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THE TRUMP ADMINISTRATION: IMMIGRATION, RACISM,  
AND COVID-19

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*Two of the most important issues defining the Trump Administration were the President's response to the COVID-19 pandemic and the Administration's dealing with immigration issues. These have been regarded, in the popular press and in the scholarly literature, as unrelated. But there is a key common feature in the Trump Administration's response: racism and xenophobia has shaped both the handling of*

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*the public health crisis and immigration issues. Understanding the underlying basis for the Trump Administration's reaction to both issues helps to clarify the fallacies, indeed the tragedies in its actions, and the legal errors that have been made.*

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## INTRODUCTION

COVID-19 is the greatest public health threat the United States has experienced in over a century. Not since the 1918 influenza pandemic has the nation experienced such a dramatic menace to its health.<sup>1</sup> Not unlike recent influenzas, the 1918 influenza “was caused by an H1N1 virus with genes of avian origin.”<sup>2</sup> According to the Centers for Disease Control and Prevention

<sup>1</sup> See *1918 Pandemic (H1N1 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> [<https://perma.cc/LV4Z-A984>] (Mar. 20, 2019) (“The 1918 influenza pandemic was the most severe pandemic in recent history.”).

<sup>2</sup> *Id.*

(CDC), the virus was first detected in the United States by military personnel in the spring of 1918 and within a year it had spread worldwide, infecting “500 million people or one-third of the world’s population . . .”<sup>3</sup> Health officials estimated that at least fifty million people worldwide perished due to the disease, with “about 675,000 [deaths] occurring in the United States.”<sup>4</sup>

Then, as now, xenophobia and racism shape political discourse and public understanding about disease, origins, and infection.<sup>5</sup> Even though the earliest recorded cases of the 1918 influenza were confirmed at Fort Riley, Kansas,<sup>6</sup> this H1N1 influenza became widely described as the “Spanish Flu.”<sup>7</sup> In essence, associating the 1918 H1N1 with maligned southern Europeans<sup>8</sup> obscured the American genesis story and complimented the “junk science” narrative of the burgeoning eugenics movement in the United States.<sup>9</sup> As one commentary explains, “[s]ome, looking for a point of origin of the so-called Spanish influenza that would eventually take the lives of 600,000 Americans, point to that day in Kansas” where “the first domino would fall signaling the commencement of the first wave of the 1918 influenza.”<sup>10</sup>

First, Albert Gitchell, the company cook at Fort Riley, “reported to the camp infirmary with complaints of a ‘bad cold.’”<sup>11</sup> Shortly thereafter, the second reported case—Corporal Lee W. Drake—also showed signs of

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See Becky Little, *Trump’s ‘Chinese’ Virus Is Part of a Long History of Blaming Other Countries for Disease*, TIME (Mar. 20, 2020, 1:57 PM), <https://time.com/5807376/virus-name-foreign-history> [<https://perma.cc/6SWP-7ZHT>] (“Even as [the Trump] Administration’s response to COVID-19 has evolved, one part of President Donald Trump’s reaction to coronavirus has remained consistent. More than a week after he prompted outcry by retweeting a supporter who called the novel coronavirus the ‘China virus,’ photos from Trump’s Thursday press briefing about the virus showed that ‘corona’ had been crossed out and replaced with ‘Chinese.’”).

<sup>6</sup> *The First Wave*, PBS: INFLUENZA 1918, <https://www.pbs.org/wgbh/americanexperience/features/influenza-first-wave> [<https://perma.cc/3A22-Z8DT>]. Despite the fact that commentators debate the influenza’s origins, which may be traced to Kansas, the mark of Spain served as a powerful trope by which to carryout xenophobic thinking.

<sup>7</sup> See Little, *supra* note 5 (“Take the so-called ‘Spanish flu,’ a pandemic in 1918 and 1919 that killed up to 50 million people worldwide. Many Americans . . . seem to believe—as the name implies—that this influenza outbreak began in Spain. However, the first recorded case was in Kansas.”).

<sup>8</sup> See Terry Gross, *Eugenics, Anti-Immigration Laws of the Past Still Resonate Today*, *Journalist Says*, KCBX (May 10, 2019, 8:12 AM), <https://www.kcbx.org/post/eugenics-anti-immigration-laws-past-still-resonate-today-journalist-says#stream/o> [<https://perma.cc/2PS6-S58X>] (quoting Daniel Okrent saying that “[e]ugenics was used as a primary weapon in the effort to keep Southern and Eastern Europeans out of the country”).

<sup>9</sup> *Id.* (“[T]he eugenics movement—a junk science that stemmed from the belief that certain races and ethnicities were morally and genetically superior to others—informed the Immigration Act of 1924, which restricted entrance to the U.S.”).

<sup>10</sup> *The First Wave*, *supra* note 6; see also *id.* (“[L]ittle did [the enlisted soldiers] know they were carrying with them a virus that would prove to be more deadly than the rifles they carried.”).

<sup>11</sup> *Id.*

infection.<sup>12</sup> Mere hours later, the camp surgeon, Dr. Edward R. Schreiner, reported more than “100 sick men on his hands,”<sup>13</sup> all suffering from the 1918 influenza that would be erroneously described *then and now* by Americans as the “Spanish Flu.”<sup>14</sup>

Of course, none of this would matter, except that racism, classism, and xenophobia alarmingly marked (and mark) the times and dangerously dictated perceptions about so-called *polluted bodies* and *unfit persons*, bounded in domestic and foreign policy.<sup>15</sup> Something as seemingly innocuous as the name of a disease actually matters in law and society. So-called “unfit” persons were decidedly unwelcome in the United States—even if they were American citizens.<sup>16</sup> Much of this ugly past is brought to light today through anti-immigration political platforms, political rhetoric, and debates about who qualifies as a birthright citizen.<sup>17</sup> As Professor Rachel E. Rosenbloom explains in copious detail, “[t]hroughout the country’s history, debates over citizenship have always been deeply entwined with racialized notions of who should be considered a ‘real’ American.”<sup>18</sup>

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see also *Spanish Influenza Much Like GRIPPE: Malady Found Not Dangerous Unless Neglected, When Pneumonia May Develop—Its History and Symptoms*, N.Y. TIMES, Sept. 22, 1918, at E37 (discussing the “Spanish influenza”); Michael Wilson, *What New York Looked Like During the 1918 Flu Pandemic*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/02/nyregion/spanish-flu-nyc-virus.html> [<https://perma.cc/9WR5-62ZX>] (“It was the Spanish flu, and it would kill tens of millions of people worldwide, including 675,000 people in the United States.”).

<sup>15</sup> See, e.g., Michele Goodwin & Erwin Chemerinsky, *No Immunity: Race, Class, and Civil Liberties in Times of Health Crisis*, 129 HARV. L. REV. 956, 956 (2016) (“Nearly a century ago, the United States found itself in the midst of a health crisis related to individuals it found to be socially unfit.”); Paul Lombardo, *Eugenic Sterilization Laws*, IMAGE ARCHIVE ON THE AM. EUGENICS MOVEMENT, <http://www.eugenicsarchive.org/html/eugenics/essay8text.html> [<https://perma.cc/V7V9-BZ49>] (noting that the history of forced sterilization is rooted in the ideology of eugenics and applied to “anti-social whites” as well).

<sup>16</sup> See Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 53-55 (1985) (discussing the “eugenical” basis of Virginia’s sterilization laws).

<sup>17</sup> For an in-depth analysis of birthright citizenship, racism associated with who qualified as American, and a history of rights associated with citizenship, see MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 25 (2018). Discussing Maryland, Jones explains that “[s]tate lawmakers also began to draw boundaries around black Marylanders, attempting to fix them in place and in status through what came to be termed black laws. . . . Central to this new legal regime were restrictions on mobility. By 1820, Maryland had closed its border to the in-migration of free black people, rendering its own residents increasingly isolated.” *Id.* Similar themes can be seen even today. See, e.g., Katie Rogers, *Trump Encourages Racist Conspiracy Theory on Kamala Harris’s Eligibility to Be Vice President*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/08/13/us/politics/trump-kamala-harris.html> [<https://perma.cc/J82G-HS5R>] (“President Trump said he heard that Ms. Harris, the presumptive Democratic vice-presidential nominee born in California, was not eligible for the ticket . . . . Constitutional scholars quickly called his words false and irresponsible.”).

<sup>18</sup> Rachel E. Rosenbloom, *There’s No Question About Harris’s Citizenship. So Why Is Trump Questioning It?*, WASH. POST (Aug. 16, 2020), <https://www.washingtonpost.com/outlook/2020/>

As few scholars and commentators have done, we find it important to contextualize and associate the early twentieth century American political climate with the 1918 influenza, including the rise and enactment of eugenics laws, which ultimately resulted in more than 60,000 poor girls, women, and men being forcibly sterilized;<sup>19</sup> the stereotyping of Asians as rife with social and physical disease, resulting in their denial of naturalization and entry in the United States;<sup>20</sup> and the scapegoating of African Americans as the epitome of American pollutant.<sup>21</sup> These perceptions, stereotypes, and stigmas—largely driven by xenophobic, white supremacist ideologies—ultimately dictated immigration policies.<sup>22</sup> Indeed, the Immigration and Nationality Act, Section 212, prohibits the entry of those who are “certified to be helpless from sickness, mental or physical disability . . .”<sup>23</sup>

By calling attention to the American social backdrop during the 1918 influenza, we identify its spread not only as part of a physical and cultural landscape, but dangerously as a key feature of the legal terrain.<sup>24</sup> We raise two important concerns. First, the weaponization of racism; the powerful

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o8/16/theres-no-question-about-harriss-citizenship-so-why-is-trump-questioning-it [https://perma.cc/K6Y5-K677] (“Even after the ratification of the Fourteenth Amendment, however, Americans continued to argue about race and birthright citizenship.”).

<sup>19</sup> Lombardo, *supra* note 16.

<sup>20</sup> See Alfred C. Reed, *The Medical Side of Immigration*, 80 POPULAR SCI. MONTHLY 383, 383-92 (1912) (noting that “certain diseases” are found frequently among certain immigrants, particularly those from southern Europe and the Middle East); *United States Immigration Station (USIS)*, ANGEL ISLAND CONSERVANCY, <http://angelisland.org/history/united-states-immigration-station-usis> [https://perma.cc/CHU7-VXXW] (describing detention centers, discriminatory employment legislation, and anti-immigration laws in the history of the exclusion of Chinese immigrants).

<sup>21</sup> See, e.g., MICHAEL WILLRICH, *POX: AN AMERICAN HISTORY*, 97 (2011) (explaining that white Americans in southern states were deeply committed to the view that Black people were inherently diseased and that white Americans were immune from smallpox); see also Cheryl I. Harris, “*Too Pure an Air*,” *Somerset’s Legacy from Anti-Slavery to Colorblindness*, 13 TEX. WESLEYAN L. REV. 439, 444 (2007) (describing and critiquing the metaphors of slaves as pollutants and slavery as pollution).

<sup>22</sup> The Immigration and Nationality Act prohibits entry of those who are “certified to be helpless from sickness, [or] mental or physical disability . . .” Immigration and Nationality Act of 1965, 8 U.S.C. § 1182(a)(10)(B)(i).

<sup>23</sup> *Id.*

<sup>24</sup> Professor Kevin Johnson warns that “the harsh treatment of noncitizens of color reveals terrifying lessons about how society views citizens of color.” He provides key examples:

[T]he era of exclusion of Chinese immigrants in the 1800s occurred almost simultaneously with punitive, often violent, action against the Chinese on the West Coast. Efforts to exclude and deport Mexican citizens from the United States, which accelerated over the course of the twentieth century, tell much about how society generally views Mexican American citizens. Similarly, the extraordinarily harsh policies directed toward poor, Black, Haitian persons, seeking refuge from violent political and economic turmoil in Haiti, leave little room for doubt—if there were any—about how this society as a whole views its own poor Black citizens.

Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1114 (1998).

influence of racial stereotypes, symbolism, and xenophobia in shaping public consciousness. Second, we raise alarm about the unconstitutional legal policies that flow from racist ideology, manifesting harmful racial ideologies into law. We see both as dangerous.

In the wake of both anti-immigration platforms targeting undocumented residents from Mexico, Central, and South America<sup>25</sup> and racial hostility toward Asian Americans,<sup>26</sup> patterns similar to those a century prior now emerge. For example, under the Trump Administration, the use of racial symbolism and stereotypes shaped how the White House communicated about the pandemic and, ultimately, policy discourse about COVID-19. This we see in former President Trump's continued, racially hostile referencing of COVID-19 as the "Wuhan virus," "Chinese flu," and "kung flu."<sup>27</sup> Commentators may

<sup>25</sup> President Trump stoked racial anxieties about Mexican immigrants while campaigning in 2015 and 2016, claiming they would bring crime, drugs, and sexual violence to the United States. See *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/> [<https://perma.cc/QKX6-NX63>] ("When Mexico sends its people, they're not sending their best . . . They're sending people that have lots of problems . . . They're bringing drugs. They're bringing crime. They're rapists."); *Drug Dealers, Criminals, Rapists: What Trump Thinks of Mexicans*, BBC NEWS (Aug. 31, 2016), <https://www.bbc.com/news/av/world-us-canada-37230916> [<https://perma.cc/7Q9Z-8KSN>] (showing a compilation of the things Trump, then a "US presidential hopeful," had said about Mexico during his campaign). After being challenged about his attacks on Mexico and these unfounded claims, Trump (then a presidential candidate) responded, "[e]verybody knows that's true. And it's happening all the time." *Donald Trump Punching Back*, FOX NEWS (Jan. 26, 2017), <https://www.foxnews.com/transcript/donald-trump-punching-back> [<https://perma.cc/9P2Y-BC69>] ("So, why when I mention all of a sudden I'm a racist. I'm not a racist. I don't have a racist bone in my body."). This pattern of anti-Mexican racism continued throughout his first term in office. See, e.g., Anthony Rivas, *Trump's Language About Mexican Immigrants Under Scrutiny in Wake of El Paso Shooting*, ABC NEWS (Aug. 4, 2019, 3:05 PM), <https://abcnews.go.com/US/trumps-language-mexican-immigrants-scrutiny-wake-el-paso/story?id=64768566> [<https://perma.cc/5BJY-B7QP>] ("The [P]resident has denied responsibility for inciting violence in American communities in the past, despite an ABC News investigation in November 2018 finding multiple criminal cases involving mostly white men where Trump's name or rhetoric was invoked in direct connection with violent acts, threats of violence or allegations of assault."). The Trump Administration's anti-immigration platform and stoking of racial anxieties was not limited to Mexico but involved Central and South American countries as well. See generally *Taking Stock of Trump's Legacy in Latin America*, WASH. OFF. ON LATIN AM. (Oct. 26, 2020), <https://www.wola.org/analysis/taking-stock-trump-legacy-latin-america/> [<https://perma.cc/G7WL-VGHA>].

<sup>26</sup> See, e.g., *Reports of Anti-Asian Assaults, Harassment and Hate Crimes Rise As Coronavirus Spreads*, ADL: BLOG (June 18, 2020), <https://www.adl.org/blog/reports-of-anti-asian-assaults-harassment-and-hate-crimes-rise-as-coronavirus-spreads> [<https://perma.cc/87YG-TCF6>] ("Since January 2020, there have been a significant number of reports of AAPI individuals being threatened and harassed on the street. These incidents include being told to 'Go back to China,' being blamed for 'bringing the virus' to the United States, being referred to with racial slurs, spat on, or physically assaulted.").

<sup>27</sup> See Colby Itkowitz, *Trump Again Uses Racially Insensitive Term To Describe Coronavirus*, WASH. POST (June 23, 2020, 8:05 PM), [https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/oab5a8d8-b5a9-11ea-ac25-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/oab5a8d8-b5a9-11ea-ac25-ebb63d27e1ff_story.html) [<https://perma.cc/Y6N2-8TS8>] ("President Trump again referred to the novel coronavirus as "kung flu," eliciting laughter and wild cheers from a young crowd in Arizona on Tuesday."); see also *id.* ("Wuhan.

debate whether the rise in anti-Asian hate crimes in the wake of COVID-19 relates to Trump's racist pandering, but the cases of threats, children being bullied, and physical attacks (people spat upon, assaulted with harmful chemicals, and stabbed) raise serious alarm.<sup>28</sup> As our Article goes to print, six women from Asian American communities were gunned down in Atlanta, Georgia<sup>29</sup> and in New York, onlookers filmed a horrific attack on a 65-year-old Asian American woman as the perpetrator yelled, "you don't belong here."<sup>30</sup>

Even though China aggressively addressed COVID-19, President Trump barred Chinese passenger carriers from flying into the United States,<sup>31</sup> banned graduate students from China,<sup>32</sup> and even threatened to prohibit the popular app

Wuhan was catching on, coronavirus, kung flu,' he said, repeating it as the crowd roared. 'I could give you many, many names. Some people call it the Chinese flu, the China flu, they call it the China.'")

<sup>28</sup> *Website Launches to Document Anti-Asian Hate Crimes in Wake of COVID-19*, NBC BAY AREA, (Mar. 19, 2020, 10:40 PM), <https://www.nbcbayarea.com/news/coronavirus/website-launches-to-document-anti-asian-hate-crimes-in-wake-of-covid-19/2258297/> [<https://perma.cc/J7BW-EVJK>] (reporting the case of an Asian woman being spat at by someone shouting "f\*\*\* China"); Marc Ramirez, *FBI Says Texas Stabbing that Targeted Asian American Family Was Hate Crime Fueled by Coronavirus Fears*, DALLAS MORNING NEWS (Apr. 1, 2020, 12:44 AM), <https://www.dallasnews.com/news/crime/2020/04/01/fbi-says-texas-stabbing-that-targeted-asian-american-family-was-hate-crime-fueled-by-coronavirus-fears/> [<https://perma.cc/9NDT-U5VV>] (reporting on a man stabbing three "members of an Asian American family," because "he thought the family was Chinese and infecting people with the coronavirus"); Clarissa-Jan Lim, *A Man Attached an Asian Woman Taking Out Her Trash at Night. She Now Has Chemical Burns on Her Face and Body*, BUZZFEED NEWS (Apr. 8, 2020, 10:52 AM), <https://www.buzzfeednews.com/article/clarissajanim/asian-woman-chemical-burns-brooklyn-new-york-attack> [<https://perma.cc/7D3N-2VM6>] (reporting on an attack against a 39 year old Asian woman, who sustained chemical burns to her face, neck, and back); Leonardo Castañeda, *Coronavirus: Attacks Against Asian Americans Reported in Bay Area and Beyond*, MERCURY NEWS (Mar. 23, 2020, 6:42 AM), <https://www.mercurynews.com/2020/03/21/coronavirus-attacks-against-asian-americans-reported-in-bay-area-and-beyond/> [<https://perma.cc/QXM2-DYPU>] (alerting readers that within the first 24 hours of launching a platform to track attacks against Asian Americans related to the coronavirus epidemic, more than 40 reports were logged); Lauren Aratani, *"Coughing While Asian": Living in Fear as Racism Feeds off Coronavirus Panic*, GUARDIAN (Mar. 24, 2020, 6:00 PM), <https://www.theguardian.com/world/2020/mar/24/coronavirus-us-asian-americans-racism> [<https://perma.cc/U4DC-JDVW>] ("It is a fear grounded in racism, but also promoted from the White House as Donald Trump—and his close advisers—insist on calling it 'the Chinese virus.'").

<sup>29</sup> Giulia McDonnell Nieto del Rio & Edgar Sandoval, *Women of Asian Descent Were 6 of the 8 Victims in Atlanta Shootings*, N.Y. TIMES (Mar. 24, 2021), <https://www.nytimes.com/2021/03/17/us/asian-women-victims-atlanta-shootings.html> [<https://perma.cc/74SX-AF56>].

<sup>30</sup> *Convicted Mom Murderer Arrested in Brutal NYC Beating of 65-Year-Old Asian Woman*, NBC N.Y. (Apr. 1, 2021, 6:21 AM), <https://www.nbcnewyork.com/news/local/nypd-arrests-suspect-in-brutal-beating-on-65-year-old-asian-woman/2973656/> [<https://perma.cc/G79R-A7NS>].

<sup>31</sup> Leslie Josephs, *Trump Administration Bans Chinese Passenger Airlines From Flying to U.S.*, CNBC (June 3, 2020, 8:49 PM), <https://www.cnbc.com/2020/06/03/trump-administration-set-to-ban-chinese-passenger-carriers-from-flying-to-us-reuters-reports.html> [<https://perma.cc/XN7X-DJDD>].

<sup>32</sup> Teresa Watanabe, *It's the New Chinese Exclusion Act: How a Trump Order Could Hurt California Universities*, L.A. TIMES (June 7, 2020, 6:00 AM), <https://www.latimes.com/california/story/2020-06-07/trump-move-to-bar-entry-of-some-chinese-graduate-students-stirs-campus-anxiety-anger> [<https://perma.cc/25XA-F469>] ("President Trump's recent decision to halt entry of some Chinese graduate students to the U.S. is sowing broad anxiety, particularly in California, as universities fear they could lose an essential source of research talent.").

among teenagers, TikTok, from operating in the United States.<sup>33</sup> In the latter case, the President considered designating the app a national security threat.<sup>34</sup>

However, our concern is not only with the powerful symbolism and dangerous racist rhetoric, far too frequently weaponized during the Trump Administration, but also with unconstitutional immigration policies. Immediately after taking office in 2017, President Trump signed an executive order entitled “Protecting the Nation from Foreign Terrorist Entry into the United States,” otherwise known as the “Muslim Ban”, as the order specifically targeted Muslim-majority countries.<sup>35</sup> During that same period, President Trump signed an executive order, which significantly increased the number of immigrants considered a priority for deportation.<sup>36</sup>

In 2018, President Trump issued a proclamation suspending the right of asylum to any migrant crossing the United States-Mexico border outside a lawful port of entry.<sup>37</sup> In 2019, the Department of Homeland Security and the Department of Justice announced an Interim Final Rule denying asylum seekers who cross the United States-Mexico border eligibility for asylum if they had not previously applied for sanctuary in countries they traveled through to reach the United States, effectively barring asylum claims from nationals from Central America.<sup>38</sup> The most severe and inhumane of these policies is the Justice Department’s “zero tolerance” rule related to

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33 Ellen Nakashima, Rachel Lerman & Jeanne Whalen, *Trump Says He Plans to Bar TikTok from Operating in the U.S.*, WASH. POST (July 31, 2020, 10:47 PM), <https://www.washingtonpost.com/technology/2020/07/31/tiktok-trump-divestiture> [https://perma.cc/3ZQD-JECD] (“President Trump said late Friday he plans to ban Chinese-owned TikTok from operating in the United States, the latest sign of the administration’s increasingly strident stance on China and its tech companies.”).

