of Americans had experienced a civil legal problem in the past two years, substantially more than the average 49 percent of people experiencing legal problems in the 100 other countries studied. Only 33 percent of Americans were able to access the help they needed to resolve their problem. The heartbreaking reality is that the United States ranks 109th out of 128 countries worldwide in terms of the accessibility and affordability of civil legal services.

can procedure customarily does not recognize inequalities in adjudicative “equipage” as a constitutional problem,<sup>468</sup> and it is unusual for a court to order the provision of experts, translators, or counsel to litigants who lack financial means to obtain such procedural resources.<sup>469</sup> Unequal access to technology, however, poses a different problem—without the technology, a litigant is not just impaired in the ability to put on a case or a defense; the litigant cannot access the court at all in “real” time.

Consideration of whether to continue to hold remote hearings after the pandemic must ensure that the use of remote-access technology expands rather than frustrates access to courts, and that citizen access to courts is provided equitably, taking account of the widely divergent distribution of digital and other resources. On these questions, important work already has been done by such groups as the National Center for State Courts (which drew from publications of the California Commission on Access to Justice).<sup>470</sup> Questions to be asked include: Which proceedings ought to be conducted remotely? How should courts select and implement the platform and associated technology needed for the virtual proceeding? How accessible is the technology? Platforms that require computers or cameras may be inaccessible to litigants without easy access to computers, whereas voice-only options like telephones may be more generally accessible. Does the platform impose charges on users? Moreover, wealth is not the only factor that determines accessibility. Consideration should be given to whether the technology is accessible to litigants with visual or auditory disabilities. In this regard, best practices recommend that minimum requirements include “closed captioning, keyboard accessi-

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468. See William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1867–68 (2002) (referring to “equipage equality,” “rule equality,” and “outcome equality”; the term equipage was borrowed from Frank Michelman).

469. See Hershkoff & Loffredo, *supra* note 376, at 787–97.

470. See NAT’L CTR. FOR ST. CTS., GUIDING PRINCIPLES FOR POST-PANDEMIC COURT TECHNOLOGY (2020), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf](https://www.ncsc.org/__data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf) (proposing a set of principles to guide policymaking over technology); NAT’L CTR. FOR ST. CTS., POST-PANDEMIC PLANNING TECHNOLOGY RESOURCE GUIDE (2020), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0020/42482/Post-Pandemic-Planning.pdf](https://www.ncsc.org/__data/assets/pdf_file/0020/42482/Post-Pandemic-Planning.pdf) (giving examples of specific technologies implemented by courts); see also CAL. COMM’N ON ACCESS TO JUSTICE, REMOTE HEARINGS AND ACCESS TO JUSTICE DURING COVID-19 AND BEYOND, [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf](https://www.ncsc.org/__data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf) (noting that “[a]fter the COVID-19 crisis, the use of technology for court appearances will very probably continue,” and that courts must be prepared to take advantage of this technology in a way that expands access to courts).

bility, automatic transcripts, and screen reader support . . . .”<sup>471</sup> Further, the literature on procedural justice is replete with discussion of “repeat players” and their comparative advantage in litigation—raising questions about whether the selected technology is easy to use for first-time users or those without computer literacy.<sup>472</sup> We already have raised questions about how remote hearing technology may potentially disadvantage litigants or whose first language is not English. A host of other issues are related to the type of technology selected and its impact on litigation outcomes (associated with concerns about decisional accuracy as well as fairness). For example, courts must protect against the entry of default judgments against pro se litigants who miss court proceedings because their phone service has been cut off for nonpayment or they lack access to the Internet or laptops.<sup>473</sup> The questions presented are large and small, but combined they affect the overall delivery and perception of civil justice.

Conversely, the nation’s approach to post-pandemic courts provides an opportunity to think carefully and creatively about the ways in which technology can facilitate judicial access for pro se litigants<sup>474</sup>—who surely have been put at risk throughout the pandemic by such requirements as paper filings when all other litigants are permitted to make electronic filings. Technology perhaps can assist the profession in assuring that indigent litigants who need representation can connect with counsel who are trustworthy and competent.<sup>475</sup> To be sure, the issues facing the state courts differ from those in the fed-

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471. CAL. COMM’N ON ACCESS TO JUSTICE, *supra* note 470, at 4.

472. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95.

473. See, e.g., Emily Mieure, *Making Online Justice Work in Wyoming During Pandemic*, ROCKET MINER (Apr. 29, 2020), [https://www.wyomingnews.com/rocketminer/news/state/making-online-justice-work-in-wyoming-during-pandemic/article\\_7586057f-eba4-5915-b9ef-096a4e753103.html](https://www.wyomingnews.com/rocketminer/news/state/making-online-justice-work-in-wyoming-during-pandemic/article_7586057f-eba4-5915-b9ef-096a4e753103.html) (discussing litigants’ lack of access to phone, Internet, and computers); see also NAT’L CTR. FOR ST. CTS., FAIR AND EFFICIENT HANDLING OF CONSUMER DEBT ACTIONS (Oct. 20, 2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0032/55499/Ensure-Fair-and-Efficient-Handling-of-Consumer-Debt-Actions.pdf](https://www.ncsc.org/_data/assets/pdf_file/0032/55499/Ensure-Fair-and-Efficient-Handling-of-Consumer-Debt-Actions.pdf) (giving recommendations to judges for ensuring fairness to unrepresented parties in debt collection cases).

474. For example, Chief Justice McCormack of the Michigan Supreme Court has noted that remote proceedings are less intimidating for pro se parties. Megan Mineiro, *Judges Tout Covid for Opening Judiciary Up to Technology*, COURTHOUSE NEWS SERV. (June 25, 2020), <https://www.courthousenews.com/judges-tout-covid-for-opening-judiciary-up-to-technology>.