34 *Id.*

35 Exec. Order No. 13,780, 3 C.F.R. 301 (2018) (barring citizens of Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen from entry into the United States); see also Jeremy Diamond, *Trump’s Latest Executive Order: Banning People from 7 Countries and More*, CNN (Jan. 29, 2017, 4:38 PM), <http://www.cnn.com/2017/01/27/politics/donald-trump-refugees-executive-order/index.html> [https://perma.cc/MJQ3-MRUG] (“Trump barred citizens of seven Muslim-majority countries from entering the US for at least the next 90 days by executive order . . .”).

36 Exec. Order No. 13,768, 3 C.F.R. 268 (2018); see SARAH PIERCE & RANDY CAPPIS, MIGRATION POL’Y INST., TRUMP EXECUTIVE ORDER AND DHS GUIDANCE ON INTERIOR ENFORCEMENT: A BRIEF REVIEW 1-2 (2017), <https://www.migrationpolicy.org/sites/default/files/publications/Trump-EO-Interior-Enforcement-FINAL.pdf> [https://perma.cc/Y4CY-FZFG] (providing a brief overview of Executive Order 13,768, including Section 5 on enforcement priorities for removal).

37 Proclamation No. 9822, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018).

38 Nick Miroff, Arelis R. Hernández & Kevin Sieff, *Trump Administration Moves to Restrict Asylum Access, Aiming to Curb Central American Migration*, WASH. POST (July 16, 2019, 6:44 AM), [https://www.washingtonpost.com/immigration/trump-administration-moves-to-restrict-asylum-access-aiming-to-curb-central-american-migration/2019/07/15/f3360576-a704-11e9-9214-246e594de5d5\\_story.html](https://www.washingtonpost.com/immigration/trump-administration-moves-to-restrict-asylum-access-aiming-to-curb-central-american-migration/2019/07/15/f3360576-a704-11e9-9214-246e594de5d5_story.html) [https://perma.cc/EZ8U-ASGB].



unauthorized crossings of the southern border, which resulted in thousands of children separated from their parents and placed in literal cages.<sup>39</sup>

In the truest meaning of intersectionality—related to the nexus of race, citizenship, and health—we are concerned that in the wake of COVID-19 a new world order has emerged—one that threatens not only civil liberties, but ultimately the public’s trust in its medical institutions and government.<sup>40</sup> Nowhere was this more apparent than Donald Trump vowing to make sweeping changes to United States immigration policy, promising in part to “chase immigrants that [he thought]” were “the likeliest to thrive and flourish and love [the United States].”<sup>41</sup>

The hostile mandates on nondocumented individuals residing in the United States pose unique problems during times of medical crisis.<sup>42</sup> We take that up in this Article. Drawing on recent litigation in the Courts of Appeals for the Second, Seventh, and Ninth Circuits, we argue that Trump Administration efforts to implement anti-immigrant-related conditions on receipt of federal grants and bar funding to “sanctuary cities” served to undermine the legitimacy of the federal government generally and separation of powers specifically.

Pursuing such matters during times of a health crisis serves to literally weaken and undercut the public’s health. Taking seriously President Trump’s series of anti-immigration threats and actions and the potential for a future president to take similar actions, this Article expresses our normative intuitions and articulates why it would be unconstitutional for any President to seek to misappropriate or block federal funds from reaching local governments addressing the pandemic. Our concerns were further substantiated by President Trump’s refusal to answer whether Congressional appropriations used to pay hospitals that test and treat uninsured coronavirus patients would apply to nondocumented persons.<sup>43</sup> In our view, even while

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<sup>39</sup> Jeff Sessions, U.S. Att’y Gen., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/Q3UL-BGNV>]; *Family Separation Under the Trump Administration—A Timeline*, S. POVERTY L. CTR. (June 17, 2020), <https://www.splcenter.org/news/2020/06/17/family-separation-under-trump-administration-timeline> [<https://perma.cc/85G6-AYAQ>].

<sup>40</sup> Ted Hesson & Dan Diamond, *Trump Moves to Suspend Visas for Uninsured Immigrants*, POLITICO (Oct. 4, 2019, 9:05 PM), <https://www.politico.com/news/2019/10/04/trump-immigrants-health-insurance-proclamation-029705> [<https://perma.cc/P6Y4-F74Q>].

<sup>41</sup> *Transcript of Donald Trump’s Immigration Speech*, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html> [<https://perma.cc/6DVK-FFHM>].

<sup>42</sup> See Hesson & Diamond, *supra* note 40 (reporting President Trump’s proclamation that requires immigrants to prove they can obtain health insurance before they are issued visas is “the latest in a series of moves that would restrict immigration.”)

<sup>43</sup> Reed Abelson & Margot Sanger-Katz, *Trump Says Hospitals Will Be Paid for Treating Uninsured Coronavirus Patients*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/>

Donald Trump failed in his bid for a second term and was impeached prior to leaving office, important lessons remain to be learned and anti-immigration harms persist, yet to be resolved.

In Part I, we briefly address the underlying institutional and infrastructural problems rendered visible by mounting deaths during the COVID-19 pandemic.<sup>44</sup> Given the dramatic racial disparities in infections and deaths due to the pandemic, we address President Trump's claim, in the height of COVID-19 suffering, to have "done more" for Black Americans and Latinx populations than any other President since Abraham Lincoln.<sup>45</sup> We study both analytically and empirically the legitimacy and veracity of such claims as the disparate death toll rose and continue to rise among these populations.

Part II then turns to litigation involving sanctuary cities, specifically addressing the Trump Administration's threats and active efforts to condition federal funding on *outing* nondocumented individuals. Part III unpacks how such conditions amount to an unconstitutional *quid pro quo*. It argues that conditioning federal funds on *outing* nondocumented individuals harms the public's health, including interfering with the objective nature of evaluating public health and responding to it, undercutting confidentiality and trust in the physician-patient relationship, undermining screening and treatment objectives, and chilling individuals from seeking care.

## I. INSTITUTIONAL AND INFRASTRUCTURAL PREEXISTING CONDITIONS

In this Part, we briefly address three important concerns. First, we address the responsibility of government to "the people." That is, historically governments sought to address pandemics by exercising responsibility in times of health crises. This, we point out, is nothing new. Second, we turn to the Trump Administration's failure in the United States, prior to and during COVID-19, to exercise care and good judgment. Third, we address the lingering institutional and infrastructural social conditions brought on by the

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2020/04/03/upshot/trump-hospitals-coronavirus.html [https://perma.cc/W7GS-7XMV] (noting that while "[t]he Trump administration plans to use money from the recent stimulus bills to pay hospitals for treatment of uninsured coronavirus patients," the President refused to answer "whether the coverage would apply to undocumented immigrants").

<sup>44</sup> This Article applies a law and society framework to address these concerns. It documents policymakers' handling of COVID-19 for the sake of preserving a legal, historical record. In doing so, the Article serves a purpose akin to diarists of prior challenging periods in history, including the antebellum era and Jim Crow, making visible the harms inflicted on vulnerable people of color.

<sup>45</sup> See Linda Qiu, *Trump's False Claim that 'Nobody Has Ever Done' More for the Black Community than He Has*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/05/us/politics/trump-black-african-americans-fact-check.html> [https://perma.cc/R9PB-UU8N] (noting that experts said that President Trump's claim that nobody had done more for the black community than he had was "profoundly ahistoric").

persistence of racial inequalities that exacerbate harms to vulnerable Latinx and Black populations in the United States during the COVID-19 pandemic.

### A. Scale of Coronavirus

This Article introduces the metaphor of war to grapple with the internecine struggle within the United States to sort its historical affairs related to race, immigration, and even protecting the public health. The war within offers a compelling lens through which to view, contextualize, and analyze law and society—particularly during a pandemic. During this pandemic, some Americans stormed capitol buildings, demanding that governments reopen. Some brandished weapons.<sup>46</sup> Some wore tactical gear, wielded confederate flags even in Michigan and California, and threatened to kill governors whom they protested.<sup>47</sup> These protests marked concerns about the government requiring people to shelter in place and wear masks when entering grocery stores, pharmacies, and restaurants. Some schools and council members in the United States sued governors to “reopen.”<sup>48</sup>

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<sup>46</sup> See Abigail Censky, *Heavily Armed Protesters Gather Again at Michigan Capitol to Decry Stay-At-Home Order*, NPR (May 14, 2020, 12:09 PM), <https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-gather-again-at-michigans-capitol-denouncing-home-order> [https://perma.cc/9ZJM-4EN9] (“Despite heavy rain, armed protesters gathered Thursday at the State Capitol in Michigan in what the organizing group, Michigan United for Liberty, has branded ‘judgment day.’”); *Some Michigan Protesters Had Confederate Flags, Nooses and Swastikas, Gov. Gretchen Whitmer Says*, BALTIMORE SUN (May 3, 2020, 4:49 PM), <https://www.baltimoresun.com/coronavirus/ct-nw-michigan-protests-gretchen-whitmer-20200503-qztfvnrw5vbi3jzfmiizgght6q-story.html> [https://perma.cc/B5DD-QDT7] (“Some went to the Senate gallery, where a senator said armed men shouted at her.”).

<sup>47</sup> *Some Michigan Protesters Had Confederate Flags, Nooses and Swastikas, Gov. Gretchen Whitmer Says*, *supra* note 46; see also Christopher Mele, *Man Faces Terrorism Charge After Threatening to Kill Michigan’s Governor, Officials Say*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/05/15/us/virus-michigan-whitmer-threats.html> [https://perma.cc/ZC5J-7SBK] (“A Detroit man has been charged with threatening to kill Gov. Gretchen Whitmer of Michigan . . .”).

<sup>48</sup> See, e.g., Hillary Davis, *Newport Beach Councilman Files His Own Beach Closure Lawsuit Against Gavin Newsom*, L.A. TIMES (May 5, 2020, 4:55 PM), <https://www.latimes.com/socal/daily-pilot/news/story/2020-05-04/newport-beach-councilman-kevin-muldoon-files-his-own-beach-closure-lawsuit-against-gavin-newsom> [https://perma.cc/J63E-TJVL] (“[C]ouncilman Kevin Muldoon individually sued Gov. Gavin Newsom . . . over Newsom’s hard beach closure targeting Orange County.”); Alexandra Kelley, *Orange County Education Board to Sue Gov. Newsom Over School Closures*, THE HILL (July 29, 2020), <https://thehill.com/changing-america/well-being/prevention-cures/509621-orange-county-education-board-to-sue-gov-newsom> [https://perma.cc/S5YT-LXLE] (“[A] Southern California school district is suing Gov. Gavin Newsom (D) to reopen in-person classes this fall despite the area being on a hotspot watch list.”); Maxine Bernstein, *3 Christian Schools Seeking to Reopen Sue Oregon Gov. Kate Brown, Contend Emergency Coronavirus Orders Are Irrational*, OR. LIVE (Aug. 12, 2020), <https://www.oregonlive.com/education/2020/08/three-christian-schools-seeking-to-re-open-sue-or-governor-contending-emergency-orders-due-to-coronavirus-are-irrational.html> [https://perma.cc/6J7N-YKKT] (“Three Christian schools in Oregon are suing Gov. Kate Brown, contending her executive orders that prohibit faith-based gatherings of more than 25 . . . are unconstitutional.”).

This Section briefly addresses the *war within*. It provides an empirical accounting and analysis of the pandemic's deadly reach. We study the pandemic mindful of its backdrop: some politicians referring to the virus as inconsequential, similar to the flu, or even a hoax or conspiracy floated by political operatives. As the data we provide shows, the numbers paint a different picture. Acknowledging the devastating and preventable death toll is crucial to understanding why governors who imposed sheltering orders operated lawfully and within the span and scope of their legal duties.

COVID-19 is the deadliest health crisis experienced in the United States since the 1918 influenza pandemic.<sup>49</sup> Some fear COVID-19 may be deadlier—at least in its earliest months.<sup>50</sup> In a study published by the Journal of the American Medical Association, Dr. Jeremy Samuel Faust and his colleagues sought to provide a historical reference for the levels of mortality related to both pandemics by looking at “excess deaths in New York City during the peak of the 1918 H1N1 influenza pandemic” and comparing it “with those during the initial period of the COVID-19 outbreak.”<sup>51</sup>

Among the results, Faust and his coauthors found that “[d]uring the peak of the 1918 H1N1 influenza outbreak in New York City, a total of 31,589 all-cause deaths occurred among 5,500,000 residents, yielding an incident rate of 287.17 deaths per 100,000 person-months.”<sup>52</sup> By comparison, “[d]uring the early period of the COVID-19 outbreak in New York City, 33,465 all-cause deaths occurred among 8,280,000 residents, yielding an incident rate of 202.08 deaths per 100,000 person-months.”<sup>53</sup>

Even though the death rates appear comparable between the peak of the 1918 pandemic and the early period of the 2020 pandemic, which is troubling considering the scale and scope of deaths associated with the 1918 pandemic, Faust and his coauthors further caution “the relative increase during early

<sup>49</sup> See, e.g., Jeremy Samuel Faust, Zhenqiu Lin & Carlos del Rio, *Comparison of Estimated Excess Deaths in New York City During the COVID-19 and 1918 Influenza Pandemics*, JAMA NETWORK (Aug. 13, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2769236> [<https://perma.cc/Z8RW-NVXJ>] (finding that the relative mortality rate of the COVID-19 pandemic is greater than the 1918 pandemic); Berkeley Lovelace, Jr., *Scientists Say the Coronavirus Is at Least as Deadly as the 1918 Flu Pandemic*, CNBC (Aug. 14, 2020, 11:05 AM), <https://www.cnbc.com/2020/08/13/scientists-say-the-coronavirus-is-at-least-as-deadly-as-the-1918-flu-pandemic.html> [<https://perma.cc/Z8GD-U5KK>] (“The coronavirus is at least as deadly as the 1918 flu pandemic . . .”).

<sup>50</sup> See Faust et al., *supra* note 49 (finding comparable mortality rates between the early period of the COVID-19 pandemic and the peak of the 1918 H1N1 influenza in New York City); Jorge L. Ortiz, *Is COVID-19 Worse than the 1918 Spanish Flu? Study Shows Deaths in New York Quadrupled in Early Months*, USA TODAY (Aug. 14, 2020, 10:20 AM), <https://www.usatoday.com/story/news/health/2020/08/13/covid-19-worse-new-york-spanish-flu-study/3360542001/> [<https://perma.cc/S8BK-6MAE>] (“In some ways, according to a new study, the COVID-19 pandemic has been worse [than the 1918 Spanish flu].”).

<sup>51</sup> Faust et al., *supra* note 49.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

COVID-19 period was substantially greater than during the peak of the 1918 H1N1 influenza pandemic.”<sup>54</sup> In other words, not only is the mortality rate of the coronavirus on the scale of the 1918 pandemic, but could be worse due to undercounting and deaths prevented because of medical technologies available today, such as mechanical ventilation, supplemental oxygen, extracorporeal membrane oxygenation, and other modern inventions.<sup>55</sup>

Other research points to an unexplained nineteen percent increase in deaths between March 1 and May 30, 2020 in the United States as possibly related to COVID-19.<sup>56</sup> As researchers study whether deaths during the first months of the 2020 coronavirus exceed death rates in “the same months during previous years,” their answers are quite revealing.<sup>57</sup> In their study, *Estimation of Excess Deaths Associated with the COVID-19 Pandemic in the United States, March to May 2020*, epidemiologist Daniel Weinberger and colleagues found the number of unexplained “excess all-cause deaths was 28% higher than the official tally of COVID-19-reported deaths” during the period of their study.<sup>58</sup> These data points help to clarify the potential scope and scale of the coronavirus and the suffering experienced by communities most affected. In particular, given the dramatic racial disparities in COVID-19 deaths, by giving closer examination to the death toll, we are able to expose the possibility of an undercount of deaths due to the virus, and further highlight the “mortality burden”<sup>59</sup> uniquely experienced by people of color.

The death toll associated with the novel coronavirus now exceeds a staggering 500,000 losses in the United States, compounded by more than 28 million confirmed cases.<sup>60</sup> To place this suffering in context, more Americans died during the first three months of the COVID-19 pandemic (over 100,000

<sup>54</sup> *Id.*

<sup>55</sup> *See id.* (“One limitation of this study is that a direct comparison of the native virulence of the 1918 H1N1 influenza strain and severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is not possible. It is unknown how many deaths due to SARS-CoV-2 infection have been prevented . . .”).

<sup>56</sup> *See* Berkeley Lovelace, Jr., *Official U.S. Coronavirus Death Toll Is a Substantial Undercount’ of Actual Tally, Yale Study Finds*, CNBC (July 2, 2020, 9:11 AM), <https://www.cnbc.com/2020/07/01/official-us-coronavirus-death-toll-is-a-substantial-undercount-of-actual-tally-new-yale-study-finds.html> [<https://perma.cc/TG4K-GPK2>] (“The 781,000 total deaths in the U.S. in the three months through May 30 were nearly 19% higher than what would normally be expected, the study said.”).

<sup>57</sup> *See, e.g.*, Daniel M. Weinberger, Jenny Chen, Ted Cohen, Forrest W. Crawford, Farzad Mostashari, Don Olson, Virginia E. Pitzer, Nicholas G. Reich, Marcus Russi, Lone Simonsen, Anne Watkins & Cecile Viboud, *Estimation of Excess Deaths Associated with the COVID-19 Pandemic in the United States, March to May 2020*, 180 JAMA INTERNAL MED. 1336, 1337 (2020) (investigating if more deaths occurred in the U.S. during the first months of the coronavirus than in the same months from prior years).

<sup>58</sup> *Id.* at 1336.

<sup>59</sup> Mortality burden reflects the unique, disproportionate death impacts experienced by people of color.

<sup>60</sup> This figure is updated as of February 24, 2021. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Feb. 24, 2021, 8:04 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [<https://perma.cc/Z8BC-LNAN>].

by June 2020)<sup>61</sup> than all the American deaths suffered during the Vietnam War;<sup>62</sup> the fatalities of the 9/11 terrorist attacks;<sup>63</sup> and the wars in Iraq<sup>64</sup> and Afghanistan;<sup>65</sup> as well as the deaths resulting from the 2009 H1N1 pandemic,<sup>66</sup> Ebola,<sup>67</sup> and the Zika virus<sup>68</sup>—all combined. In the first three months, when fatalities were roughly 100,000, COVID-19 had killed more people in the United States than what Americans have witnessed in the past fifty years of war and disease combined.

On close inspection, the sobering number of American deaths that spanned the nearly two decades of the Vietnam War (58,000) pales in comparison to deaths caused by this deadly virus in mere months. In essence, COVID-19 took barely two months to surpass deaths suffered by Americans in the nineteen years of the Vietnam War. And while the Vietnam War is long over, as of this publication, COVID-19 still rages in the United States.

<sup>61</sup> *Daily Updates of Totals by Week and State: Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)*, NAT'L CTR. FOR HEALTH STAT., CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 23, 2020), <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> [<https://perma.cc/BLK4-346B>].

<sup>62</sup> *America's Wars*, DEP'T OF VETERANS AFFS. (Nov. 2019), [https://www.va.gov/opal/publications/factsheets/fs\\_americas\\_wars.pdf](https://www.va.gov/opal/publications/factsheets/fs_americas_wars.pdf) [<https://perma.cc/M59Q-T8UL>] (placing battle deaths in Vietnam at 47,434 and other deaths occurring near combat areas at 10,786).

<sup>63</sup> *See Deaths in World Trade Center Terrorist Attacks—New York City, 2001*, CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. (Sept. 11, 2002), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm51SPa6.htm> [<https://perma.cc/H3AM-MENW>] (“As of August 16, 2002, a total of 2,726 death certificates related to the WTC attacks had been filed.”); Colin Moynihan, *9/11 Light Tribute to Take Different Shape*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/08/13/arts/design/september-11-memorial-light-canceled-coronavirus.html> [<https://perma.cc/12ALK-4KBB>] (noting that there were “2,983 victims of the Sept. 11 attacks”).

<sup>64</sup> *See, e.g., Casualty Status*, U.S. DEP'T. OF DEF. (Aug. 31, 2020, 10:00 AM), <https://www.defense.gov/casualty.pdf> [<https://perma.cc/9PHA-6XDL>] (reporting 4,431 deaths from Operation Iraqi Freedom from March 19, 2003 to August 31, 2010); *see also* Philip Bump, *15 Years After the Iraq War Began, the Death Toll Is Still Murky*, WASH. POST (Mar. 20, 2018, 12:44 PM), <https://www.washingtonpost.com/news/politics/wp/2018/03/20/15-years-after-it-began-the-death-toll-from-the-iraq-war-is-still-murky/> [<https://perma.cc/NGH9-CYTW>] (reporting that although death toll figures are uncertain, “nearly 5,000 . . . U.S. service members” died). These figures do not account for the loss of non-American lives, which far exceeded the deaths of American soldiers and civilians.

<sup>65</sup> *See, e.g., Casualty Status*, *supra* note 64 (reporting 2,219 deaths from Operation Enduring Freedom from October 7, 2001 to December 31, 2014 in Afghanistan only).

<sup>66</sup> *See 2009 H1N1 Pandemic (H1N1pdm09 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 11, 2019), <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> [<https://perma.cc/88WM-JCDK>] (reporting 12,469 deaths in the United States from the H1N1 virus from April 2009 to April 2010).

<sup>67</sup> *See Ebola Facts*, INFECTIOUS DISEASE SOC'Y OF AM., <https://www.idsociety.org/public-health/ebola/ebola-resources/ebola-facts> [<https://perma.cc/EP67-CK6G>] (noting that only two out of eleven people being treated for Ebola in the United States died during the 2014 to 2016 outbreak).

<sup>68</sup> The number of Zika virus cases in the United States have been relatively few. The CDC reports that in 2018 and 2019 were “no reports of Zika virus transmission by mosquitoes in the continental United States.” *Zika Virus*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 7, 2019), [https://www.cdc.gov/zika/reporting/index.html?CDC\\_AA\\_refVal=https%3A%2F%2F](https://www.cdc.gov/zika/reporting/index.html?CDC_AA_refVal=https%3A%2F%2F) [<https://perma.cc/7UKP-VTL6>].

The United States “by far leads all other nations in confirmed coronavirus cases.”<sup>69</sup> By August 2020, epidemiologists and statisticians estimated that roughly 1,000 Americans died per day due to COVID-19.<sup>70</sup> This calculates to approximately forty-two Americans dying per hour due to the pandemic. These deaths represented only the reported cases, and the cases continued to rise. By January 7, 2021, 359,849 people had died in the United States from COVID-19, and the virus was still surging throughout the country.<sup>71</sup>

### B. *Race and COVID-19: Racism is a Preexisting Condition*

Given how poorly the United States has addressed COVID-19, particularly the lack of coherence from the Trump White House, some pundits and commentators speculate whether more aggressive actions would take place if the rates of infection and deaths were not so deeply racialized and prevalent in Latinx and Black communities.<sup>72</sup> Adam Serwer, a nationally recognized journalist, offers this observation: “The coronavirus epidemic has rendered the racial contract visible in multiple ways. Once the disproportionate impact of the epidemic was revealed to the American political and financial elite, many began to regard the rising death toll less as a national emergency than as an inconvenience.”<sup>73</sup> He’s not alone.<sup>74</sup>

<sup>69</sup> Jason Silverstein, *Trump on 1,000 Americans a Day Dying from COVID-19: “It Is What It Is”*, CBS NEWS (Aug. 4, 2020, 7:14 PM), <https://www.cbsnews.com/news/trump-covid-19-thousands-dying-daily-is-what-is> [<https://perma.cc/XUR3-AQ3F>].

<sup>70</sup> *Id.*

<sup>71</sup> CDC *Covid Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 7, 2021), [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) [<https://perma.cc/C7U2-W3G5>].

<sup>72</sup> See, e.g., Adam Serwer, *The Coronavirus Was an Emergency Until Trump Found Out Who Was Dying*, THE ATL. (May 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389/> [<https://perma.cc/65M3-4ZB9>] (arguing that politicians discounted the severity of the pandemic once they realized the greater impact of the coronavirus on communities of color).

<sup>73</sup> *Id.*

<sup>74</sup> See, e.g., 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> [<https://perma.cc/5AX8-LWT6>] (“Trump administration officials—including President Donald Trump himself—have increasingly begun to recognize the fact that black Americans are dying of Covid-19 at a greater rate than Americans of other ethnicities. But in attempting to explain why, the [P]resident and top officials are taking a narrow view of the problem—and one that ignores the many ways the Trump administration has helped make black Americans uniquely vulnerable to the coronavirus.”); Stacey Patton, *The Pathology of American Racism Is Making The Pathology of the Coronavirus Worse*, WASH. POST (Apr. 11, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/04/11/coronavirus-black-america-racism> [<https://perma.cc/25QM-K9K7>] (pointing out how American racism has exacerbated the effects of the coronavirus on people of color); Madeleine Carlisle, *Here’s What Trump Got Wrong About America’s COVID-19 Death Rate*, TIME (Aug. 4, 2020, 12:37 PM), <https://time.com/5875411/trump-covid-19-death-rate-interview> [<https://perma.cc/8XXN-CXT8>] (remarking on President Trump’s unfounded claim to have done more for Black people than prior Presidents); Ron Elving, *What Coronavirus Exposes About America’s*

Key findings from the CDC and American Public Media (APM) place our concerns in context. Rather than the mortality impacts decreasing as COVID-19 lingers, they have worsened for people of color. In Table 1, we compare death rates from August 18, 2020<sup>75</sup> and December 8, 2020.<sup>76</sup> Noticeable are the death rate increases between August and December 2020. The December data does not represent a unique spike, but rather a steady climb, exposing the failure of the United States to contain the spread of the virus.

Table 1: Death Rates by Race, August 2020 and December 2020

	August 2020	December 2020
Black Americans	1 in 1125 (88.4 per 100,000)	1 in 800 (123.7 per 100,000)
Indigenous Americans	1 in 1375 (73.2 per 100,000)	1 in 750 (133.0 per 100,000)
Pacific Islander Americans	1 in 1575 (63.9 per 100,000)	1 in 1100 (90.4 per 100,000)
Latin[x] Americans	1 in 1850 (54.4 per 100,000)	1 in 1150 (86.7 per 100,000)
White Americans	1 in 2450 (40.4 per 100,000)	1 in 1325 (75.7 per 100,000)
Asian Americans	1 in 2750 (36.4 per 100,000)	1 in 1925 (51.6 per 100,000)

As we study COVID-19's deadly reach into vulnerable and marginalized communities of color, we notice important trends particularly among African Americans, Native Americans, and nonwhite Latinx persons, which we unpack and highlight here. In particular, we counter the reductive narrative that attributes the cause(s) for grave racial disparities, which are now manifestly revealed during the pandemic, to biology and class. These causation theories ignore the persistent and powerful role of racism in American healthcare.

*Political Divide*, NPR (Apr. 12, 2020, 7:00 AM), <https://www.npr.org/2020/04/12/832455226/what-coronavirus-exposes-about-americas-political-divide> [<https://perma.cc/P7JU-HBDP>] (quoting President Trump as saying that “[p]arts of our country are very lightly affected,” as the President mentioned Nebraska, Idaho, and Iowa—states with low numbers of African Americans).

<sup>75</sup> APM Research Lab Staff, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH. LAB (Aug. 18, 2020), [<https://perma.cc/Z3XP-Z2UT>] (reporting data through August 18, 2020).

<sup>76</sup> APM Research Lab Staff, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH. LAB (Dec. 10, 2020), <https://www.apmresearchlab.org/covid/deaths-by-race> [<https://perma.cc/YLW8-F62S>] (reporting data through December 8, 2020).



Rather, based on our research and close review of medical and public health data even prior to COVID-19, preexisting, systemic patterns of racism in healthcare aggravate and intensify the substandard care and poor access patients of color experience.<sup>77</sup> Simply put, racial biases (implicit and explicit) often influence quality of care, access to care, medical providers' perceptions of their patients, and more. Racial bias in healthcare influences whether people of color receive access to medical treatments and services even while at hospitals and clinics.<sup>78</sup> Black patients have died on the steps of hospitals,<sup>79</sup>

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<sup>77</sup> See, e.g., Michelle van Ryn & Steven S. Fu, *Paved with Good Intentions: Do Public Health and Human Service Providers Contribute to Race/Ethnic Disparities in Health?*, 93 AM. J. PUB. HEALTH 248, 248 (2003) (reviewing evidence of healthcare providers' contributions to racial and ethnic disparities in healthcare); Council on Ethical & Judicial Affairs, *Black-White Disparities in Health Care*, 263 JAMA 2344, 2344-45 (1990) (discussing the correlation of race and the likelihood of receiving certain medical procedures or levels of care); COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* 77-79 (Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson eds., 2002) (reviewing evidence of racial disparities in health care, considering the sources of those disparities, and recommending interventions to address it); Alexie Cintron & R. Sean Morrison, *Pain and Ethnicity in the United States: A Systematic Review*, 9 J. PALLIATIVE MED. 1454, 1454 (2006) (writing that the evidence demonstrates that people have access to different pain treatment based on race and ethnicity); Alain G. Bertoni, Kelly L. Goonan, Denise E. Bonds, Melicia C. Whitt, David C. Goff Jr. & Frederick L. Brancati, *Racial and Ethnic Disparities in Cardiac Catheterization for Acute Myocardial Infarction in the United States, 1995-2001*, 97 J. NAT'L MED. ASS'N 317, 321 (2005) (finding substantial racial differences in cardiac catheterization during hospitalization persisted into 2001, despite increased awareness of racial disparities); Michele Goodwin & Naomi Duke, *Cognitive Bias in Medical Decision-Making*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 95, 96 (Justin D. Levinson & Robert J. Smith eds., 2012) (discussing that an understanding of implicit racial bias can help explain disparate medical treatments and outcomes for racial minorities); HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* (2006) (discussing the historical roots of distrust and mistreatment of Black people by doctors); cf. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 6 (1997) (emphasis omitted) ("[R]egulating Black women's reproductive decisions has been a central aspect of racial oppression in America."); MICHELE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* 1-6 (2006) (discussing race and the inequitable allocation and distribution of organ transplants, such that Black Americans are more likely to be organ donors but have the longest wait times and are more likely to die while waiting for an organ donation).

<sup>78</sup> COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *supra* note 77, at 5.

<sup>79</sup> See, e.g., Jeremy Manier & William Recktenwald, *Boy's Death Forces Shift in ER Policy*, CHI. TRIB., May 19, 1998, at N1 (reporting the death of a Black teenager who died feet away from the front door of the emergency room entrance as staff refused to bring him into the hospital).

been the subjects of nonconsensual medical experimentation,<sup>80</sup> denied care,<sup>81</sup> sent home with inadequate care,<sup>82</sup> arrested while demanding care,<sup>83</sup> or simply died due to medical neglect, even while in clinics and hospitals.<sup>84</sup> Such horrors reflect the modern era—*not slavery or Jim Crow*.

In fact, a 2016 study revealed disturbing, racially biased, and stereotyped views about the differences between Blacks and whites among medical

<sup>80</sup> See WASHINGTON, *supra* note 77 (reporting and cataloguing the myriad ways in which Black people have been exploited through nonconsensual medical research); see also, Katie Moisse, *Baltimore's Kennedy Krieger Institute Sued Over Lead Paint Study*, ABC NEWS (Sept. 16, 2011, 12:41 PM), <https://abcnews.go.com/Health/Wellness/baltimores-kennedy-krieger-institute-sued-lead-paint-study/story?id=14536695> [<https://perma.cc/GX6H-NYSC>] (“A class action lawsuit . . . accuses Baltimore’s Kennedy Krieger Institute, a research and care facility for children with disabilities affiliated with Johns Hopkins University, of exposing poor black children to ‘dangerous lead hazards’ during a 1990s housing study.”).

<sup>81</sup> See, e.g., Janelle Griffith, *Detroit Health Care Worker Dies After Being Denied Coronavirus Test 4 Times, Daughter Says*, NBC NEWS (Apr. 25, 2020, 11:30 AM), <https://www.nbcnews.com/news/us-news/detroit-health-care-worker-dies-after-being-denied-coronavirus-test-n1192076> [<https://perma.cc/7FPA-RENG>] (describing a hospital employee who was denied a COVID-19 test and told to go home, despite exhibiting clear symptoms of the virus, which ultimately led to her death).

<sup>82</sup> See, e.g., Jasmin Barmore, *5-Year-Old with Rare Complication Becomes First Michigan Child to Die of COVID-19*, DETROIT NEWS (Apr. 19, 2020, 9:22 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2020/04/19/5-year-old-first-michigan-child-dies-coronavirus/5163094002> [<https://perma.cc/BzSS-UFUN>] (describing a girl who died from COVID-19 after initially being treated for strep throat and sent home).

<sup>83</sup> See, e.g., BLOUNTSTOWN, FLA. POLICE DEP’T, EVENT NO. 2015120734, SERVICES EVENT REPORT (2015), <https://data.tallahassee.com/dawson-report-bpd> (reporting the death of Barbara Dawson who was arrested while seeking medical care at a hospital); Christine Hauser, *Recordings Add Detail in Death of Woman Forced from Florida Hospital*, N.Y. TIMES (Jan. 7, 2016), <https://www.nytimes.com/2016/01/08/us/recordings-add-detail-in-death-of-woman-forced-from-florida-hospital.html> [<https://perma.cc/EV4T-GMML>] (describing the death of Barbara Dawson, who was forced out of hospital by police and collapsed in the parking lot); *Fla. Officer Resigns Months After Handcuffed Woman at Hospital Dies*, CBS NEWS (June 1, 2016, 5:21 PM), <https://www.cbsnews.com/news/florida-officer-resigns-months-after-handcuffed-woman-at-hospital-dies-barbara-dawson> [<https://perma.cc/Q5AC-TGXC>] (noting that while the officer who forced Dawson from the hospital resigned, he would not face any charges).

<sup>84</sup> See, e.g., Michele Goodwin, *Revisiting Death: Implicit Bias and the Case of Jahi McMath*, 48 HASTINGS CTR. REP. (SPECIAL REPORT) S77, S78-79 (2018) (describing how racial bias impacted the case of a teenage girl who was pronounced brain-dead due to bleeding following a tonsillectomy); Nina Martin & Renee Montagne, *Nothing Protects Black Women from Dying in Pregnancy and Childbirth*, PROPUBLICA (Dec. 7, 2017, 8:00 AM), <https://www.propublica.org/article/nothing-protects-black-women-from-dying-in-pregnancy-and-childbirth> [<https://perma.cc/6GNR-SKJ8>] (“Even Shalon’s many advantages—her B.A. in sociology, her two master’s degrees and dual-subject Ph.D., her gold-plated insurance and rock-solid support system—had not been enough to ensure her survival. If a village this powerful hadn’t been able to protect her, was any black woman safe?”); Erica Y. King, *Widowed Father Works with Congresswoman on Legislation to Prevent Maternal Deaths*, ABC NEWS (Jan. 6, 2019, 2:26 PM), <https://abcnews.go.com/Health/widowed-father-works-congresswoman-legislation-prevent-maternal-deaths/story?id=59846228> [<https://perma.cc/9HRB-Y7GQ>] (reporting on Black maternal mortality, noting Black women are three to four times more likely to die during pregnancy and child delivery than white women).

students and residents.<sup>85</sup> The study included a group of 222 white medical students at the University of Virginia, and the findings, though deeply worrying, are relevant for understanding the milieu in which healthcare is delivered.<sup>86</sup> According to the authors, white medical students and residents believe debunked biological stereotypes about African Americans, and as a result, made “less accurate treatment recommendations.”<sup>87</sup> Many believed that Black Americans age more slowly than their white counterparts, have thicker skin, that their nerve endings are less sensitive, and even that blood coagulation is different between Blacks and whites.<sup>88</sup>

In other words, explicit and implicit biases contribute to the ecosystem in which the United States addresses COVID-19. Racism is a preexisting medical condition that implicates nearly every aspect of healthcare delivery. Disparities persist in diagnostic screening and general medical care, mental health diagnosis and treatment, pain management, HIV-related care, and treatments for cancer, heart disease, diabetes, and kidney disease.<sup>89</sup> These disparities are not fully explained by differences in patient education, income, insurance status, expressed preference for treatments, or severity of disease.

Even while a full literature review would be beyond the scope of this Article, these are the types of conditions and concerns unpacked in copious detail in prior literature<sup>90</sup> and by researchers such as Harriet Washington, author of the much-acclaimed *Medical Apartheid*,<sup>91</sup> and the Institute of Medicine (IOM) in the pathbreaking study *Unequal Treatment: Confronting Race and Ethnic Disparities in Health Care*<sup>92</sup> which documents that thousands of people of color die each year due to avoidable, unfair, and unjust differences in the quantity and quality of care received compared to white counterparts.<sup>93</sup>

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<sup>85</sup> Kelly M. Hoffman, Sophie Trawalter, Jordan R. Axt & M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences Between Blacks and Whites*, 113 PROCS. NAT'L ACAD. SCIS. U.S. 4296, 4299 (2016).

<sup>86</sup> *Id.* at 4300.

<sup>87</sup> *Id.* at 4296.

<sup>88</sup> *Id.* at 4298 tbl.1.

<sup>89</sup> See van Ryn & Fu, *supra* note 77, at 249 (reviewing evidence of racial disparities in various medical fields).

<sup>90</sup> See, e.g., Goodwin & Chemerinsky, *supra* note 15, at 964 (“[C]laims to protect the public’s health frequently have served as proxies for bias, discrimination, and nativism.”); Goodwin, *supra* note 84 (discussing how race impacted the case of a teenage girl who died from bleeding following a tonsillectomy); GOODWIN, *supra* note 77 (discussing how race impacts the processes of organ donation and allocation); Goodwin & Duke, *supra* note 77 (discussing the role implicit bias plays in racial health disparities).

<sup>91</sup> WASHINGTON, *supra* note 77.

<sup>92</sup> COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *supra* note 77.

<sup>93</sup> *Id.*; see also DAYNA BOWEN MATTHEW, JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE 2, 6 (2015) (finding “racial and ethnic discrimination

### 1. Black Americans and COVID-19

Despite bold and unsubstantiated claims from President Trump that “[n]obody has done more for Black Americans than I have”<sup>94</sup> and that his staff members and senior officials “are doing everything in our power to address this [pandemic] challenge,”<sup>95</sup> the data simply does not bear that out. Rather, the dramatic disparate racial death tolls during COVID-19 paint an altogether different picture. According to the CDC, “[a]mong 79 counties identified as hotspots during June 5–18, 2020 that also had sufficient data on race, a disproportionate number of COVID-19 cases among underrepresented racial/ethnic groups occurred in almost all areas during February–June 2020.”<sup>96</sup> These dramatic racial disparities spanned twenty-two states.<sup>97</sup>

Black Americans represent 12.4% of the population in the United States, but they have suffered 18.5% of COVID-19 deaths where race was reported.<sup>98</sup> In fact, during the Trump Administration and as of August 2020 “Black Americans continue to experience the highest actual COVID-19 mortality rates nationwide—more than twice as high as the rate for Whites and Asians, who have the lowest actual rates.”<sup>99</sup> Black Americans have also been over-represented in deaths in at least fifteen states and the District of Columbia by at least ten percentage points, according to data from American Public Media Research Lab.<sup>100</sup> Additionally, Black children were the earliest reported cases of childhood deaths due to COVID-19 in the United States.<sup>101</sup>

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against minority patient populations [is] an uncontrovertibly significant contributor to health inequality” and proposing “strengthening legal interventions” to address health disparities).

<sup>94</sup> Carlisle, *supra* note 74 (quoting President Trump).

<sup>95</sup> Elving, *supra* note 74.

<sup>96</sup> Jazmyn T. Moore, Jessica N. Ricaldi, Charles E. Rose, Jennifer Fuld, Monica Parise, Gloria J. Kang, Anne K. Driscoll, Tina Norris, Nana Wilson, Gabriel Rainisch et al., *Disparities in Incidence of COVID-19 Among Underrepresented Racial/Ethnic Groups in Counties Identified as Hotspots During June 5-18, 2020—22 States, February-June 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1122, 1126 (Aug. 21, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6933e1-H.pdf> [<https://perma.cc/C8PC-PGTU>].

<sup>97</sup> *Id.* at 1123.

<sup>98</sup> APM Research Lab Staff, *supra* note 76 (compiling nationwide data and assembling various figures to depict racial and ethnic disparities in COVID-19 mortality rates as of December 8, 2020, with a focus on white, Black, Latinx, Indigenous, Pacific Islander, and Asian populations).

<sup>99</sup> APM Research Lab Staff, *supra* note 75 (compiling nationwide data and assembling various figures to depict racial and ethnic disparities in COVID-19 mortality rates as of August 18, 2020, with a focus on white, Black, Latinx, Indigenous, Pacific Islander, and Asian populations).

<sup>100</sup> As of August 18, 2020. These states are Michigan, Missouri, South Carolina, Louisiana, Kansas, Alabama, Wisconsin, Tennessee, Georgia, Arkansas, Illinois, Mississippi, Maryland, North Carolina, and New York. APM Research Lab Staff, *supra* note 75 (excel spreadsheet with full data downloaded by and on file with the Editors at The University of Pennsylvania Law Review).

<sup>101</sup> See e.g., Barmore, *supra* note 82 (identifying a 5-year-old Black girl as the first child in Michigan to die from COVID-19); David Ovalle & Michelle Marchante, *Miami Boy, 11, Is Florida's Youngest Death from COVID-19*, TAMPA BAY TIMES (July 3, 2020), <https://www.tampabay.com/news/health/2020/07/03/miami-boy-11-is-floridas-youngest-death-from-covid-19> [<https://perma.cc/7EUS-37QT>].

However, African Americans are not the only racial group suffering disproportionately from COVID-19.

## 2. Native Americans and COVID-19

Indigenous populations have also experienced elevated COVID-19 contraction and death rates.<sup>102</sup> This disparity is likely driven by prevailing and longstanding infrastructural problems. The disproportionately high rate of COVID-19 infection among Native Americans has been clear since the early stages of the pandemic. For example, as of February 22, 2021, the Indian Health Service (IHS), the federal agency responsible for the healthcare of 2.2 million of the 3.7 million Native Alaskans and American Indians residing in the United States, reported 185,223 positive cases from testing among Native Americans.<sup>103</sup>

Although the IHS does not track deaths, tribes often do themselves. The local data paints a grim picture. The Navajo Nation, by far the most populous tribal nation with nearly 200,000 members, had the highest infection rate per capita in the country as of May 18, 2020.<sup>104</sup>

This outpaced hotspots like New York state.<sup>105</sup> By late December of 2020, COVID-19 had killed 781 members of the Navajo Nation, for an adjusted

(identifying an 11-year-old Black boy as Florida's youngest COVID-19 victim at the time); Gabrielle Chung, *Florida's Youngest Coronavirus Victim Identified as 9-year-old Kimora "Kimmie" Lynum*, PEOPLE (July 27, 2020), <https://people.com/health/florida-youngest-coronavirus-victim-identified-as-9-year-old-girl-with-kimora-kimmie-lynum-no-preexisting-health-issues> [https://perma.cc/X2GM-HTEG] (identifying a 9-year-old Black girl as Florida's youngest COVID-19 victim at the time); J. Scott Trubey, *Georgia Child, 7, Dies of Coronavirus as State's Death Toll Surpasses 4,000*, ATLANTA J.-CONST. (Aug. 6, 2020), <https://www.ajc.com/news/atlanta-news/georgia-child-7-dies-of-coronavirus-as-states-death-toll-surpasses-4000/FOXZOKK2RE5LOQVRYTUDZE6W4> [https://perma.cc/MVA7-ZNZC] (identifying a 7-year-old Black boy as Georgia's first child COVID-19 victim).

<sup>102</sup> Sarah M. Hatcher, Christine Agnew-Brune, Mark Anderson, Laura D. Zambrano, Charles E. Rose, Melissa A. Jim, Amy Baugher, Grace S. Liu, Sadhna V. Patel, Mary E. Evans et al., *COVID-19 Among American Indian and Alaska Native Persons—23 States, January 31–July 3, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1166, 1167 (Aug. 19, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6934e1-H.pdf> [https://perma.cc/UM9W-Y7JN] (discussing the disparity between white and indigenous Americans in confirmed COVID-19 cases and systemic inequalities faced by indigenous peoples that may contribute to such a disparity); *Coronavirus in Indian Country: Latest Case Counts*, UCLA AM. INDIAN STUD. CTR. (May 31, 2020), [https://www.aisc.ucla.edu/progression\\_charts.aspx](https://www.aisc.ucla.edu/progression_charts.aspx) [https://perma.cc/M6C4-LDAX] (depicting COVID-19 case and death rates by tribal nation).

<sup>103</sup> *Coronavirus (COVID-19)*, INDIAN HEALTH SERV., <https://www.ihs.gov/coronavirus> [https://perma.cc/K2DA-DJVN].

<sup>104</sup> Hollie Silverman, Konstantin Toropin, Sara Sidner & Leslie Perrot, *Navajo Nation Surpasses New York State for the Highest COVID-19 Infection Rate in the US*, CNN (May 18, 2020), <https://www.cnn.com/2020/05/18/us/navajo-nation-infection-rate-trnd/index.html> [https://perma.cc/YE7X-2LJ7] (discussing the high COVID-19 case count in the Navajo Nation and comparing this data to national hotspots).