475. See, e.g., *Web Portal Connects Lawyers to Those in Need During Pandemic*, A.B.A. (Mar. 23, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/free-legal-answers-milestone>; *Virtual Legal Clinics Since 2007*, TEX. ADVOC. PROJECT, <https://www.texasadvocacyproject.org/free-legal-services/virtual-legal-clinics> (last accessed Feb. 18, 2021).

eral courts, and concern larger numbers of litigants, although they typically have received less attention. If nothing else, the pandemic insists that attention now be paid.

### *Court Reform, Cost, and Public Investment*

Looming over the entire question of procedural reform is the question of cost and how much the United States is willing to invest in a fair and accessible system of civil justice. Many state judiciaries never recovered from budget shortfalls that followed the 2008 recession, and the pandemic—exacerbated by the Trump Administration’s failures—has further drained the states of expected tax revenues.<sup>476</sup> The federal judiciary likewise has faced significant budget shortfalls, with the appropriation process mired in partisan rancor and legislative dysfunction, impacting issues ranging from technological security to litigant support.<sup>477</sup> Technology costs money; so too do physical plant accessibility and security.<sup>478</sup> Funding for courts raises questions not only about the overall size of budget appropriations, but also their source and distribution. The prejudicial dangers of courts’ using fees, fines, and civil forfeiture proceeds have been well documented.<sup>479</sup> Likewise, the withholding of adjudicative equipage from indigent parties raises concerns about the fairness and integrity of the system overall. On this issue, we end as we began: emphasizing the role of the courts as an essential and democratic public good that can flourish only if there is an open and informed process that ensures adequate public funding for all who seek justice.

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476. See, e.g., GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, RAND CORP., WHO PAYS FOR JUSTICE? PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE (2014) (discussing the impact of the 2008 recession on state judicial budgets); see also Daniel J. Hall, *Funding Justice*, COUNCIL OF ST. GOV’TS (2017), [https://www.csg.org/pubs/capitolideas/2017\\_mar\\_apr/court\\_funding.aspx](https://www.csg.org/pubs/capitolideas/2017_mar_apr/court_funding.aspx) [<https://perma.cc/VV43-JZGC>] (“In a climate of decreasing revenues from all sources, unpredictable federal funding, and increased competition for funding at the state and local level, state courts must vigorously present and justify their resource needs in order to deliver justice.”).

477. See *Federal Court Funding*, A.B.A., [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_judiciary/federal-court-funding](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding) (last updated Dec. 31, 2020).

478. Infrastructure upgrades cost money. For example, the Washington State Department of Health proposed increasing airflow throughout court buildings, upgrading ventilation systems with improved filters, and installing Plexiglas partitions between different parts of the courtroom in order to resume in-person proceedings. WASH. ST. DEP’T OF HEALTH, COVID-19 AND WASHINGTON STATE COURTS: PUBLIC HEALTH RISK REDUCTION RECOMMENDATIONS 8–9 (2020).

479. See, e.g., Kirby Corley Swartz, *The Broken Taillight Theory: Striking a Balance Between Due Process Requirements and Budgetary Concerns in Texas Municipal Courts*, 57 HOUS. L. REV. 953 (2020).

## CONCLUSION

We are both professors of United States civil procedure, and the rules that we use as a model—the Federal Rules of Civil Procedure—emerged during the crisis of the Great Depression. Those Rules were designed to instantiate the democratic ethos of President Franklin D. Roosevelt’s New Deal, reflecting a conception of litigation not only as a private legal act, but also as a public act that promotes the country’s shared welfare.<sup>480</sup> Many scholars have discussed the possible end of the New Deal spirit in the United States and the ways in which civil procedure has undergone deformation from its democratic origin.<sup>481</sup> Those concerns have been heightened by the pandemic and by the Trump presidency. The judiciary’s emergency response to COVID thus far has depended on technology to ensure the continued operation of the courts when the courthouse is closed. Used properly technology can increase citizen participation, improve government transparency, decrease costs, and afford greater autonomy. But technology is dual headed, and the legal profession ignores at its peril technology’s dangers—namely, the potential to dilute privacy, to diminish access to justice, and to damage democratic practice.<sup>482</sup> In this moment of national crisis, we believe that any plan for court reform and for changes to procedural rules must resist treating the judiciary’s emergency response to COVID as the appropriate, let alone the necessary, way to conceptualize a post-COVID judicial system. If there are any lessons to be learned from the current pandemic, they show the need for enlarging the discussion from a focus on technological capacity to ensuring that deep structural inequalities in American society not be allowed to undermine foundational principles of fairness, integrity, and equality.

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480. See Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 (1981) (discussing the influence of the New Deal on the Federal Rules).

481. See Miller, *supra* note 4; Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269 (1997) (discussing how the end of the New Deal philosophy is likely to affect revision of the Federal Rules); see also Helen Hershkoff & Rolf Stürner, *Managerial Judging and Procedural Convergence: Judicial Role as Democratic Practice* (unpublished manuscript on file with the authors) (comparing the democratic potential of the German judicial mandate of “hints and feedback” with judicial case management under the United States Federal Rules of Civil Procedure).

482. See Janna Anderson & Lee Rainie, *Many Tech Experts Say Digital Disruption Will Hurt Democracy*, PEW RSCH. CTR. (Feb. 21, 2020), <https://www.pewresearch.org/internet/2020/02/21/many-tech-experts-say-digital-disruption-will-hurt-democracy/> (discussing concerns about democracy in the digital age).