<sup>105</sup> *Id.*

mortality rate of 450 deaths per 100,000 people.<sup>106</sup> The data emerging from smaller tribes is often even more severe. For example, the Mississippi Band of Choctaw Indians has been hit particularly hard, and COVID-19 “eventually sicken[ed] more than 10 percent of the tribe’s 10,000 residents and kill[ed] at least 81 people.”<sup>107</sup>

Sadly, as the pandemic persists, the data do not improve. The high infection rate among Native populations is likely due to prevailing institutional and infrastructural problems rendered visible, during COVID-19.<sup>108</sup> The Navajo Nation is located in the dry climate of Arizona, Utah, and New Mexico and as with other indigenous communities, experienced expulsion and relocation with “more than 10,000 Navajos and Mescalero Apaches . . . forcibly marched to a desolate reservation,” where “nearly one-third . . . died of disease, exposure and hunger” while held “captive by the U.S. Army.”<sup>109</sup>

Today, living conditions remain challenging. For example, a lack of plumbing infrastructure, which the federal government is obligated to

<sup>106</sup> COVID-19, NAVAJO DEP’T OF HEALTH (Dec. 29, 2020), <https://www.ndoh.navajonnsn.gov/COVID-19> [<https://perma.cc/3Z8G-ZHU2> (listing total positive and negative cases, and deaths caused by COVID-19). Calculation arrives at 449.7 as an adjusted mortality, using Navajo Nation 2010 census data, showing 173,667 persons residing within the Navajo Nation. NAVAJO EPIDEMIOLOGY CTR., NAVAJO POPULATION PROFILE 2010 U.S. CENSUS 13 (2013), <https://www.nec.navajonnsn.gov/Portals/o/Reports/NN2010PopulationProfile.pdf?forcedefault=true> [<https://perma.cc/SM8K-LXP5>].

<sup>107</sup> The datasets confirming cases of COVID-19 regularly update. The data offered here reflects the specific date identified and by time of publication the rate of contractions and death may have increased or decreased. Mark Walker, *A Devastating Blow: Virus Kills 81 Members of Native American Tribe*, N.Y. TIMES (Jan. 3, 2021), <https://www.nytimes.com/2020/10/08/us/choctaw-indians-coronavirus.html> [<https://perma.cc/P3EA-BGA9>] (originally published October 8, 2020).

<sup>108</sup> A combination of factors has made this community, which has one of the strictest COVID-19 policies in the country and nearly 15% testing among its citizens, just as vulnerable to the virus as the most densely populated states. See Hatcher et al., *supra* note 102 (stating that systemic inequities that limit Native Americans’ access to transportation and running water may contribute to the elevated incidence of COVID-19). Some tribes have instituted restrictive curfews to mitigate the spread of COVID-19, such as the Navajo Nation in April:

A public health order banning members of the Navajo Nation from leaving their homes except for emergencies or to go to work as essential employees went into effect at 8 p.m. on Friday and will continue until 5 a.m. Monday. The weekend order is in addition to a curfew that already mandates that members stay in their homes from 8 p.m. until 5 a.m. daily . . . . Tourists and visitors have been banned from entering Navajo Nation territory unless they are delivering necessary supplies.

Hollie Silverman, *The Navajo Nation Is Under a Weekend Curfew to Help Combat the Spread of Coronavirus*, CNN (Apr. 12, 2020, 3:16 AM), <https://www.cnn.com/2020/04/12/us/navajo-nation-coronavirus/index.html> [<https://perma.cc/WR5G-KSD5>].

<sup>109</sup> John Burnett, *The Navajo Nation’s Own ‘Trail of Tears’*, NPR (June 15, 2005, 12:00 AM), <https://www.npr.org/2005/06/15/4703136/the-navajo-nation-s-own-trail-of-tears> [<https://perma.cc/USZ6-8VKT>].

provide,<sup>110</sup> creates a lack of water access that makes basic COVID-19 protocols like hand-washing extremely difficult.<sup>111</sup> More than 30% of the Navajo living on Navajo land don't have access to tap water or a toilet, compared to 0.5% among all Americans and 12% among Indian tribes.<sup>112</sup> These families must walk to rivers and wells to collect water for household use.<sup>113</sup> Their water sources are often natural, shallow, and contaminated with dangerous bacteria and parasites.<sup>114</sup> Additionally, "food deserts" (areas with a small number of grocery stores) pose a similar problem. The Navajo Nation has only thirteen grocery stores in an area the size of South Carolina.<sup>115</sup> This forced indoor concentration of people makes physical distancing extremely difficult and presents an elevated transmission risk.

In August 2020, the CDC released a report detailing disproportionate COVID-19 impacts among Indigenous populations.<sup>116</sup> The CDC found that "[i]n 23 states with adequate race/ethnicity data, the cumulative incidence of laboratory-confirmed COVID-19 among [American Indian/Alaskan Native] persons was 3.5 times that among non-Hispanic white persons."<sup>117</sup> We see the value of the CDC report not only in the confirmation of contraction and morbidity rates that we suspected given our tracking of the cases, but also in the unnamed implications, which we briefly address here, and urge greater study and government action.

<sup>110</sup> U.S. COMM'N ON C.R., *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 1 (2018), <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf> [<https://perma.cc/FR22-EMY4>] ("The broken treaties have left many reservations without adequate access to clean water . . .").

<sup>111</sup> See Laurel Morales, *Many Native Americans Can't Get Clean Water, Report Finds*, NPR (Nov. 18, 2019, 5:01 AM), <https://www.npr.org/2019/11/18/779821510/many-native-americans-cant-get-clean-water-report-finds> [<https://perma.cc/6RVQ-UYFB>] ("Fifty-eight out of every 1,000 Native American households lack plumbing, compared with 3 out of every 1,000 white households, according to the report. This disparity has implications for public health.").

<sup>112</sup> Scott P. Grytdal, Robert Weatherholtz, Douglas H. Esposito, James Campbell, Raymond Reid, Nicole Gregoricus, Chandra Schneeberger, Tina S. Lusk, Lihua Xiao, Nancy Garrett, Cheryl Bopp, Laura L. Hammitt, Jan Vinjé, Vincent R. Hill, Katherine L. O'Brien & Aron J. Hall, *Water Quality, Availability, and Acute Gastroenteritis on the Navajo Nation—A Pilot Case-Control Study*, 16 J. WATER & HEALTH 1018, 1019 (2018).

<sup>113</sup> See Creede Newton, *Why Has Navajo Nation Been Hit So Hard by the Coronavirus?*, AL JAZEERA (May 27, 2020), <https://www.aljazeera.com/news/2020/05/navajo-nation-hit-hard-coronavirus-200526171504037.html> [<https://perma.cc/2F5W-BFW9>] ("You got the feds, you got everybody saying, 'Wash your hands with soap and water,' but our people are still hauling water. Here's a great opportunity for us to get running water to the Navajo people . . .").

<sup>114</sup> Grytdal et al., *supra* note 112, at 1025 (stating that over sixty percent of water samples tested in a Navajo Nation water study were positive for coliform bacteria and lacked sufficient residual levels of chlorine to counteract the bacteria).

<sup>115</sup> *Growing Strawberries in the Navajo Food Desert*, ADMIN. FOR CHILD. & FAMS. (Mar. 29, 2020), <https://www.acf.hhs.gov/ana/news/growing-strawberries-in-the-navajo-food-desert> [<https://perma.cc/M6KX-36X3>].

<sup>116</sup> Hatcher et al., *supra* note 102.

<sup>117</sup> *Id.* at 1169.

Public health crises such as COVID-19 must be understood within their social and political contexts rather than as abstract happenings. Water rights are a hotly litigated issue in the Southwestern States. The Navajo and several smaller tribes have been parties to one adjudication in Maricopa County Superior Court contesting access to the Little Colorado River for over forty years.<sup>118</sup> Even where water rights are secured, families must construct bathrooms before the IHS will even build a water line to connect homes to public utilities.<sup>119</sup> This requires a financial investment that the federal government simply has not made and many families cannot feasibly make.<sup>120</sup>

During the pandemic, Navajo families have been forced to crowd together in limited housing, often with multiple generations living under one roof. The remoteness, lack of infrastructure, and legal constraints related to ownership of land held in trust for the tribes by the federal government make it extremely difficult to develop housing on reservations. As a result, affordable housing is rare and housing generally is overcrowded.<sup>121</sup>

### 3. Latinx Communities and COVID-19

In Latinx communities, the COVID-19 death tolls are dramatically higher than among whites. According to American Public Media (APM), “COVID-19 is stealing far more Latino lives than we would expect despite this group’s relative youthfulness.”<sup>122</sup> In California, members of Latinx communities

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<sup>118</sup> *Overview of General Stream Adjudications*, MARICOPA CNTY. SUPERIOR CT., <http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/faq.asp#2> [<https://perma.cc/6QAP-RZUM>] (describing the history of adjudications regarding the Little Colorado River and providing additional information regarding participation in these adjudications).

<sup>119</sup> Debra Utacia Krol, *Navajo Nation’s Water Shortage May Be Supporting COVID-19 Spread*, AZCENTRAL (Apr. 28, 2020, 3:22 PM), <https://www.azcentral.com/story/news/local/arizona-health/2020/04/18/navajo-nation-water-shortage-contributing-covid-19-spread/2992288001> [<https://perma.cc/7NN4-7WYP>]. State Senator Jamescita Peshlakai, who lives on the Navajo Nation, described her experience rationing water during a pandemic:

“We’ve become kind of water experts,” Peshlakai said. “We have drinking water and household cleaning water. We have showering and bathing water. We have water for the plants and the animals, and then we have gray water for anything else that we need like agricultural use.” The family maintains their supply in different barrels.

*Id.*

<sup>120</sup> S. REP. NO. 116-79, at 2 (2019) (“While many Indian reservations were established for the purpose of settling Indian people into agricultural communities, the Federal Government never invested sufficient resources into water-delivery systems to fulfill that purpose.”).

<sup>121</sup> See U.S. DEP’T OF HOUS. AND URB. DEV., *HOUSING NEEDS OF AMERICAN INDIANS AND ALASKA NATIVES IN TRIBAL AREAS: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN HOUSING NEEDS* xv, xviii (2017), <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf> [<https://perma.cc/52AD-LUZ7>] (discussing the barriers to improve housing conditions in Indigenous communities that often cause overcrowding).

<sup>122</sup> APM Research Lab Staff, *supra* note 75.



account for nearly 60% of COVID-19 cases and almost 50% of deaths, despite comprising only 38.9% of the state's population.<sup>123</sup> Nationally, they are “three times as likely to become infected [by COVID-19] as their white neighbors.”<sup>124</sup> *What explains this?*

In addition to underlying medical and social factors, economic inequalities increase Latinx communities in the United States' risk to COVID-19. Latinx Americans are often employed in lower-wage jobs, such as in agriculture or meatpacking.<sup>125</sup> Both fields of employment are now designated as “essential industries” and as such they remain open during the pandemic.<sup>126</sup> A recent study from the Centers for Disease Control and Prevention found that workers in these industries—particularly Latinx workers—have been hit particularly hard in the COVID-19 pandemic with disproportionately high rates of infection.<sup>127</sup>

For example, when agricultural industries remained in operation, COVID-19 outbreaks emerged on farms in California, Washington, Florida, and Michigan.<sup>128</sup> Several food processing facilities in California's Central Valley

<sup>123</sup> As of December 29, 2020. *COVID-19 Race and Ethnicity Data*, CAL. DEP'T OF PUB. HEALTH (Dec. 29, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Race-Ethnicity.aspx> [<https://perma.cc/2ZJE-ATN4>].

<sup>124</sup> Richard A. Oppel Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> [<https://perma.cc/9J5B-UMB5>] (analyzing the differential impact of COVID-19 on various demographic groups in the United States using CDC data obtained after filing a Freedom of Information Act request).

<sup>125</sup> *Hispanics and Latinos in Industries and Occupations*, U.S. BUREAU OF LAB. STAT. (Oct. 9, 2015), <https://www.bls.gov/opub/ted/2015/hispanics-and-latinos-in-industries-and-occupations.htm> [<https://perma.cc/8VTH-XQR2>]; Angela Stuesse & Nathan T. Dollar, *Who Are America's Meat and Poultry Workers?*, ECON. POL'Y INST. (Sept. 24, 2020, 10:00 AM), <https://www.epi.org/blog/meat-and-poultry-worker-demographics/> [<https://perma.cc/PA27-5Y8G>].

<sup>126</sup> See Memorandum from Christopher C. Krebs, Dir., Cybersecurity & Infrastructure Sec. Agency, Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response 8-9 (Apr. 17, 2020), [https://www.cisa.gov/sites/default/files/publications/Version\\_3.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_4.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_4.pdf) [<https://perma.cc/2ZPG-RA6D>] (issuing definitions of “essential” work for COVID-19 safety guidelines).

<sup>127</sup> Michelle A. Waltenburg, Charles E. Rose, Tristan Victoroff, Marilee Butterfield, Jennifer A. Dillaha, Amy Heinzerling, Meagan Chuey, Maria Fierro, Rachel H. Jervis, Kristen M. Fedak et al., *Coronavirus Disease Among Workers in Food Processing, Food Manufacturing, and Agriculture Workplaces*, 27 EMERGING INFECTIOUS DISEASES 243, 245-47 (2021).

<sup>128</sup> See Victoria Knight, *Without Federal Protections, Farm Workers Risk Coronavirus Infection to Harvest Crops*, NPR (Aug. 8, 2020, 7:00 AM), <https://www.npr.org/sections/health-shots/2020/08/08/900220260/without-federal-protections-farm-workers-risk-coronavirus-infection-to-harvest-c> [<https://perma.cc/2GG2-CCS2>] (discussing numerous COVID-19 outbreaks on farms around the country and hypothesizing that some laborers' inability to wear masks, to distance themselves from others, and stay home when exhibiting symptoms may hasten the spread in agricultural settings).

region reported outbreaks resulting in “hundreds of infections.”<sup>129</sup> Likewise, slaughterhouses and meatpacking plants present another spawning ground for COVID-19 outbreaks across the country. In one instance, Central Valley Meat Co. in Kings County, California, reported 161 COVID-19 cases in early May of 2020—more than the 158 total cases reported by Kings County itself at that same time.<sup>130</sup> Nationally, as of July 2020, of the thousands of meatpacking workers diagnosed with COVID-19, nearly 90% were racial and ethnic minorities and a majority of these were Latinx community members (56%).<sup>131</sup>

The nature of the meatpacking industry, often characterized by arduous work with diseased animals, unsanitary conditions, and crowded spaces at meatpacking facilities, made Latinx populations vulnerable to disease and illness even prior to COVID-19.<sup>132</sup> One investigative report from 2019 referred to the meatpacking industry’s work as, “dirty, demanding, and dangerous.”<sup>133</sup> Industry workers must risk high incidences of cuts and infections as they work with knives, hooks, scissors, and saws.<sup>134</sup> Across the nation, hundreds of thousands of women and men—mostly Latinx—“do the killing, cutting, deboning, and packaging of American-grown meat, most of whom spend their entire shift operating as components of a continually moving dissection machine . . . disassembling animals.”<sup>135</sup> Furthermore, industry workers are frequently exposed to chemicals that specifically cause respiratory symptoms and illnesses.<sup>136</sup>

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129 Vivian Ho, “Everyone Tested Positive”: Covid Devastates Agriculture Workers in California’s Heartland, *THE GUARDIAN* (Aug. 8, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/aug/08/california-covid-19-central-valley-essential-workers> [<https://perma.cc/8JVL-RLLE>].

130 *Id.*

131 Matt Perez, *87% of Meatpacking Workers Infected with Coronavirus Have Been Racial and Ethnic Minorities*, *CDC Says*, *FORBES* (July 7, 2020, 4:47 PM), <https://www.forbes.com/sites/mattperetz/2020/07/07/87-of-meatpacking-workers-infected-with-coronavirus-have-been-racial-and-ethnic-minorities-cdc-says> [<https://perma.cc/94AR-GVXT>]; see also Michelle A. Waltenburg, Tristan Victoroff, Charles E. Rose, Marilee Butterfield, Rachel H. Jervis, Kristen M. Fedak, Julie A. Gabel, Amanda Feldpausch, Eileen M. Dunne, Connie Austin et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April-May 2020*, 69 *MORBIDITY & MORTALITY WKLY. REP.* 887, 887 (July 10, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6927e2.htm> [<https://perma.cc/6XYG-M6DV>] (discussing nationwide trends in COVID-19 infection rates at meat and poultry processing facilities and proposing preventative measures to slow the spread and protect workers).

132 See BRIAN STAUFFER, HUMAN RIGHTS WATCH, “WHEN WE’RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING”: WORKERS’ RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS 27-42 (2019), [https://www.hrw.org/sites/default/files/report\\_pdf/us0919\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0919_web.pdf) [<https://perma.cc/M47D-L545>] (describing numerous health and safety hazards in the meat and poultry industry, including, but not limited to, crowded spaces and chemical exposure).

133 *Id.* at 16.

134 *Id.* at 27.

135 *Id.* at 1.

136 *Id.* at 40-42.

Additionally, the workplace crowding in the meatpacking industry, even before the pandemic, could lead to rapid transmission of an illness. The industry has “[d]istinctive factors that increase meat and poultry processing workers’ risk for exposure to” COVID-19.<sup>137</sup> These factors include “prolonged close workplace contact with coworkers (within 6 feet for  $\geq 15$  minutes) for long time periods (8–12 hour shifts), shared work spaces, shared transportation to and from the workplace, congregate housing, and frequent community contact with fellow workers.”<sup>138</sup>

These conditions and vulnerabilities were only exacerbated by the virus, particularly as employees lacked personal protective equipment<sup>139</sup> and meaningful ways to protect their jobs if they decided to shelter in place rather than return to high-risk meat-packing facilities. Reasonably, employees may be reluctant to call attention to their work conditions because of their immigration status.<sup>140</sup> There are no federal laws that specifically protect nondocumented, noncitizen workers from workplace retaliation.<sup>141</sup>

Despite the thousands of reported COVID-19 illnesses and deaths at meatpacking facilities, President Trump signed an executive order<sup>142</sup> “compelling meat processors to remain open” during the pandemic.<sup>143</sup> According to his order, meat processing facilities are part of America’s “critical infrastructure . . . even as many become virus hot spots.”<sup>144</sup> And while President Trump did not enlist industries to produce or expand productions of masks, ventilators, or other essential items to combat COVID-19, he “invoked the Defense Production Act to classify meat plants as essential infrastructure that must remain open.”<sup>145</sup> By forcing meat processing plants to remain open, President Trump preempted local health officials from closing facilities with unsafe working conditions. Local health officials “also

<sup>137</sup> Waltenburg et al., *supra* note 131.

<sup>138</sup> *Id.*

<sup>139</sup> J. Edward Moreno, *Coronavirus Outbreaks Triggers Call for More Protections for Meat Plant Workers*, THE HILL (Apr. 25, 2020, 2:04 PM), <https://thehill.com/homenews/news/494658-coronavirus-outbreaks-triggers-call-for-more-protections-for-meat-plant-workers> [<https://perma.cc/Y3GW-E7KR>].

<sup>140</sup> See STAUFFER, *supra* note 132, at 10 (“Most workers who spoke with Human Rights Watch requested to remain unidentified in the report, with many expressing fear of retaliation from their employer or potential immigration consequences if they were identified.”).

<sup>141</sup> The Protecting our Workers from Exploitation and Retaliation Act (POWER Act), which would have provided such protection, was proposed in November 2019 but has not been enacted by Congress. POWER Act, H.R. 5225, 116th Cong. (2019); POWER Act, S. 2929, 116th Cong. (2019).

<sup>142</sup> Exec. Order No. 13,917, 85 Fed. Reg. 26313 (Apr. 28, 2020).

<sup>143</sup> See, e.g., Taylor Telford, Kimberly Kindy & Jacob Bogue, *Trump Orders Meat Plants to Stay Open in Pandemic*, WASH. POST (Apr. 29, 2020, 12:52 PM), <https://www.washingtonpost.com/business/2020/04/28/trump-meat-plants-dpa/> [<https://perma.cc/B83J-ZGK6>] (describing the Executive Order and discussing various viewpoints on the mandate).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

fear that [the executive order] . . . undercut[s] newly issued federal health guidelines designed to put space between plant workers.”<sup>146</sup>

Sadly, many of these factors likely contribute to ongoing community transmission. Agricultural and meat processing workers who are undocumented may fear detention by Immigration and Customs Enforcement (ICE). Further, workers with green cards may worry that seeking public medical assistance could trigger their citizenship applications for negative review under the Trump Administration’s “public charge” rule.<sup>147</sup> Because workers are so unlikely to complain about working conditions, there are few incentives for employers to improve workplace conditions for low-wage earning, nondocumented noncitizens.

Thus, despite real or imagined efforts to address endemic racial disparities in healthcare in this century prior to and during the COVID pandemic, racism and infrastructural and institutional inequalities persist, undermining healthcare access, quality of care, and quality of life.

### C. Government Accountability During Health Crisis

The coronavirus crisis brings to the forefront a national debate related to the interaction between constitutional rights, state police powers, and federalism: What are the limits of government action during a pandemic? Certain basic constitutional law questions persist for some Americans: *Is it legal to impose shelter-in-place on Sundays—a day when many Americans seek to worship?*<sup>148</sup> *Have governors the authority to issue executive orders to shelter-in-place or quarantine?* *May the legislature prioritize some business activity as “essential” while not granting that status to others?*

The short answer is yes: quarantine has been justified and legally upheld for nearly three centuries, dating back to 1738—even before the official founding of

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*; see also U.S. CITIZENSHIP AND IMMIGR. SERVS., PUBLIC CHARGE FACT SHEET (Sept. 22, 2020), <https://www.uscis.gov/news/public-charge-fact-sheet> [<https://perma.cc/49FE-CG53>] (providing an overview of the “public charge” rule); *New York v. U.S. Dep’t of Homeland Sec.*, 969 F.3d 42, 55, 87 (2d Cir. 2020) (upholding preliminary injunction against final rule setting out a new agency interpretation of a provision of immigration law that renders inadmissible to the United States any noncitizen who is likely to become a “public charge”).

<sup>148</sup> See, e.g., *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, J., concurring) (“The precise question of when restrictions on particular social activities should be lifted during the pandemic . . . .”); see also Adam Liptak, *Supreme Court, in 5-4 Decision, Rejects Church’s Challenge to Shutdown Order*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/us/supreme-court-churches-coronavirus.html> [<https://perma.cc/55R6-TEDY>] (“The Supreme Court . . . turned away a request from a church in California to block enforcement of state restrictions on attendance at religious services.”).

the United States.<sup>149</sup> Rousseau,<sup>150</sup> Rawls,<sup>151</sup> Hobbes,<sup>152</sup> and Locke<sup>153</sup> (and other philosophers and scholars among them)<sup>154</sup> shaped early legal thought on social obligations, duties, and responsibilities of government vis-à-vis its peoples and the people vis-à-vis each other, including maintaining peace, promoting justice, distributing resources, and protecting social welfare.<sup>155</sup> Yet, the expectation of government to serve and protect its peoples even precedes their foundational

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<sup>149</sup> See Josh Hicks, *A Brief History of Quarantines in the United States*, WASH. POST (Oct. 7, 2014, 6:00 AM), <https://www.washingtonpost.com/news/federal-eye/wp/2014/10/07/a-brief-history-of-quarantines-in-the-united-states> [<https://perma.cc/F7RY-8CP3>] (“1738: New York City commandeers Bedloe’s Island, now home to the Statue of Liberty, as a quarantine station sometime after 1732, due to concerns about smallpox and yellow fever . . . .”); Peter Tyson, *A Short History of Quarantine*, PBS NOVA (Oct. 12, 2004), <https://www.pbs.org/wgbh/nova/article/short-history-of-quarantine> [<https://perma.cc/2Z2D-9EFG>] (“With smallpox and yellow fever threatening to strike New York, the City Council sets up a quarantine anchorage off Bedloe’s Island . . . . The island becomes a quarantine station for contagious passengers and crew from arriving ships.”).

<sup>150</sup> See JEAN-JACQUES ROUSSEAU, *The Social Contract or The Principles of Political Right*, in DISCOURSE ON POLITICAL ECONOMY AND THE SOCIAL CONTRACT 54-55 (Christopher Betts, trans., Oxford Univ. Press 1994) (1762) (speaking to the relationship between citizens and the state through the social contract); ERNEST BARKER, INTRODUCTION TO SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU (1947) (same).

<sup>151</sup> JOHN RAWLS, A THEORY OF JUSTICE (1971); Will Kymlicka, *The Social Contract Tradition*, in A COMPANION TO ETHICS 191-93 (1991).

<sup>152</sup> Hobbes explained the social contract as follows:

For if we could suppose a great Multitude of men to consent in the observation of Justice, and other Lawes of Nature, without a common Power to keep them all in awe; we might as well suppose all Man-kind to do the same; and then there neither would be, nor need to be any Civill Government, or Common-wealth at all; because there would be Peace without subjection.

THOMAS HOBBS, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVILL 116-17 (1651).

<sup>153</sup> Across several foundational works, Locke pursued questions related to the roles and responsibilities of government, particularly with regard to education. See, e.g., JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION (Cambridge Univ. Press 1913) (1693) (providing advice to parents on child-rearing and education); JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 87 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690) (“But because no Political Society can be, nor subsist without having in it self the Power to preserve the Property, and in order thereunto, punish the Offences of all those of that Society; there, and there only is *Political Society*, where every one of the Members hath quitted this natural Power, resign’d it up into the hands of the Community in all cases that exclude him not from appealing for Protection to the Law established by it.”).

<sup>154</sup> See, e.g., MICHAEL LESSNOFF, SOCIAL CONTRACT (1986) (speaking to the relationship between citizens and the state through the social contract); Jean Hampton, *Contract and Consent*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY (Robert E. Goodin, Philip Pettit & Thomas Pogge eds., 2d ed. 2007) (same).

<sup>155</sup> For an overview of social contract theory, see ROUSSEAU, *supra* note 150; BARKER, *supra* note 150; RAWLS, *supra* note 151; LESSNOFF, *supra* note 154; Kymlicka, *supra* note 151; Hampton, *supra* note 154.

scholarship, dating back millennia. According to Anne-Marie Slaughter, “[t]he oldest and simplest justification for government is as protector.”<sup>156</sup>

In addressing these issues, Slaughter specifies this “idea of government as protector” requires that government impose certain conditions on its citizens, such as taxes, in order to fund, train, and equip those who will protect populations; to build infrastructure; and to appoint officials who will draft and enact policies and laws that further serve to protect the public.<sup>157</sup> In other words, “government [is a] provider of goods and services that individuals cannot provide individually for themselves.”<sup>158</sup> This conception of government as “the solution to collective action problems” is rooted in the notion that the state serves as “the medium” through which people engage each other.<sup>159</sup> Equally, an expanded view of government’s obligation to its peoples, includes the affirmative notion of “government as provider” of social welfare. Slaughter describes how “government can cushion the inability of citizens to provide for themselves, particularly in the vulnerable condition[] of . . . sickness . . . due to economic forces beyond their control.”<sup>160</sup>

As Slaughter notes, the principle of government as a protector and provider is a foundational concept of our democracy and not a passing whim. Government’s obligation is to meet “national and global” health and security concerns and challenges<sup>161</sup> and invest in its populations such that they can succeed and thrive. These important values underpin protecting the public’s health.

The dramatic death tolls associated with COVID-19 raise important questions related to protecting the public’s health and the scope and scale of government accountability and negligence. These issues are made more complex by evidence of racial disparities in contractions of the virus and deaths. Specifically, the glaring disproportional weight of COVID-19 on Latinx and Black populations in the United States warrants serious focus both as a matter of public health and also public policy. These matters are further dramatized by the scale of horror associated with COVID-19 and how it literally cripples the body, suffocating it of air, rendering the body unable to breathe.

In South Bay United Pentecostal Church’s recent litigation to enjoin the California governor’s shelter in place order, the 5–4 Supreme Court denied the injunction, stating that “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States

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<sup>156</sup> Anne-Marie Slaughter, *3 Responsibilities Every Government Has Towards Its Citizens*, WORLD ECON. F. (Feb. 13, 2017), <https://www.weforum.org/agenda/2017/02/government-responsibility-to-citizens-anne-marie-slaughter> [<https://perma.cc/CU93-H8P6>].

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

‘to guard and protect.’”<sup>162</sup> Citing *Jacobson v. Massachusetts*<sup>163</sup> and *Marshall v. United States*,<sup>164</sup> the Court stated, “[w]hen those officials ‘undertake[] to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad.’”<sup>165</sup> While we are particularly mindful of the risks associated with government *exceeding* its authority during pandemic or national health crises,<sup>166</sup> government’s authority, if not its obligation to protect its populations from health harms, is well established in law.<sup>167</sup>

This deadly backdrop informs our observations and analysis about the public’s health, immigration, law, and race in the United States. What explains the stark racial disparities the data represents and contradicting statements from the White House and President Trump regarding a commitment to protecting the lives of people of color? Does law itself limit what a mayor, governor, or President may do to address a pandemic? For example, in Michigan, the “Republican-controlled Legislature has questioned [Governor Gretchen] Whitmer’s authority to extend stay-at-home orders amid the coronavirus pandemic.”<sup>168</sup> We conclude Part I by briefly addressing this issue.

The state’s power to protect the public’s health is well established.<sup>169</sup> The Supreme Court has held that government may impose certain duties, or in

<sup>162</sup> *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)).

<sup>163</sup> *Jacobson*, 197 U.S. at 38.

<sup>164</sup> *Marshall v. United States*, 414 U.S. 417, 427 (1974).

<sup>165</sup> *South Bay*, 140 S. Ct. at 1613. *But see* *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (granting an application for injunctive relief in a case seeking to enjoin the state of Colorado’s “capacity limits on worship services”).

<sup>166</sup> *See, e.g., Goodwin & Chemerinsky, supra* note 17, at 965 (“[T]he government must demonstrate that there is no other means by which to protect public health before it infringes on individuals’ constitutional rights.”); Michele Goodwin, *Pandemic Constitutional Rights: Not An All-Or-Nothing Proposition*, NEWSWEEK (June 4, 2020, 4:54 PM), <https://www.newsweek.com/pandemic-constitutional-rights-not-all-nothing-proposition-opinion-1508831> [<https://perma.cc/9W3E-JWS6>] (arguing that while government has broad powers during times of emergency, this power is not absolute and government may at times attempt to infringe on civil rights and civil liberties).

<sup>167</sup> *See South Bay*, 140 S. Ct. at 1613-14 (citation omitted) (“Where those broad limits are not exceeded, they should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people.”). *But see* *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (Roberts, J., concurring) (“At the same time, the State’s present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake”); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 41 S. Ct. 62 (2020) (in a 5-4 decision split along ideological lines, enjoining New York’s Governor Cuomo from enforcing an executive order limiting occupancy during religious services in the period of the pandemic).

<sup>168</sup> *Some Michigan Protesters Had Confederate Flags, Nooses and Swastikas, Gov. Gretchen Whitmer Says, supra* note 46.

<sup>169</sup> *See Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (explaining that the government has a power to protect the communities it serves from disease that threatens the people).

some instances restrictions, on its populations in order to protect the broader public wellbeing and safety.<sup>170</sup> Despite the lawsuits and challenges to shelter-in-place and mask orders, the history of governments assuming responsibility to protect their citizens during pandemics dates back to the Middle Ages.<sup>171</sup> Centuries ago, quarantine regulations imposed conditions on merchants, sailors, and townspeople to protect against the bubonic plague.<sup>172</sup> In 1374, officials in Venice issued an order that all ships and its passengers were to be stationed on a nearby island until a special health board or council authorized their entry into the port.<sup>173</sup> Likewise, there are historical records of quarantine practices dating back centuries prior in China.<sup>174</sup>

In the United States, early expressions of local governments taking on this role to protect the public's health date back to the eighteenth century when New York City designated Bedloe's Island as a quarantine station.<sup>175</sup> As early as 1824, the Supreme Court recognized the state's police power and quarantine authority in *Gibbons v. Ogden*.<sup>176</sup> In that case, Justice John Marshall specifically referenced the state's power to mandate quarantine:

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<sup>170</sup> See, e.g., *Louisiana v. Texas*, 176 U.S. 1, 20-21 (1900) (holding that interstate commerce concerns did not negate a state's power to protect the health of its people by police regulations); see also Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 604 (2016) (discussing two Supreme Court cases endorsing state power in public health emergencies, one of which, *Jacobson*, "held that laws promoting public health or safety fall under a state's police power and are under the sole discretion of the state unless the law violates the Constitution"); *Jacobson*, 197 U.S. at 25 ("According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

<sup>171</sup> In fact, the word quarantine derives from the Italian, "quaranta giorni," or "forty days," the time in which merchant ships were barred from entering Italian ports during the plague. Kristin Vuković, *Dubrovnik: The Medieval City Designed Around Quarantine*, BBC (Apr. 22, 2020), <http://www.bbc.com/travel/story/20200421-dubrovnik-the-medieval-city-designed-around-quarantine> [<https://perma.cc/5B44-VR3K>]. What is believed to be the first legislation mandating quarantine survives from 1377. *Id.* That local ordinance, enacted by a local city council "stipulates that those who come from plague-infested areas shall not enter . . . unless they spend a month" in specified communities "for the purpose of disinfection." Dave Roos, *Social Distancing and Quarantine Were Used In Medieval Times To Fight the Black Death*, HISTORY (Mar. 27, 2020), <https://www.history.com/news/quarantine-black-death-medieval> [<https://perma.cc/4LMZ-CKF2>]. This order, according to some medical historians, is considered one of the early public health achievements, because it demonstrated an early sophisticated understanding of incubation periods and balancing the public's health against important economic interests. *Id.* As Jane Stevens Crawshaw, a researcher of early modern European history explained, "[t]hey knew that you had to be very careful with goods that are being traded, because the disease could be spread on objects and surfaces, and that you tried your best to limit person-to-person contact." *Id.* Thus, dating back to the 1300s, governments enacted orders mandating quarantine and screening for infection. *Id.*

<sup>172</sup> Roos, *supra* note 171.

<sup>173</sup> Vuković, *supra* note 171.

<sup>174</sup> Tyson, *supra* note 149.

<sup>175</sup> *Id.*

<sup>176</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).



[T]hat immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, *quarantine laws*, health laws of every description, as well as laws for regulating the internal commerce of a State . . . .<sup>177</sup>

Fifty years later, Congress enacted a Joint Resolution Providing for a More Effective System of Quarantine on the Southern and Gulf Coasts.<sup>178</sup>

Protecting the public's health is firmly rooted not only in law, but also in Supreme Court jurisprudence. In *Louisiana v. Texas*, where Louisiana lawmakers sued Texas seeking to enjoin officials from administering a quarantine law, the Court noted the states' unique positions.<sup>179</sup> Chief Justice Fuller wrote:

It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian or representative of all her citizens.<sup>180</sup>

The Court observed that Louisiana sought relief not to vindicate "any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large."<sup>181</sup>

Even so, the Court dismissed the claim. In his concurrence, Justice Harlan explained, "[t]his court has often declared that the States have the power to protect the health of their people by police regulations directed to that end, and that regulations of that character are not to be disregarded because they may indirectly or incidentally affect interstate commerce."<sup>182</sup>

Moreover, the government's authority to protect the public's health extends beyond quarantine. As we noted in prior work, "[t]here is no doubt that compulsory vaccination is constitutional."<sup>183</sup> In 1905, in *Jacobson v. Massachusetts*, the Supreme Court ruled that state mandated vaccination laws are constitutional when they are "necessary for the public health or the public safety."<sup>184</sup> Since then, the Court has affirmed the constitutionality of state

<sup>177</sup> *Id.* at 2 (emphasis added).

<sup>178</sup> HARVEY E. BROWN, REPORT ON QUARANTINE ON THE SOUTHERN AND GULF COASTS OF THE UNITED STATES 2 (William Wood & Co. 1873).

<sup>179</sup> *Louisiana v. Texas*, 176 U.S. 1, 19 (1900).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 23-24 (Harlan, J., concurring). However, Justice Harlan did note "that the police power of a State cannot be so exerted as to obstruct foreign or interstate commerce beyond the necessity for its exercise, and that the courts must guard vigilantly against needless intrusion upon the field committed to Congress." *Id.* at 24 (citation omitted).

<sup>183</sup> Chemerinsky & Goodwin, *supra* note 170, at 595.

<sup>184</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

compulsory vaccination laws in other cases such as *Zucht v. King*, which upheld childhood vaccination requirements for entrance to public schools.<sup>185</sup> Thus, compulsory vaccination laws have existed in the United States in some form since the nineteenth century<sup>186</sup> and quarantine measures even before that,<sup>187</sup> giving the government powerful tools to address public health crises, stem the tides of death, and protect the public from harm.

#### D. Conclusion

Historical, persistent racial biases and barriers in society and medicine help to explain some of the racial disparities during the coronavirus pandemic. However, contemporary health disparities are also the result of current infrastructural, institutional, and political inequalities that render poor people of color vulnerable in their workplaces and homes whether with no running water in their homes, fraught and dangerous work conditions, or trepidation and fear related to immigration status.

## II. REVIVING AND TRANSFORMING JIM CROW: PRESIDENT TRUMP AND ANTI-IMMIGRATION POLICIES

To reasonably comprehend the scale and scope of Jim Crow is to recognize “the existence of the institution [that] produced the notion that the white man was of superior character, intelligence, and morality.”<sup>188</sup> Black people “were little more than livestock—to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.”<sup>189</sup> So wrote Justice Douglas in 1968, concurring in *Jones v. Mayer Co.* Justice Douglas reflected on the badges of inequality that persisted even beyond the 1964 Civil Rights Act, the 1965 Voting Rights Act, and various civil rights victories in Congress and the Court, only to conclude, “[s]ome badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.”<sup>190</sup> Reciting numerous cases to “show how prejudices, once part and parcel of slavery, still persist,”

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<sup>185</sup> *Zucht v. King*, 260 U.S. 174, 177 (1922).

<sup>186</sup> James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 849 n.126 (2002).

<sup>187</sup> The first record of New York City imposing quarantine on ships entering its harbors was in 1738. What is now Ellis Island served that purpose. See, e.g., Hicks, *supra* note 149.

<sup>188</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

Justice Douglas perceptively noted, equality “has been delayed by numerous stratagems and devices.”<sup>191</sup> We distill lessons from this.

Part II catalogs the Trump Administration’s threats and active efforts to discriminate against Latinx immigrants. It catalogs some of the many ways the Administration sought to demean, degrade, and deport, to criminalize and jail women, men, and children arriving lawfully and unlawfully, seeking asylum or immigration, from Mexico, Central and South America. Yet, even as this Article addresses several policy platforms crudely targeting Latinx communities, we count numerous other anti-immigration policy positions taken by the Administration—primarily against Latinx immigrants. As we explain, these policy platforms and executive orders stand apart from prior administrations and served as a revived Jim Crow, strategically transformed to also sow seeds of distrust and fear against people of color from Mexico, Central America, and South America.

Even prior to the detection of COVID-19 in the United States, the Trump Administration actively threatened and stereotyped Mexicans and Mexican Americans. In 2016, in an interview with CNN, Trump disparaged U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who immigrated from Mexico: “I’ve been treated very unfairly by this judge. Now, this judge is of Mexican heritage. I’m building a wall, OK?”<sup>192</sup> Accusing Judge Curiel of unethical conduct in presiding over the case of Trump University, he claimed, “[t]his judge is giving us unfair rulings. Now I say why. Well, I want to—I’m building a wall, OK? And it’s a wall between Mexico, not another country.”<sup>193</sup>

Despite data showing “inverse trajectories since the 1990s: immigration has increased, while crime has decreased,”<sup>194</sup> President Trump campaigned on anti-Mexican xenophobia and racism.<sup>195</sup> In fact, he launched his presidential campaign, centering anti-Mexican racism. On June 16, 2015, at a rally attended by thousands, “[t]hey’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”<sup>196</sup> His urgent call to that massive crowd: “[t]hey are not our friend, believe me.”<sup>197</sup>

<sup>191</sup> *Id.* at 448-49.

<sup>192</sup> Z. Byron Wolf, *Trump’s Attacks on Judge Curiel are Still Jarring to Read*, CNN (Feb. 27, 2018, 8:24 PM), <https://www.cnn.com/2018/02/27/politics/judge-curiel-trump-border-wall/index.html> [<https://perma.cc/5FEN-7JCA>].

<sup>193</sup> *Id.*

<sup>194</sup> Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime> [<https://perma.cc/U2D2-2CME>].

<sup>195</sup> See *supra* note 25.

<sup>196</sup> Full Text: *Donald Trump Announces a Presidential Bid*, *supra* note 25.

<sup>197</sup> *Id.*

He informed audiences that Mexican immigration resulted in the United States “becom[ing] a dumping ground,” because “[w]hen Mexico sends its people, they’re not sending their best.”<sup>198</sup> He often invoked murder, killing, and death in these speeches and on Twitter: “[t]hey’re killing us on the border,” “they’re killing us economically,” “they’re killing us on jobs and trade. FIGHT!” and “El Chapo and Mexican drug cartels use the border unimpeded like it was a vacuum cleaner, sucking drugs and death right into the U.S.”<sup>199</sup>

The President derided Chief Justice John Roberts’ admonition that “[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges,”<sup>200</sup> a statement made on the heels of the President’s scathing criticism of Judge Jay Bybee, a George W. Bush nominee to the United States Court of Appeals for the Ninth Circuit, for siding against the Administration in an unlawful anti-immigration proclamation.<sup>201</sup>

In response to Justice Roberts, the President turned to Twitter, tweeting:

Sorry Chief Justice John Roberts, but you do indeed have “Obama judges,” and they have a much different point of view than the people who are charged with the safety of our country. It would be great if the 9th Circuit was indeed an “independent judiciary,” but if it is why . . . are so many opposing view (on Border and Safety) cases filed there, and why are a vast number of those cases overturned. Please study the numbers, they are shocking. We need protection and security - these rulings are making our country unsafe! Very dangerous and unwise!<sup>202</sup>

Thus, our concerns and observations stem from the fact that racist symbolism profoundly impacts law to enduring, poisonous effect.<sup>203</sup> American legal history demonstrates the lingering, institutional effects of racial symbolism and how it hampers the pursuit and achievement of equality in

<sup>198</sup> *Id.*

<sup>199</sup> Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <https://time.com/4473972/donald-trump-mexico-meeting-insult> [<https://perma.cc/VMV6-MRPN>].

<sup>200</sup> *Chief Justice Roberts Rebukes Trump’s ‘Obama Judge’ Gibe*, BBC NEWS (Nov. 22, 2018), <https://www.bbc.com/news/world-us-canada-46294734> [<https://perma.cc/8ZDR-X64G>].

<sup>201</sup> *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018).

<sup>202</sup> *Chief Justice Roberts Rebukes Trump’s ‘Obama Judge’ Gibe*, *supra* note 200.

<sup>203</sup> *Cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring) (“Cases which have come to this Court depict a spectacle of slavery unwilling to die.”).

schooling,<sup>204</sup> housing,<sup>205</sup> serving on juries,<sup>206</sup> voting,<sup>207</sup> and criminal justice and social equality generally.<sup>208</sup> When rally-goers and pundits urged in 2016 to “take Trump seriously, not literally,”<sup>209</sup> sadly they misunderstood the power behind racist rhetoric and the ways that it could be weaponized by any political leader,<sup>210</sup> let alone a President.

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<sup>204</sup> *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954) (holding that state laws establishing racial segregation in public schools are unconstitutional and overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896) and the doctrine of separate but equal); *Pennsylvania v. Bd. of Trs.*, 353 U.S. 230, 231 (1957) (finding that a trust donated to a university by private funds but administered by a public body could not discriminate based on race); *Sweatt v. Painter*, 339 U.S. 629, 636 (1950) (holding that the University of Texas Law School could not deny petitioner admission solely on the basis of his race).

<sup>205</sup> *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (reversing the Supreme Court of Missouri, stating “[t]he historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.”); *Jones*, 392 U.S. at 412 (finding that racial discrimination in public and private sale and rental of property violated 42 U.S.C. § 1982); *see also id.* at 445 (Douglas, J., concurring) (“Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.”).

<sup>206</sup> *E.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 304 (1880) (holding that state laws barring African Americans from jury service violated the Equal Protection Clause).

<sup>207</sup> *E.g.*, *Lane v. Wilson*, 307 U.S. 268, 271 (1939) (striking down a twelve-day voter registration period that overwhelmingly disenfranchised African American voters).

<sup>208</sup> *See, e.g.*, Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899 (2019) (discussing the ways in which antebellum slavery endures through the exploitive system of prison labor).

<sup>209</sup> Salena Zito, *Taking Trump Seriously, Not Literally*, ATL. (Sept. 23, 2016), <https://www.theatlantic.com/politics/archive/2016/09/trump-makes-his-case-in-pittsburgh/501335> [<https://perma.cc/EV5T-F7EJ>].

<sup>210</sup> For example, consider the record of Senator Jesse Helms. He famously blocked funding for HIV/AIDS research, claiming the disease resulted from unnatural and disgusting behavior. He also blocked legislation that would ensure protections for women and was a self-proclaimed bigot. The legacy of his misogyny lives survives in domestic and international law. *See e.g.*, Steven A. Holmes, *Jesse Helms Dies at 86; Conservative Force in the Senate*, N.Y. TIMES (July 5, 2008), <http://www.nytimes.com/2008/07/05/us/politics/00helms.html> [<https://perma.cc/976G-67ZH>] (reporting and reflecting on Helms’ 52-year career, including how he fought “bitterly” against federal funding of “AIDS research and treatment, saying the disease resulted from ‘unnatural’ and ‘disgusting’ homosexual behavior”); Al Kamen, *Helms on Nominee: ‘She’s a Damn Lesbian’*, WASH. POST (May 7, 1993), <https://www.washingtonpost.com/archive/politics/1993/05/07/helms-on-nominee-shes-a-damn-lesbian/> [<https://perma.cc/R7Z2-SSEX>] (quoting Helms as saying “she’s a damn lesbian. I’m not going to put a lesbian in a position like that. If you want to call me a bigot, fine”); Carolyn Lochhead, *White House Cheers Woolsey After Row / Support Pledges on Women’s Treaty*, SFGATE (Feb. 1, 2012, 12:47 AM), <https://www.sfgate.com/politics/article/White-House-Cheers-Woolsey-After-Row-Support-2900092.php> [<https://perma.cc/6SK7-NRHJ>] (originally published on October 29, 1999) (noting that as the chairman of the Senate Foreign Relations Committee, Helms opposed the United Nations Convention on the Elimination of all Forms of Discrimination Against Women and continually blocked it); Kevin Sack, *Ideas & Trends; The Quotations of Chairman Helms: Race, God, AIDS and More*, N.Y. TIMES (Aug. 26, 2001), <https://www.nytimes.com/2001/08/26/weekinreview/ideas-trends-the-quotations-of-chairman-helms-race-god-aids-and-more.html> [<https://perma.cc/QQY2-W83A>] (providing a sampler of Helms’ commentary

As one commentator recently noted, “President Trump’s comments both publicly and behind the scenes about illegal immigrants make one thing clear: They have no place in the [P]resident’s ideas of a ‘great’ America.”<sup>211</sup> At least one reporter, the Washington Post’s Josh Dawsey, has confirmed reports that President Trump stated that migrants that illegally cross the southern border should be shot.<sup>212</sup> And, as *New York Times* reporters Michael D. Shear and Julie Hirschfeld Davis wrote:

Privately, the [P]resident had often talked about fortifying a border wall with a water-filled trench, stocked with snakes or alligators, prompting aides to seek a cost estimate. He wanted the wall electrified, with spikes on top that could pierce human flesh. After publicly suggesting that soldiers shoot migrants if they threw rocks, the [P]resident backed off when his staff told him that was illegal. But later in a meeting, aides recalled, he suggested that they shoot migrants in the legs to slow them down. That’s not allowed either, they told him.<sup>213</sup>

Semantics aside, in this Part, we turn to policy, illustrating why it is important to take President Trump and his Administration’s Jim Crow anti-immigration platforms very seriously, during and since he left office.

### A. The Border Wall

Mere days after taking office, President Trump signed Executive Order 13767, formally titled “Border Security and Immigration Enforcement Improvements,” directing the federal government to construct a wall along the southern border of the United States.<sup>214</sup> In his order, the President wrote that “[a]liens who illegally enter the United States without inspection or admission present a significant threat to national security and public

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throughout his career); Michele Goodwin, *Challenging the Rhetorical Gag and TRAP: Reproductive Capacities, Rights, and the Helms Amendment*, 112 NW. L. REV. 1417, 1427 (2018) (footnotes omitted) (“Senator Jesse Helms, notoriously revered and remembered as a vehement segregationist, sponsored an amendment to the Foreign Assistance Act, stipulating that no foreign aid from the United States shall be used to fund abortions. This became known as the Helms Amendment. The law remains in effect.”).

<sup>211</sup> Eugene Scott, *Trump’s Most Insulting—and Violent—Language Is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019, 3:21 PM), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants> [<https://perma.cc/GTW9-XY4J>].

<sup>212</sup> Josh Dawsey (@jdawsey1), Twitter (Oct. 1, 2019, 10:53 PM), <https://twitter.com/jdawsey1/status/1179227759861813249?s=20> (“Can confirm NYT reporting that Trump suggested shooting immigrants in legs, per ppl familiar.”).

<sup>213</sup> Michael D. Shear & Julie Hirschfeld Davis, *Shoot Migrants’ Legs, Build Alligator Moat: Behind Trump’s Ideas For Border*, N.Y. TIMES (Oct. 2, 2019) <https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html> [<https://perma.cc/YA6L-VTQL>]; see also *id.* (“The Oval Office meeting this past March began, as so many had, with President Trump fuming about migrants. But this time he had a solution. As White House advisers listened astonished, he ordered them to shut down the entire 2,000-mile border with Mexico—by noon the next day.”).

<sup>214</sup> Exec. Order No. 13767, 82 Fed. Reg. 8793 (2017).

safety.”<sup>215</sup> As the Executive Order tells it, “[a]mong those who illegally enter are those who seek to harm Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.”<sup>216</sup> Despite the fact that no actual construction began at the time, the Trump Administration signaled its desire to deploy agencies to carry out the President’s anti-Mexican agenda.<sup>217</sup>

One year later, the federal government entered a partial shutdown because President Trump insisted he would veto any spending bill that did not include \$5.7 billion for a border wall.<sup>218</sup> After nearly two months of deadlock, Congress passed an appropriations bill which included \$1.375 billion for the Administration to construct new “fencing” on fifty-five miles of the United States-Mexico border.<sup>219</sup> President Trump signed the bill into law on February 15, ending the shutdown.<sup>220</sup> Unsatisfied with that result, the same month, President Trump signed a declaration of National Emergency re-appropriating federal funds earmarked for other purposes (including military spending) to build the border wall.<sup>221</sup>

Despite successful lawsuits enjoining the Trump Administration from “using § 2808 funds beyond” what Congress has otherwise appropriated “for border wall construction,”<sup>222</sup> these district court victories have in turn been stayed by a divided Supreme Court. For example, district courts in California and Texas enjoined the Trump Administration from seizing funds congressionally appropriated for different purposes in service of his desire to

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* (“The purpose of this order is to direct executive departments and agencies (agencies) to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.”); see also Julie Hirschfeld Davis, *Trump Orders Mexican Border Wall to Be Built and Plans to Block Syrian Refugees*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/refugees-immigrants-wall-trump.html> [<https://perma.cc/7Z9B-3C5Q>] (describing various executive orders and programs activated to arrest and detain unauthorized immigrants with criminal records).

<sup>218</sup> Jennifer Scholtes, *Trump to Seek \$8.6B to Finish Border Wall Before 2020 Election*, POLITICO (Mar. 10, 2019 11:36AM), <https://www.politico.com/story/2019/03/10/trump-budget-border-wall-1214829> [<https://perma.cc/KDT6-ZU5F>].

<sup>219</sup> Peter Baker, Emily Cochrane & Maggie Haberman, *As Congress Passes Spending Bill, Trump Plans National Emergency to Build Border Wall*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/us/politics/trump-national-emergency-border.html> [<https://perma.cc/5FYZ-QMLX>].

<sup>220</sup> Jacob Pramuk & Cristina Wilkie, *Trump Declares National Emergency to Build Border Wall, Setting Up Massive Legal Fight*, CNBC (Feb. 15, 2019, 2:52 PM), <https://www.cnbc.com/2019/02/15/trump-national-emergency-declaration-border-wall-spending-bill.html> [<https://perma.cc/J3QW-38RS>].

<sup>221</sup> Quint Forgey, *I Didn’t Need to Do This’: Dems Pounce on Trump’s National Emergency Admission*, POLITICO (Feb. 16, 2019, 11:48 AM), <https://www.politico.com/story/2019/02/16/trump-national-emergency-democrats-1173334> [<https://perma.cc/5XKQ-B9HH>].

<sup>222</sup> *El Paso Cnty. v. Trump*, 407 F. Supp. 3d 655, 668 (W.D. Tex. 2019).

build a border wall.<sup>223</sup> Nevertheless, a divided Supreme Court intervened, issuing a stay.<sup>224</sup> In February 2020, the Trump Administration extended the emergency declaration for another year.<sup>225</sup>

### B. *Deportation and Expedited Removal*

In August 2015, then-presidential candidate Donald Trump promised during a campaign stop in Derry, New Hampshire that on “[d]ay [one] of my presidency, [illegal immigrants] are getting out and getting out fast.”<sup>226</sup> Within days of his inauguration, on January 25, 2017, President Trump delivered on that promise, signing an executive order that markedly increased the number of immigrants prioritized for deportation.<sup>227</sup> On one hand, as immigration lawyers and advocates note, the Obama Administration also deported undocumented migrants—at a broad scale.<sup>228</sup> On the other, they and even courts have recognized key distinctions. They point to the Trump Administration’s strategies to block legal migration from Mexico and a lack of compassion for children, families, and asylum seekers fleeing violence.<sup>229</sup> We echo this concern. Particularly troublesome have been the ways in which the Trump Administration conflated individuals with criminal convictions (subject to deportation even under President Obama<sup>230</sup>) alongside undocumented residents with well-established lives in the United States and

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<sup>223</sup> *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 928 (N.D. Cal. 2018), *aff’d* 929 F.3d 670 (9th Cir. 2019); *El Paso Cnty.*, 407 F. Supp. 3d at 668.

<sup>224</sup> *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (granting the application for stay); *see also id.* at 2 (Breyer, J. concurring in part and dissenting in part) (“I can therefore find no justification for granting the stay in full, as the majority does. I would grant the Government’s application to stay the injunction only to the extent that the injunction prevents the Government from finalizing the contracts or taking other preparatory administrative action, but leave it in place insofar as it precludes the Government from disbursing those funds or beginning construction. I accordingly would grant the stay in part and deny it in part.”).

<sup>225</sup> *See* Niv Elis, *Trump Extends Emergency Declaration at Border*, THE HILL (Feb. 13, 2020, 4:49 PM), <https://thehill.com/policy/finance/483039-trump-extends-emergency-declaration-at-border> [<https://perma.cc/A8L2-8E7M>] (“The notice comes just hours after reports surfaced that Trump was moving an additional \$3.8 billion in defense funds toward building the wall.”).

<sup>226</sup> *Donald Trump Emphasizes Plans to Build “Real” Wall at Mexico Border*, CBC NEWS (Aug. 19, 2015, 5:44 PM), <http://www.cbc.ca/news/world/donald-trump-emphasizes-plans-to-build-real-wall-at-mexico-border-1.3196807> [<https://perma.cc/RJ5X-6PU7>].

<sup>227</sup> *See* Exec. Order No. 13,768, 3 C.F.R. 268 (2018) (emphasis added) (“I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against *all removable aliens*.”).

<sup>228</sup> Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on Deportations: Deportee in Chief or Not?*, MIGRATION POL’Y INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not> [<https://perma.cc/7W5Y-TKNF>].

<sup>229</sup> Suzanne Gamboa, *Is Trump Carrying Out A Mass Deportation? It Feels That Way to Some*, NBC NEWS (Jan. 17, 2018, 3:58 PM), <https://www.nbcnews.com/news/latino/trump-carrying-out-mass-deportation-it-feels-way-some-n838381> [<https://perma.cc/MQ9M-99ZL>].

<sup>230</sup> Chishti et al., *supra* note 228.



no criminal records. The latter were branded “fugitive[s]” under the Trump Administration,<sup>231</sup> evoking antebellum and Jim Crow imagery.

For example, after Jorge Garcia—a father of two from Detroit who had been in the United States for thirty years—was deported to Mexico, his wife told a reporter, “under the Obama [A]dministration, we were safe.”<sup>232</sup> Mr. Garcia had no criminal history or record and for years his family had been working to change his immigration status.<sup>233</sup> While his age prevented him from qualifying for Deferred Action for Childhood Arrivals (DACA), in 2009 the family “was granted a stay of deportation” and thereafter met annually with ICE officials.<sup>234</sup> However, their world changed dramatically when President Trump came into office, and in November 2017 Mr. Garcia’s family was informed that he would be detained.<sup>235</sup> His treatment was, in fact, part of a trend; in the 2017 fiscal year, ICE conducted more arrests than in the three prior years under the Obama Administration.<sup>236</sup>

Moreover, immigration lawyers and advocates note the racism and white supremacy reflected in President Trump’s immigration policies.<sup>237</sup> For

<sup>231</sup> See, e.g., *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGRATION & CUSTOMS ENF’T (Aug. 5, 2020), <https://www.ice.gov/removal-statistics/2017> [<https://perma.cc/S2J9-8DT2>] (“Of these arrests, 92 percent had a criminal conviction, a pending criminal charge, were an ICE fugitive or were processed with a reinstated final order. In FY2017, ICE conducted 226,119 removals.”).

<sup>232</sup> Gamboa, *supra* note 229 (quoting Cindy Garcia).

<sup>233</sup> Daniella Silva, *Michigan Father Deported to Mexico After Living in U.S. For Three Decades*, NBC NEWS (Jan. 16, 2018, 7:57 PM), <https://www.nbcnews.com/news/us-news/michigan-father-deported-mexico-after-living-u-s-three-decades-n838211> [<https://perma.cc/63LZ-BKN2>].

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> See, e.g., *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, *supra* note 231 (“In FY2017, ICE ERO conducted 143,470 overall administrative arrests, which is the highest number of administrative arrests over the past three fiscal years.”).

<sup>237</sup> See *ACLU Statement on Trump’s Intended Immigration Ban*, ACLU (April 21, 2020), <https://www.aclu.org/press-releases/aclu-statement-trumps-intended-immigration-ban> [<https://perma.cc/CK3N-D7QG>] (“We cannot allow President Trump to exploit this pandemic to advance his racism and xenophobia.”); David R. Jones, *A Racist Trump Declares War On Immigrants of Color*, CMTY. SERV. SOC’Y (Aug. 22, 2019), <https://www.cssny.org/news/entry/a-racist-trump-declares-war-on-immigrants-of-color> [<https://perma.cc/26PQ-YGST>] (“Truth be told, the [P]resident’s vile politics of racism, nativism, white supremacy and xenophobia has already made the country unbearable for a lot of us.”); Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 203 (2019) (“To the extent that the President’s statements reflect a view of U.S. national identity as centered in white identity, they render immigration policies suspect even if the President has not disparaged the particular nonwhite nationalities affected.”); Brentin Mock, *The Racism Behind Trump’s New ‘Public Charge’ Immigration Policy, Explained*, BLOOMBERG CITYLAB (Aug. 14, 2019, 11:02 AM), <https://www.bloomberg.com/news/articles/2019-08-14/the-racist-roots-of-trump-s-public-charge-policy> [<https://perma.cc/3G2W-CS9L>] (“[R]acist history heavily informs Trump’s immigration policies today . . .”); Azadeh Erfani, *Closing The Border Was an Illegal, Racist Distraction from a Failed COVID-19 Response. Then, It Became Indefinite*, NAT’L IMMIGRANT JUST. CTR. (June 22, 2020), <https://immigrantjustice.org/staff/blog/closing-border-was-illegal-racist-distraction->

example, the manner in which the deportation policies were introduced and executed,<sup>238</sup> the expansive scale of the Trump Administration's anti-immigration policies,<sup>239</sup> the inhumane detention policies enforced on children,<sup>240</sup> and the manner in which ICE specifically targeted Mexican migrants (and continues to do so).<sup>241</sup> As one commentator explained, "the [Trump] [A]dministration's attempt to return to the peak deportation levels under Obama or surpass them, combined with Trump's rhetoric and his drive to slash legal immigration, have whipped up enough fear to make some feel a mass roundup is underway."<sup>242</sup>

Accordingly, the Trump Administration's deportation and expedited removal policies were marked by the Administration's failure to adhere to well-established procedures, as well as violations of immigration and constitutional law, resulting in the denial of due process to persons migrating to the United States.

Dispensing with Obama-era rules, the Trump Administration authorized nondocumented persons to be considered a priority for deportation even if they committed no serious criminal offense.<sup>243</sup> The number of arrests made under this new policy rose 30% in fiscal year 2017 after the Trump Administration enacted Executive Order 13,768.<sup>244</sup> Similarly, in 2018, the Customs and Border Protection and Immigration and Customs Enforcement (ICE) removed nearly 340,000 people considered "unauthorized immigrants," a sharp increase of 17% from the prior year.<sup>245</sup>

The Trump Administration's deportation policies were also marked by procedural flaws and unlawful promulgation of agency rules.<sup>246</sup> This is not simply our opinion, but that of courts that have issued injunctions throughout the span of Trump's presidency, blocking implementation or expansion of the

failed-covid-19-response-then-it-became [https://perma.cc/Q4Q4-E5JB] ("[T]he Trump administration's fury of anti-immigrant policies leads back to an author with ample white supremacist ties.").

<sup>238</sup> Exec. Order No. 13,768, 3 C.F.R. 268 (2018).

<sup>239</sup> Mock, *supra* note 237.

<sup>240</sup> *E.g.*, Gamboa, *supra* note 229 (quoting Luis, a 16-year-old in fear of deportation, as saying "at any moment I feel I could just be taken away").

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Exec. Order No. 13,768, 3 C.F.R. 268 (2018).

<sup>244</sup> John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. GRP. (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump> [https://perma.cc/FL99-NBAM].

<sup>245</sup> *Id.*

<sup>246</sup> *See, e.g.*, *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 44 (D.D.C. 2019), *rev'd sub nom.* *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020) (holding that DHS had failed to engage in the required notice-and-comment rulemaking when expanding eligibility criteria for expedited removal).

policies.<sup>247</sup> Our close review of the policies reveals arbitrary and capricious implementation. We also note the policies were frequently beset by violations of law. As was the case more generally with the Trump Administration's immigration policies, there was little care about the potential and actual impacts on undocumented noncitizens, their families, and communities. Whether ignoring these matters was by fault or design, is unclear. What is clear is the Trump Administration rushed to enact restrictions on immigration with such velocity as to fail to take into account governmental responsibilities, including to engage in fact-finding and employ reasoned decisionmaking as a matter of evaluating the consequences of their policies.<sup>248</sup>

The story of its expedited removal policy is illustrative of these behaviors. In 2019, the Trump Administration issued a rule expanding the "number of migrants who can be subject to a sped-up deportation process without oversight by an immigration judge."<sup>249</sup> Most significantly, migrants subject to expedited removal "are not entitled to a review of their cases in front of an immigration judge or access to an attorney."<sup>250</sup> Because of these consequences, the designation had previously been limited to persons apprehended within 100 miles of a U.S. land border who had been in the United States for fewer than 14 days.<sup>251</sup> But under the new policy, immigration officers could apply this designation to migrants anywhere in the country for up to two years after their arrival.<sup>252</sup>

Represented by the American Civil Liberties Union ("ACLU"), a group of plaintiffs—including Make the Road New York, La Union Del Pueblo Entero ("LUPE"), and WeCount!—challenged the new policy under the Administrative Procedures Act. In *Make the Road New York v. McAleenan*, the question presented to Judge Ketanji Brown Jackson was whether the Department of Homeland Security (DHS) had unlawfully "dispensed with

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<sup>247</sup> See *infra* notes 253–58; see also, e.g., Josh Gerstein, *Judge Permanently Blocks Another Trump Immigration Policy*, POLITICO (Feb. 6, 2020), <https://www.politico.com/news/2020/02/06/judge-blocks-another-trump-immigration-policy-11705> [<https://perma.cc/JA37-ED8T>] ("A federal judge issued a permanent nationwide injunction Thursday against yet another Trump administration immigration policy: a move to make it harder for foreigners to remain in the U.S. after their legal status runs out. U.S. District Court Judge Loretta Biggs said the 2018 action by the U.S. Citizenship and Immigration Service ran afoul of federal law.").

<sup>248</sup> See *Make the Rd. N.Y.*, 405 F. Supp. 3d at 56 ("With respect to the policy at issue here, the potential devastation is so obvious that DHS can be fairly faulted for its unexplained failure to predict, and attempt to mitigate, the fully foreseeable [consequences].").

<sup>249</sup> Mica Rosenberg, *Groups Sue To Block Trump Administration's Expansion of Rapid Deportations*, REUTERS (Aug. 6, 2019, 4:06 PM), <https://www.reuters.com/article/us-usa-immigration-deportation/groups-sue-to-block-trump-administrations-expansion-of-rapid-deportations-idUSKCN1UW27K> [<https://perma.cc/Z55Z-C3UC>].

<sup>250</sup> *Id.* Indeed, the Supreme Court recently held that persons subject to expedited removal cannot even seek habeas review of their deportation. *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969–71 (2020).

<sup>251</sup> Rosenberg, *supra* note 249.

<sup>252</sup> Notice Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019).

core procedural prerequisites when it suddenly announced that the agency was designating undocumented non-citizens who have been in this country for up to two years, and who are located far beyond the border, as eligible for ‘expedited removal’ from the United States.”<sup>253</sup> As with so many other Trump Administration immigration policies, the court found that it did.<sup>254</sup>

Judge Jackson’s opinion made several important observations about the Trump Administration’s approach to immigration law. First, in rushing to implement the expedited expulsion policy, DHS ignored basic standards of law.<sup>255</sup> Final agency actions are required to undergo notice-and-comment rulemaking—a process designed to give interested persons “an opportunity to participate in the rule making.”<sup>256</sup> DHS ignored this responsibility, instead publishing the Administration’s new expedite policy with no advanced warning or opportunity for protest.<sup>257</sup> But just as importantly, the court also found that DHS engaged in limited—if any—review of the established defects in the existing expedited removal policy before expanding it to include broader categories of noncitizens.<sup>258</sup> In other words, DHS not only failed to adhere to well-established agency rulemaking standards, it also enacted a defective rule.

The United States Court of Appeals for the District of Columbia Circuit reversed this decision, holding that the expansion of expedited removal was not reviewable under the Administrative Procedures Act.<sup>259</sup> The D.C. Circuit said: “But because Congress committed the judgment whether to expand expedited removal to the Secretary’s ‘sole and unreviewable discretion,’ the Secretary’s decision is not subject to review under the APA’s standards for agency decisionmaking. Nor is it subject to the APA’s notice-and-comment rulemaking requirements.”<sup>260</sup> But this dismissal for lack of jurisdiction does not deny the crucial flaws found by the federal district court.

Yet, beyond the procedural and substantive flaws in DHS’s expedited removal policy, we raise one final concern. The fear and trauma imposed on undocumented noncitizens as well as documented and undocumented lawful

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<sup>253</sup> *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 9 (D.D.C. 2019), *rev’d sub nom.* *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

<sup>254</sup> *Id.* at 11-12.

<sup>255</sup> *Make the Rd. N.Y.*, 405 F. Supp. 3d at 44-60.

<sup>256</sup> 5 U.S.C. § 553(c).

<sup>257</sup> *See Make the Rd. N.Y.*, 405 F. Supp. 3d at 48 (“[I]mportantly, the policy change that the Notice announced ‘was made effective upon publication,’ . . .”).

<sup>258</sup> *See id.* at 55 (“Because of the potentially serious implications that DHS’s expansion of expedited removal might have on the persons who would be subjected to expedited removal . . . the Court is persuaded that . . . the agency failed to engage in reasoned decision making, as required by law.”); *see also id.* (“[A]n agency cannot possibly conduct reasoned, non-arbitrary decision making concerning policies that might impact *real* people and not take such *real life circumstances* into account.”).

<sup>259</sup> *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

<sup>260</sup> *Id.* at 618.

residents is evocative of distress and suffering resulting from antebellum fugitive slave laws.<sup>261</sup> Fugitive slave laws caused even “free” Blacks to fear that they could be “captured” and reduced back to the conditions of slavery with limited contingencies for their protection from bounty hunters whose only goals were capture of Black persons and payments by white slaveholders, further fueling a cruel and inhumane system.<sup>262</sup> Similar fears seem unavoidable, particularly as the Trump Administration failed, in this case, to make any contingencies for mistakes.<sup>263</sup> However, even if they had, any appreciation for the context in which these policies have been written and implemented suggests that contingencies might do little to address the underlying, persistent, and unavoidable fear of rapid deportation based on race or national origin. It is why the Trump policies reflect a new Jim Crow-era in the way the federal government has treated immigrants during this time in American history.

This is also evident in the asylum policies adopted by the Trump Administration. On November 9, 2018, President Trump signed a proclamation suspending the right of asylum to any “aliens” crossing the United States-Mexico border outside of official points of entry with narrow exceptions, such as visa holders.<sup>264</sup> This proclamation was particularly cruel and antithetical to immigration and asylum law given the nature of asylum; individuals seeking asylum are often fleeing circumstances where they fear for their lives because of domestic violence, death threats, attempted murder, and sexual violence.<sup>265</sup> Despite this, an injunction halting the policy only just survived appellate

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<sup>261</sup> Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864). Perhaps the most shocking of all fugitive slave cases was that of Margaret Garner, who killed her own daughter rather than allow her to be returned to slavery. Julius Yanuck, *The Garner Fugitive Slave Case*, 40 MISS. VALLEY HIST. REV. 47, 47 (1953); Rebecca Carroll, *Overlooked: Margaret Garner*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/obituaries/margaret-garner-overlooked.html> [<https://perma.cc/BYR4-7RKW>] (“Garner found herself in that fleeting, lightless instant of a mother’s incongruous love on a frigid night, when slave catchers surrounded her cousins’ home and when she made the decision, in one soul-chilling moment, to slit the throat of her 2-year-old daughter rather than return her to slavery.”).

<sup>262</sup> *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (holding that enslavers are authorized under the Constitution to “seize and recapture” an enslaved person); see also RICHARD BELL, *STOLEN: FIVE FREE BOYS KIDNAPPED INTO SLAVERY AND THEIR ASTONISHING ODYSSEY HOME* (2019) (detailing the horrors of the experiences of free Black children who became enslaved).

<sup>263</sup> See *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 60 (D.D.C. 2019), *rev’d sub nom. Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020) (“[A]n administrative agency that just plows ahead and announces a new rule, without taking the reasonably foreseeable potential negative impacts of the policy determination into account . . . might as well have picked its policy out of a hat.”).

<sup>264</sup> Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 15, 2018).

<sup>265</sup> Robert Barnes, *Supreme Court Denies Trump Administration Request to Immediately Enforce New Asylum Rules*, WASH. POST (Dec. 21, 2018, 2:54 PM), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-denies-trump-administration-request-to-immediately-enforce-new-asylum-rules/2018/12/21/e9cdaf32-03c8-11e9-b6a9-0aa5c2fcc9e4\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-denies-trump-administration-request-to-immediately-enforce-new-asylum-rules/2018/12/21/e9cdaf32-03c8-11e9-b6a9-0aa5c2fcc9e4_story.html) [<https://perma.cc/Y38E-ZBAP>].

review—Justices Alito, Gorsuch, Kavanaugh, and Thomas all voted to “grant[] the [A]dministration’s request to lift the hold on the ban.”<sup>266</sup>

Undeterred and perhaps emboldened by losses in the Ninth Circuit and Supreme Court, President Trump, through the Department of Homeland Security, next announced the “Migrant Protection Protocols.”<sup>267</sup> Euphemistically known as the “Remain in Mexico” program, the policy permits the federal government to release asylum-seekers to Mexico to await their hearings in the United States.<sup>268</sup> According to an investigative report, nearly 60,000 asylum-seekers have been diverted to Mexico.<sup>269</sup> Among them, more than 600 suffered the type of violence their migration sought to avoid, including kidnapping, rape, torture, and assault.<sup>270</sup> As of September 2019, only about 15% of relocated asylum seekers had their petitions heard: just 11 having been granted asylum, with more than 5,000 cases denied and 4,471 cases dismissed without being evaluated.<sup>271</sup>

### C. *Children in Cages: Trump Administration Family Separation Policy*

On May 7, 2018, the Justice Department announced a “zero tolerance” policy related to unauthorized crossings of the United States-Mexico border.<sup>272</sup> Under the policy, “all adults entering the United States illegally would be subject to criminal prosecution, and if accompanied by a minor child, the child would be separated from the parent.”<sup>273</sup> Pursuant to this policy and under the direction of the Justice Department, federal authorities separated children from their parents, siblings, relatives, or other guardians

<sup>266</sup> Caroline Kelly, Ariane de Vogue & Dan Berman, *Supreme Court Upholds Block on Trump’s Asylum Ban*, CNN (Dec. 22, 2018, 10:35 AM), <https://www.cnn.com/2018/12/21/politics/supreme-court-upholds-block-on-trumps-asylum-ban/index.html> [<https://perma.cc/Q7T3-4XMQ>]; *Trump v. E. Bay Sanctuary Covenant*, 139 S.Ct. 782 (2018) (mem).

<sup>267</sup> Press Release, Dep’t of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/396W-Y4KS>].

<sup>268</sup> *Id.*; see also HOPE BORDER INST., BORDER OBSERVATORY, 2020 SITUATION REPORT: REMAIN IN MEXICO 2 (2020), [https://7dac4932-ebde-4b1a-96f5-fac5c6bec362.filesusr.com/ugd/e07ba9\\_42dc2e4ae15b49e5a833d297491fae6d.pdf](https://7dac4932-ebde-4b1a-96f5-fac5c6bec362.filesusr.com/ugd/e07ba9_42dc2e4ae15b49e5a833d297491fae6d.pdf) [<https://perma.cc/7SZS-RTGD>].

<sup>269</sup> Tom Phillips, *Trump’s “Shameful” Migrant Stance Condemns Thousands to Violent Limbo in Mexico*, THE GUARDIAN (Dec. 20, 2019, 4:30 AM), <https://www.theguardian.com/us-news/2019/dec/20/immigration-remain-in-mexico-policy-border-migrants> [<https://perma.cc/CPG7-C4FL>].

<sup>270</sup> *Id.*

<sup>271</sup> Gustavo Solis, *Remain in Mexico Has a 0.1 Percent Asylum Grant Rate*, SAN DIEGO UNION-TRIB. (Dec. 15, 2019, 4:52 AM), <https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-12-15/remain-in-mexico-has-a-0-01-percent-asylum-grant-rate> [<https://perma.cc/Y8ZZ-LZT2>].

<sup>272</sup> Jeff Sessions, U.S. Att’y Gen., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/Q3UL-BGNV>].

<sup>273</sup> Ms. L. v. U.S. Immigr. & Customs Enf’t, 310 F.Supp. 3d 1133, 1136 (S.D. Cal. 2018).

who accompanied them across the border illegally.<sup>274</sup> The Trump Administration incarcerated adults in federal jails while detaining children under the aegis of the Department of Health and Human Services in so-called “shelters” that were little more than cages.<sup>275</sup> In quick succession, the Trump Administration issued an additional Executive Order purporting to “preserve” the family unit, although without a commitment to reunify children with their parents, and to maintain “rigorous[] enforcement of immigration laws.”<sup>276</sup>

The policy sparked domestic and international outrage. The chilling imagery of children pulled from their parents’ arms, detained in cages, sleeping on concrete floors, eating frozen burritos, sleeping under blankets apparently made from foil were captured by journalists, photographers, and members of Congress.<sup>277</sup> A 2018 PBS Frontline investigation reported that almost 3,000 children were separated from their families.<sup>278</sup> Reports of children experiencing molestation, hunger, and deprivation of their basic needs (soap, bathing, toothpaste) framed the Trump Administration’s enforcement of their “zero tolerance” policy.<sup>279</sup>

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<sup>274</sup> *Id.* at 1136-37; see also Sari Horwitz & Maria Sacchetti, *Sessions Vows to Prosecute All Illegal Border Crossers and Separate Children from Their Parents*, WASH. POST (May 7, 2018, 6:07 PM), [https://www.washingtonpost.com/world/national-security/sessions-says-justice-dept-will-prosecute-every-person-who-crosses-border-unlawfully/2018/05/07/e1312b7e-5216-11e8-9c91-7dab596e8252\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-says-justice-dept-will-prosecute-every-person-who-crosses-border-unlawfully/2018/05/07/e1312b7e-5216-11e8-9c91-7dab596e8252_story.html) [<https://perma.cc/MC88-MZ7L>] (quoting Jeff Sessions, then Attorney General, as saying “If you’re smuggling a child [across the border], then we’re going to prosecute you, and that child will be separated from you . . . . If you don’t want your child separated, then don’t bring them across the border illegally.”).

<sup>275</sup> See Manny Fernandez, *Inside the Former Walmart That is Now a Shelter for Almost 1,500 Migrant Children*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html> [<https://perma.cc/T4LC-57XR>] (describing “[t]he converted retail store at the southern tip of Texas” that, as of June 2018, was “the largest licensed migrant children’s shelter in the country” housing nearly 1,500 boys aged 10 to 17 who were caught illegally crossing the border”); *Parents of 545 Children Separated at U.S.-Mexico Border Have Not Been Located*, NPR (Oct. 24, 2020), <https://www.npr.org/2020/10/24/927384388/parents-of-545-children-separated-at-u-s-mexico-border-have-not-been-located> [<https://perma.cc/62JL-R4DA>] (discussing the “cages that everyone talks about” in which children were held).

<sup>276</sup> *Ms. L.*, 310 F. Supp. 3d at 1136; see also Exec. Order No. 13,841, 3 C.F.R. 841 (2019).

<sup>277</sup> See, e.g., Fernandez, *supra* note 275 (describing a media tour of one of the largest migrant children’s shelters in the country).

<sup>278</sup> Leila Miller, *After Deadline to Reunited Them, Hundreds of Children Remain Separated*, PBS (July 27, 2018), <https://www.pbs.org/wgbh/frontline/article/after-deadline-to-reunite-them-hundreds-of-children-remain-separated> [<https://perma.cc/94UK-4US5>].

<sup>279</sup> For example, U.S. District Judge Dolly Gee found in 2017 that there was sufficient evidence that migrant children were not provided with adequate food and water, personal hygiene items, or sanitary facilities. Additionally, Judge Gee held that there was sufficient evidence on the claims of improperly cold temperatures and inadequate sleeping conditions in the facilities. *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1041, 1053-61 (C.D. Cal. 2017). The Trump Administration appealed this decision, but the Ninth Circuit dismissed their appeal in 2019. *Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019). This case garnered media attention. For example, the Washington Post in 2019 wrote about the appeal and specifically the horrible conditions in which migrant children were being held:

The ACLU brought suit, asking the court to grant a classwide preliminary injunction to halt the practice of separation and to reunite all the separated families.<sup>280</sup> Its argument was simple: “Thousands of families have been torn apart by this inhumane practice, which is designed to scare other families from seeking refuge in the United States.”<sup>281</sup>

The court agreed, ordering an immediate reunification of separated children with their parents.<sup>282</sup> In his opinion, Judge Dana Sabraw was scathing in his assessment of the government’s conduct:

[T]here is no genuine dispute that the Government was not prepared to accommodate the mass influx of separated children. Measures were not in place to provide for communication between governmental agencies responsible for detaining parents and those responsible for housing children, or to provide for ready communication between separated parents and children. There was no reunification plan in place, and families have been separated for months. Some parents were deported at separate times and from different locations than their children.<sup>283</sup>

Even families that lawfully entered the United States at authorized ports of entry “seeking asylum were separated.”<sup>284</sup> And those that entered unlawfully

[M]igrants in Rio Grande Valley facilities were hungry, with some eating only “sandwiches of two pieces of dry bread and one slice of ham.” They were thirsty, with up to 20 migrants sharing the same cup to drink from the water cooler. They were embarrassed to use a toilet in front of 50 other people and they couldn’t take a shower or brush their teeth or even wash their hands with soap and dry them with a towel, the judge found. At night, they couldn’t sleep. The lights were left on, as they shivered beneath an aluminum blanket on the concrete floor . . .

Meagan Flynn, *Detained Migrant Children Got No Toothbrush, No Soap, No Sleep. It’s No Problem, Government Argues.*, WASH. POST (June 21, 2019, 6:59 AM), <https://www.washingtonpost.com/nation/2019/06/21/detained-migrant-children-no-toothbrush-soap-sleep> [<https://perma.cc/L897-B546>]. Also in 2019, the New York Times reported on the shocking number of migrant children sexually abused while being held in detention. See Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html> [<https://perma.cc/KMN2-3SNM>] (“The federal government received more than 4,500 complaints in four years about the sexual abuse of immigrant children who were being held at government-funded detention facilities, including an increase in complaints while the Trump administration’s policy of separating migrant families at the border was in place, the Justice Department revealed this week.”).

<sup>280</sup> *Ms. L.*, 310 F. Supp. 3d at 1141.

<sup>281</sup> Press Release, Am. Civ. Liberties Union, *Federal Court Orders Reunification of Thousands of Parents and Children Torn Apart by Trump Family Separation Policy* (June 26, 2018), <https://www.aclu.org/press-releases/federal-court-orders-reunification-thousands-parents-and-children-torn-apart-trump> [<https://perma.cc/QU9P-6PZV>].

<sup>282</sup> *Ms. L.*, 310 F. Supp. 3d at 1149.

<sup>283</sup> *Id.* at 1136-37.

<sup>284</sup> *Id.* at 1137.



were not reunited even “following the parent’s completion of criminal proceedings and return to immigration detention.”<sup>285</sup>

In finding a violation of the families’ constitutional rights, the court held that “[t]he unfortunate reality is that under the present system, migrant children are not accounted for with the same efficiency and accuracy as *property*.”<sup>286</sup> The court found the Trump Administration acted unlawfully, violating the constitutional rights of the families. “What Plaintiffs . . . seek by way of the requested injunction is to uphold their rights to family integrity and association while their immigration proceedings are underway. This right, specifically, the relationship between parent and child, is ‘constitutionally protected,’ . . . and ‘well established.’”<sup>287</sup>

The court ordered immediate reunification, giving the government fourteen days for children under five and thirty days for all others.<sup>288</sup> Yet by the time of the court’s order, the Trump Administration had already lost track of parents, deported others, and otherwise proved generally inept at reuniting families.<sup>289</sup> Six months later, the DHS Inspector General issued a report “revealing that thousands more children than previously disclosed may have been torn from their parents . . . months before the policy was even announced.”<sup>290</sup> The report exposed the unconscionable scale of the Trump Administration’s immigration policies. Not only had the Administration shown hostility toward Latinx immigrants, but it had also adopted punitive policies toward noncitizen families, thereby harming children.<sup>291</sup>

Finally, the Inspector General’s report exposed an additional issue: the Trump Administration’s incompetence in addressing asylum cases.<sup>292</sup> In short, the Inspector General offered two key takeaways. First, “[t]he total number of children separated from a parent or guardian by immigration authorities is

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 1144.

<sup>287</sup> *Id.* at 1148 (first citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); and then citing *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1079 (9th Cir. 2011)).

<sup>288</sup> *Id.* at 1149.

<sup>289</sup> See The Editorial Board, Opinion, *The Lost Children of the Trump Administration*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/opinion/family-separation-border-trump.html> [<https://perma.cc/N2DZ-4ADQ>] (“Why can’t the government account for how many children it separated from their parents at the border?”); *Parents of 545 Children Separated at U.S.-Mexico Border Have Not Been Located*, *supra* note 275 (“Federal court filings made this week by the [ACLU] and the Justice Department say that the parents of some 545 migrant children who are currently in the United States have not been found. These parents were separated from their children at the U.S. border by border officials under President Trump’s zero tolerance policy from 2017 to 2018, and the filing says the parents are now unreachable.”).

<sup>290</sup> The Editorial Board, *supra* note 289.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

unknown.”<sup>293</sup> Second, “thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court, and HHS has faced challenges in identifying separated children.”<sup>294</sup>

### III. IMMIGRATION AND PUBLIC HEALTH DURING A PANDEMIC

Collectively, the health and policy concerns described and analyzed in Parts I and II provide foundation for and foreground the question and final arguments presented in Part III of this Article: *Is it lawful for a president to deny federal funds to sanctuary cities and states if they refuse to assist with its administration’s immigration policies?* As demonstrated in Parts I and II, institutional and infrastructural conditions render documented and undocumented citizens and noncitizens from Latinx communities vulnerable to both the pandemic and harsh anti-immigration policies implemented by the Trump Administration. Some of these policies have been enjoined because the Administration lacked the legal authority to implement or enforce them. Others—though not all—have been rolled back by the Biden Administration.<sup>295</sup> As we showed in Part II, given irreparable harms to communities and the potential or likelihood for mistaken enforcement of immigration policies against persons who are not subject to the Administration’s rules, these policies present serious dangers for society at large.<sup>296</sup>

Specifically, in Part III we address the Trump Administration’s unlawful conditioning of federal funds on sanctuary cities *outing* undocumented noncitizens. This raises important, urgent questions for law. That is, can the President force local governments to enforce federal statutes? If Congress cannot set conditions on spending to force or coerce counties, cities, or states to participate in a federal program against their will can the President? We think not.

These questions gain even greater urgency in light of the COVID-19 pandemic, particularly as the President’s strategies to condition funding reach beyond criminal law enforcement to all agencies. Thus, in Part III, we examine three distinct strategies articulated by President Trump that involve

<sup>293</sup> U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., HHS OIG ISSUE BRIEF, OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 1 (2020), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> [<https://perma.cc/A6MD-UBYR>].

<sup>294</sup> *Id.*

<sup>295</sup> See, e.g., Ted Hesson & Steve Holland, *Biden Moves to Reverse Trump Immigration Policies, Too Slowly For Some*, REUTERS (Feb. 2, 2021, 5:13 AM), <https://www.reuters.com/article/us-usa-biden-immigration-actions/biden-moves-to-reverse-trump-immigration-policies-too-slowly-for-some-idUSKBN2A212D> [<https://perma.cc/MGD6-UHQ6>].

<sup>296</sup> See *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 11-12 (D.D.C. 2019) (noting that the administration’s policies had “serious implications for society writ large” because they had already harmed immigrant communities and could be mistakenly applied), *rev’d sub nom.* *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020) (reversing the district court’s conclusion that the Administrative Procedure Act provided plaintiffs a cause of action).

withholding federal funds to local jurisdictions. We believe these policies violate the law; two have been implemented and we feared, with a possible second term, President Trump would use the power of his office to engage in immigration strategies that violate the law.

In Section III.A, we turn to President Trump's executive order, *Enhancing Public Safety in The Interior of the United States* (E.O. 13,768). According to its plain language, E.O. 13,768 was signed to halt funding to sanctuary cities that refuse to comply with his immigration policies.<sup>297</sup> In Section III.B, we focus on a second strategy deployed by President Trump, using agencies as a shield to carry out an unlawful immigration policy agenda. We address recent litigation in the Second, Seventh, and Ninth Circuits, arguing that the Trump Administration's policy of withholding federal funding to "sanctuary cities" that refuse to collaborate with ICE, surveil noncitizens, or deny services, is an unconstitutional abuse of power. At a practical level, such unconstitutional demands are an imperfect and unlawful proxy for enforcing federal immigration policy.

We argue in Section III.C that conditioning federal funds on cities "outing" nondocumented individuals, particularly during a pandemic, undermines sanctuary cities' interests in *protecting* their peoples. The harms, as we articulate, are multifold, including interfering with the objective nature of evaluating public health and responding to it; undercutting confidentiality and trust in the physician-patient relationship; undermining screening and treatment objectives; and chilling interest and follow-through in seeking care. These concerns are rendered more visible in the wake of COVID-19.

### A. Sanctuary City Litigation

#### 1. What is a Sanctuary City?

"Sanctuary city" and "welcoming city" are terms generally describing local municipalities that have chosen to prioritize building trust and cooperation between local immigrant communities and city services such as law enforcement or public health.<sup>298</sup> Even as these cities have become the

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<sup>297</sup> Exec. Order No. 13,768, 3 C.F.R. § 268 (2018) ("It is the policy of the executive branch to . . . [e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law . . .").

<sup>298</sup> While there is no specific definition for a sanctuary city, two scholars recently offered a helpful frame of reference for understanding how the Trump Administration has defined this term. See Rose Cuisson Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1217-25 (2019) (suggesting three definitions used by the administration: a first general meaning, derived from Executive Order 13,768, refers to localities that "willfully violate Federal law in an attempt to shield aliens from removal"; a second definition limits the first to "only . . . those jurisdictions that receive grants from the Department of Justice (DOJ) or Department of Homeland

focus of significant media coverage during the Trump Administration,<sup>299</sup> in some cases the policies date back decades. For example, in Chicago, the city’s “Welcoming City” policy—“designed to build trust and cooperation between the Chicago Police Department and local immigrant communities”—dates back to the 1980s.<sup>300</sup> According to the city, “at its core, the policy prioritizes local crime-fighting and public safety over the policing of federal civil immigration infractions.”<sup>301</sup> Over the years, the city refined the policy, prescribed it through mayoral executive orders, and in 2006 formalized it through its unanimously adopted Welcoming City Ordinance (WCO).<sup>302</sup>

In 2012, during the Obama Administration, Chicago further revised and enhanced its WCO to achieve what it believes is “[o]ne of the City’s most important goals,” which is to enhance the city’s “relationship with the immigrant communities.”<sup>303</sup> Local leaders believed that dismantling barriers and obstacles between the city’s immigrant communities, “both documented citizens and those without documentation status,” and police and other law enforcement agencies was pivotal to “prevent[ing] and solv[ing] crimes and maintain[ing] public order, safety, and security in the entire City.”<sup>304</sup>

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Security (DHS)” conditioned on cooperation with immigration authorities; and a third “refers to jurisdictions that do not honor civil detainer requests by ICE officials”); *see also* Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017) <https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html?smid=pl-share> [<https://perma.cc/LL29-S3SK>] (defining “sanctuary city” as “a term that has been used to generally describe places that limit how local law enforcement can cooperate with federal immigration agents”); Darla Cameron, *How Sanctuary Cities Work, and How Trump’s Blocked Executive Order Could Have Affected Them*, WASH. POST (Nov. 21, 2017), <https://www.washingtonpost.com/graphics/national/sanctuary-cities> [<https://perma.cc/3YZL-7HCA>] (describing various jurisdictions’ “sanctuary” practices).

<sup>299</sup> For just a few examples of the attention these policies have received in recent years, see generally Caitlin Dickerson, Zolan Kanno-Youngs & Annie Correal, *Flood the Streets: ICE Targets Sanctuary Cities with Increased Surveillance*, N.Y. TIMES (Mar. 5, 2020) <https://www.nytimes.com/2020/03/05/us/ICE-BORTAC-sanctuary-cities.html> [<https://perma.cc/PXB9-KB2D>]; Caitlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020) <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html> [<https://perma.cc/L73D-CSCS>]; Eli Rosenberg, *Federal Judge Blocks Trump’s Executive Order on Denying Funding to Sanctuary Cities*, WASH. POST (Nov. 21, 2017, 1:04 AM), <https://www.washingtonpost.com/news/politics/wp/2017/11/21/federal-judge-blocks-trumps-executive-order-on-denying-funding-to-sanctuary-cities> [<https://perma.cc/6YPB-3795>]. Sanctuary cities have also gotten attention from some legal scholars. *See, e.g.*, Kit Johnson, *The Mythology of Sanctuary Cities*, 28 S. CAL. INTERDISC. L.J. 589, 589-90 (2019) (questioning popular conceptions of sanctuary cities as dangerous and lawless); Grace Benton, *The Legality of Sanctuary Cities*, 33 GEO. IMMIGR. L.J. 139, 144 (2018) (arguing that sanctuary cities do not violate constitutional norms when they refuse to cooperate with federal immigration enforcement).

<sup>300</sup> Brief for Plaintiff-Appellee at 1, *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (No. 17-2991).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 2.

<sup>304</sup> Welcoming City Ordinance, CHI., ILL., CODE § 2-173-005 (2020).

Chicago's WCO policy affirmatively restricts participation in federal immigration enforcement, with some exceptions such as cooperating with federal immigration enforcement efforts associated with known gang members or individuals convicted of a felony.<sup>305</sup> Otherwise, the WCO and the Municipal Code of Chicago (MCC) prohibit local authorities and city officials from collecting, investigating, or disclosing a person's immigration status or citizenship unless required by state or federal law, authorized in writing, or by court order.<sup>306</sup> However, it is not only police person hours that are barred: the MCC also prohibits government employees and city officials from "expend[ing] . . . time responding to ICE inquiries" related to whether a noncitizen is incarcerated or her release date, and also prohibits granting access to city facilities for investigative purposes—unless the person in question is a "known gang member."<sup>307</sup>

Chicago's policy to enhance local community relationships and build trust and cooperation between the city and immigrant communities is not unlike that of other "welcoming" or "sanctuary" cities.<sup>308</sup> Nor is its position to reject spending "limited local resources" on traditionally federal functions unusual given that hundreds of local jurisdictions similarly prioritize their resources and local values.<sup>309</sup> Rather, the WCO is simply the kind of local self-governance that is the hallmark of American democracy.<sup>310</sup>

## 2. E.O. 13,768 and *County of Santa Clara v. Donald J. Trump*

Less than one week after taking office, President Trump signed an executive order, *Enhancing Public Safety in The Interior of the United States* (E.O. 13,768),<sup>311</sup> to halt funding to cities and counties that refused to cooperate with federal immigration efforts.<sup>312</sup> The executive order declared that cities, counties, and local municipalities that fail to comply with ICE "are not eligible to receive Federal grants, except as deemed necessary for law

<sup>305</sup> Brief for Plaintiff-Appellee, *supra* note 300, at 2; § 2-173-042.

<sup>306</sup> Brief for Plaintiff-Appellee, *supra* note 300, at 2-3; §§ 2-173-020, -030.

<sup>307</sup> § 2-173-042(b)(1), (c)(4).

<sup>308</sup> See e.g., *Cnty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1205-06 (N.D. Cal. 2017) (describing similar sanctuary policies in Santa Clara and San Francisco), *aff'd in part, rev'd in part sub nom.* *City of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

<sup>309</sup> Lee et al., *supra* note 298.

<sup>310</sup> See Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 389-90 (2019) ("One of the hallmarks of local governments is their ability to enhance democratic self-government. Local governments generally enable people to collectively engage in political matters in order to become masters of their own fate as a community.").

<sup>311</sup> Exec. Order No. 13,768, 3 C.F.R. 268 (2018).

<sup>312</sup> Liz Robbins, *'Sanctuary City' Mayors Vow to Defy Trump's Immigration Order*, N.Y. TIMES (Jan. 25, 2017) <https://www.nytimes.com/2017/01/25/nyregion/outraged-mayors-vow-to-defy-trumps-immigration-order.html> [https://perma.cc/5J4E-F4MF].

enforcement purposes . . . .”<sup>313</sup> At the time, at least 364 counties and 39 cities in the United States deemed their jurisdictions “sanctuaries” or safe harbors, meaning they limited cooperation with immigration enforcement.<sup>314</sup> Today, there are “at least 633 counties with these policies.”<sup>315</sup>

According to President Trump’s order, “[m]any aliens who illegally enter the United States . . . present a significant threat to national security and public safety.”<sup>316</sup> Despite evidence to the contrary,<sup>317</sup> the executive order states that sanctuary cities “have caused immeasurable harm to the American people and to the very fabric of our Republic.”<sup>318</sup> In defining E.O. 13,768’s justification and purpose, Section 1 states that “[s]anctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States.”<sup>319</sup> The E.O. goes on to state that this policy will “[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law.”<sup>320</sup> In Section 4, in “furtherance of the policy,” the President directs all agencies to “employ all lawful means” to faithfully execute this policy and all immigration laws of the United States “against all removable aliens.”<sup>321</sup>

In addition to calling upon local law enforcement “to perform the function of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary,” the order also specifically directs the Attorney General, “to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply” and that funds be withheld from “jurisdictions that willfully refuse to comply.”<sup>322</sup>

Not surprisingly, the order immediately drew the ire of mayors and city councils in Boston, Los Angeles, Chicago, New York, San Jose “and smaller cities, including New Haven; Syracuse; and Austin, Tex[as].”<sup>323</sup> In pushing back against the Administration, local leaders announced that they were willing and prepared to defend their policies even if protracted legal battles

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<sup>313</sup> 3 C.F.R. 268.

<sup>314</sup> Robbins, *supra* note 312.

<sup>315</sup> Lee et al., *supra* note 298.

<sup>316</sup> 3 C.F.R. 268 § 1.

<sup>317</sup> See Alex Nowrasteh, *Illegal Immigrants and Crime—Assessing the Evidence*, CATO INST. (Mar. 4, 2019, 1:16 PM), <https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence> [<https://perma.cc/6LXA-Z569>] (“All immigrants have a lower criminal incarceration rate and there are lower crime rates in neighborhoods where they live, according to the near-unanimous finds of the peer-reviewed evidence.”).

<sup>318</sup> 3 C.F.R. 268 § 1.

<sup>319</sup> *Id.* § 1.

<sup>320</sup> *Id.* § 2(c).

<sup>321</sup> *Id.* § 4.

<sup>322</sup> *Id.* §§ 8(b), 9 (a).

<sup>323</sup> Robbins, *supra* note 312.

ensured.<sup>324</sup> New York City's mayor, Bill de Blasio, vowed that "[w]e're going to defend all of our people regardless of where they come from, regardless of their immigration status."<sup>325</sup> Similarly, Rahm Emanuel, then mayor of Chicago, declared a commitment to remaining a sanctuary city: "I want to be clear: . . . There is no stranger among us. Whether you're from Poland or Pakistan, whether you're from Ireland or India or Israel and whether you're from Mexico or Moldova, where my grandfather came from, you are welcome in Chicago as you pursue the American dream."<sup>326</sup> Perhaps the strongest statement came from Boston's mayor Martin Walsh, who offered up City Hall as a sanctuary; "they can use my office, they can use any office in this building . . . this building [is] a safe space."<sup>327</sup> Ultimately cities across the nation prepared to sue the Administration to enjoin enforcement.

Despite Administration officials' attempts to downplay E.O. 13,768 as being limited in its scope and scale, a plain reading of the order and the Administration's subsequent actions suggest otherwise. In a subsequent memorandum articulating the Justice Department's analysis and interpretation of the executive order, then-Attorney General Sessions stated that the order's defunding provision will only be applied to grants administered by the Department of Justice (DOJ) or Department of Homeland Security (DHS).<sup>328</sup>

Yet, even with a more tailored interpretation of the policy by DOJ and purported remediation of flaws in the scope of E.O. 13,768,<sup>329</sup> the important underlying question is whether the executive has such legal authority to strong arm jurisdictions by withholding of congressionally appropriated funds. We think not. In our opinion, the only corrective or constitutional remedy for an executive order that violates the constitution is to strike the unconstitutional language. In other words, E.O. 13,768 was unconstitutional on its face and its unconstitutionality could not be remedied by Sessions claiming that he would enforce some provisions and not others. Even with the aspects of the order that the DOJ was willing to enforce, the amount was such as to be so coercive as to unconstitutionally force the hand of sanctuary cities.

In this case, billions of congressionally appropriated dollars were at stake. In Santa Clara alone—the first jurisdiction to seek an injunction—\$1.7 billion

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<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> Memorandum from Jefferson Sessions, U.S. Att'y Gen., Implementation of Executive Order 13768, "Enhancing Public Safety in the Interior of the United States" (May 22, 2017), <https://www.justice.gov/opa/press-release/file/968146/download> [<https://perma.cc/92JE-J3W4>].

<sup>329</sup> *See id.* (explaining that section 9(a) of E.O. 13,768 "will be applied solely to federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding").

in federal and federally dependent funds were at stake in 2017, “making up roughly 35% of the County’s total revenues.”<sup>330</sup> Moreover, these funds related to essential safety-net programs and essential services.<sup>331</sup> If funds were to be withheld, thousands of employees would have been harmed through layoffs and various other cutbacks.

These concerns served as the foundation of litigation in *County of Santa Clara v. Donald J. Trump*. In November 2017, a federal district judge issued an injunction to permanently block enforcement of E.O. 13,768, finding that it violated separation of powers and the Fifth and Tenth Amendments.<sup>332</sup> This followed an early ruling in April 2017 where the judge had granted a temporary ban on the order’s enforcement.<sup>333</sup>

In upholding his preliminary injunction and permanently enjoining E.O. 13,768, Judge Orrick rejected several claims brought by Attorney General Sessions. Sessions had argued that the Trump Administration operated within its authority to issue the broad executive order, making E.O. 13,768 “consistent with separation of powers.”<sup>334</sup> The Administration claimed “authority to impose at least some of the conditions is inherent in the statutory authority to administer a grant program.”<sup>335</sup> And finally, Sessions claimed that sanctuary cities failed to show “that the Executive Order would be unconstitutional in all its applications.”<sup>336</sup> The court rejected each of these arguments in turn, finding that E.O. 13,768 “[an] afoul of [] fundamental constitutional structure.”<sup>337</sup> And while the Ninth Circuit ultimately disagreed about the scope of Judge Orrick’s injunction, it affirmed this constitutional holding.<sup>338</sup>

In this case, as with the other Trump-era immigration policies that seek to wield power that belongs exclusively to Congress, the constitutional question and principle are simple: may the executive claim powers that the Constitution designates to Congress? Put another way, Article I of the Constitution grants Congress the federal spending powers.<sup>339</sup> Can the President usurp that authority to achieve his policy purposes? As the Supreme Court stated in *South Dakota v. Dole*, “[i]ncident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power ‘to further

<sup>330</sup> *Cnty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1206 (N.D. Cal. 2017), *aff’d in part, rev’d in part sub nom. City of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

<sup>331</sup> *See, e.g., id.* at 1207 (“The County’s Public Health Department receives 40% of its budget . . . in federal funds.”).

<sup>332</sup> *Id.* at 1219.

<sup>333</sup> *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017).

<sup>334</sup> *Cnty. of Santa Clara*, 275 F. Supp. 3d at 1212.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 1213.

<sup>338</sup> *City of San Francisco v. Trump*, 897 F.3d 1225, 1234-35 (9th Cir. 2018).

<sup>339</sup> *Id.*; *see also*, U.S. CONST. art. I, § 8, cl. 1 (vesting spending power authority in Congress).



broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”<sup>340</sup> Here, in contrast, it appears that the executive has “attempted to coopt Congress’s power to legislate.”<sup>341</sup>

To be sure, the President possesses the power to veto congressional legislation in whole or part under the Presentment Clause.<sup>342</sup> However, the President may not claim powers not designated. For example, in *Clinton v. City of New York*, the Supreme Court struck down the President’s line-item veto, ruling that a President may not “repeal[] or amend[] parts of duly enacted statutes” after they become law.<sup>343</sup> Indeed, as Judge Orrick noted, the President may not assume powers designated to Congress even if “Congress has attempted to expressly delegate such power to the President.”<sup>344</sup> Instead, the President’s responsibility—indeed, his or her duty—is to enforce the laws enacted by Congress, including in matters related to appropriations designated to local jurisdictions. In this instance, President Trump’s executive order violated this basic constitutional law principle and “fundamental constitutional structure.”<sup>345</sup> When a President assumes such authority, which is “incompatible with the expressed or implied will of Congress, his power” sinks to “its lowest ebb.”<sup>346</sup>

Judge Orrick found that where “[f]ederal funding . . . bears no meaningful relationship to immigration enforcement [it] cannot be threatened merely because a jurisdiction chooses an immigration enforcement strategy of which the President disapproves.”<sup>347</sup> We agree with this fundamental principle. Yet while the court entered an order permanently enjoining E.O. 13,768 from enforcement, we remained concerned that its clear warning to the Trump Administration would continue to go unheeded beyond E.O. 13,768, including during the pandemic. Moreover, our concerns are not confined to the Trump Administration as any future President might seek to abuse the power of their office.

In our opinion, the President’s executive order to strip funding from sanctuary cities that refuse to assist the executive in its immigration efforts amounts to an alarming unconstitutional usurpation of authority that resides with local

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340 *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)) (emphasis added).

341 *City of San Francisco*, 897 F.3d at 1234.

342 *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998).

343 *Id.* at 439.

344 *Cnty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1212 (N.D. Cal. 2017).

345 *Id.* at 1213.

346 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

347 *Cnty. of Santa Clara*, 275 F. Supp. 3d at 1202.

governments. Simply put, it is a weaponized power grab that, at its core, ignores constitutional limits and constraints on the executive branch of government.

### B. *Byrne JAG Funds: An Unconstitutional Quid Pro Quo*

In this Section, we further explain why the President's policy to condition federal funds on compliance with his immigration mandate is unconstitutional and why federal courts should block enforcement. Our concern rests not only with E.O. 13,768. We believe that the executive order was simply the beginning of a series of immigration policy strategies that rely on withholding federal funds.

Three years after his defeat in *County of Santa Clara*, President Trump continued to demonstrate that his Administration would readily pressure and coerce cities, counties, and states to force compliance with his immigration priorities, including denying federal grants designated by Congress.<sup>348</sup> As discussed in Part II, many of President Trump's immigration policies are cruel, arbitrary, and pose irreparable harms to noncitizens and citizens alike as long as they continue to be enforced. That is equally true in this case.

Statements from President Trump made clear his intent to use his immigration policy to withhold funds as "a weapon . . . against jurisdictions that disagree with his preferred policies of immigration enforcement, and his press secretary [has] reiterated that the President intends to ensure that counties and other institutions that remain sanctuary cities don't get federal government funding . . ."<sup>349</sup>

Undeterred by litigation challenging the basic constitutional law violation found in E.O. 13,768, President Trump expanded his immigration policy to an important federal grant program, the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG),<sup>350</sup> which distributes hundreds of millions of dollars to jurisdictions throughout the United States. Given the broad scope and reach of this new demand that jurisdictions comply or risk losing funding, many sued.<sup>351</sup>

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<sup>348</sup> See, e.g., *Oregon v. Trump*, 406 F. Supp. 3d 940, 950 (D. Or. 2019) ("The President of the United States and his Attorney General seek to advance their policy priorities by pressuring states and localities to comply with two immigration-related laws and by withholding federal funds from jurisdictions which refuse to assist immigration authorities."); see also Cuisson Villazor & Gulaskaram, *supra* note 298, at 1278 (discussing threats to "take away federal grants made to local law enforcement" in response to local noncooperation policies).

<sup>349</sup> See, e.g., *Cnty. of Santa Clara*, 275 F. Supp. 3d at 1202 (quotation marks omitted) (quoting an interview of President Trump on his administration's defunding measures).

<sup>350</sup> See 34 U.S.C. §§ 10151-58 (formerly codified at 42 U.S.C. § 3750) (explaining the background of the Byrne JAG program).

<sup>351</sup> See, e.g., *City of Chicago v. Sessions*, 888 F.3d 272, 280 (7th Cir. 2018) (The City . . . could not comply . . . with the conditions imposed by the Attorney General on those seeking funds under the Byrne JAG program, and filed this suit alleging that the conditions were unlawful . . .").

Preliminary injunctions halted the enforcement of two conditions put in place by the Trump Administration on funds from the Byrne JAG program.<sup>352</sup> Byrne JAG funds, named for a fallen officer, “allocate[] substantial funds annually to provide for the needs of state and local law enforcement, including personnel, equipment, training, and other uses identified by those entities.”<sup>353</sup> In fact, according to the Appellee’s brief in *City of Chicago v. Sessions*, Byrne JAG funds are the primary source of funding from the federal government to states for criminal justice matters.<sup>354</sup> In fiscal year 2016, Congress appropriated \$476 million for the Byrne JAG program, resulting in more than 1,000 grants.<sup>355</sup>

The Byrne JAG grants provide support for a broad range of services: investigation tools, the prosecution of drug offenses, the purchasing of body cameras, and more.<sup>356</sup> Congress designated the program to “allow local flexibility and discretion.”<sup>357</sup> The grant operates through a formula that provides for the Attorney General’s office to allocate the funds in accordance with a formula based on crime statistics and local population.<sup>358</sup> Importantly, while the Attorney General’s office assists in the distribution of the funds, the Byrne JAG funds are not “awarded at the discretion of a state or federal agency, but are awarded pursuant to a statutory formula.”<sup>359</sup>

In designating how the Byrne JAG funds will be distributed, Congress accords narrow discretion to the Attorney General’s process, which includes a requirement that the Attorney General “follow the statutory formula to determine allotments for each state and local government.”<sup>360</sup> The statute provides no authority to deviate from the formula save the Attorney General

<sup>352</sup> *Id.* at 277.

<sup>353</sup> *Id.* at 276.

<sup>354</sup> Brief for Plaintiff-Appellee, *supra* note 300, at 4; *see also* Oregon v. Trump, 406 F. Supp. 3d 940, 951 (D. Or. 2019) (noting that the State of Oregon had received more than \$26 million through the program); City of San Francisco v. Sessions, 372 F. Supp. 3d 928, 936 (N.D. Cal. 2019) (“California is expected to receive \$ 28.9 million Byrne JAG funds in fiscal year 2018 . . . .”); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289 (E.D. Pa. 2018) (“In fiscal year 2017, Philadelphia would have been entitled to \$1.598 million . . . .”); Colorado v. U.S. Dep’t of Justice, No. 19-CV-00736, 2020 WL 1955474, at \*4 (D. Colo. Apr. 23, 2020) (“Colorado applied for a FY 2018 Byrne JAG grant and expected to receive more than \$2.7 million based on the statutory formula.”).

<sup>355</sup> Dep’t of Just., Off. of Just. Programs, *Awards Made for Solicitation: Edward Byrne Memorial Justice Assistance Grant (JAG) Program—Local Solicitation* (Sept. 27, 2017), [https://external.ojp.usdoj.gov/SelectorServer/awards/pdf/solicitation/Edward%20Byrne%20Memorial%20Justice%20Assistance%20Grant%20\(JAG\)%20Program%20-%20Local%20Solicitation](https://external.ojp.usdoj.gov/SelectorServer/awards/pdf/solicitation/Edward%20Byrne%20Memorial%20Justice%20Assistance%20Grant%20(JAG)%20Program%20-%20Local%20Solicitation) [<https://perma.cc/F8M5-YDG5>].

<sup>356</sup> 34 U.S.C. § 10152(a)(1).

<sup>357</sup> Brief for Plaintiff-Appellee, *supra* note 300, at 4.

<sup>358</sup> *See* 34 U.S.C. § 10156 (directing the distribution formula).

<sup>359</sup> Brief for Plaintiff-Appellee, *supra* note 300, at 4 (quoting *City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989)).

<sup>360</sup> *Id.* (citing 34 U.S.C. § 10156).

being authorized to “reserve not more than 5 percent” of funds allocated for urgent or “necessary” matters to address “extraordinary increases in crime.”<sup>361</sup> By authorizing the Byrne JAG program, Congress chose to emphasize local law enforcement strategies, granting deference to cities and counties greater “flexibility to spend money for programs that work for them rather than to impose a ‘one size fits all’ solution.”<sup>362</sup>

In an effort to advance the President’s immigration policy directives through manipulation of congressional appropriations, the Trump Administration released a revised Byrne JAG application which articulated two new conditions.<sup>363</sup> The first imposed a new “notice” requirement whereby grant recipients were required to “provide at least 48 hours’ advance notice to [DHS] regarding the scheduled release date and time of an alien in the jurisdiction’s custody when DHS requests such notice to take custody of the alien pursuant to the Immigration and Nationality Act.”<sup>364</sup> The second condition required grant recipients to allow DHS access all correctional or detention facilities in order to meet with and interrogate anyone suspected of being a noncitizen.<sup>365</sup> These conditions effectively sought to press local law enforcement into the service of the President’s immigration policy initiatives by forcing them to aid in federal civil immigration enforcement efforts.

We find the revised Byrne JAG program policies as problematic as E.O. 13,768, namely because it violates basic constitutional law principles. Congress has not accorded the DOJ or attorney general with the authority to impose substantive policy conditions on the funds it has allocated through the Byrne JAG program. A phalanx of states and municipalities share this view and, though their litigation efforts, have created a split among the courts. For our purposes, the legal issues in these cases are basically the same and the implications for all applicants are virtually identical. We argue that sanctuary cities have valid constitutional interests in refusing to comply with Trump era overly broad, ill-defined immigration policies that threaten to withhold federal funding based on noncompliance with the newly imposed Byrne JAG conditions. We offer four reasons in support of this point and then briefly discuss the recent litigation involving these issues.

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<sup>361</sup> 34 U.S.C. § 10157(b).

<sup>362</sup> H.R. REP. NO. 109-233, at 89 (2005); see also *Reauthorization of the U.S. Dep’t of Justice: Criminal Law Enforcement: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 68 (2003) (testimony of Deborah Daniels, Assistant Att’y Gen. for the Office of Justice Programs) (expressing support for the new Byrne JAG program to “permit States and communities to improve all aspects of their criminal justice and correction systems” by giving them “more discretion”).

<sup>363</sup> Brief for Plaintiff-Appellee, *supra* note 300, at 8.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 9.

First, the Constitution vests spending power authority in Congress and not the President.<sup>366</sup> By law, President Trump could only exercise the authority granted by the Constitution. When the President—acting through the Attorney General—expanded his authority to reach into the coffers of sanctuary cities to grab funds allocated by Congress or to withhold grants and other monetary assistance to coerce compliance or participation in his policy objectives, he did so unconstitutionally. Second, in such instances, not only does the President abuse his/her authority, but s/he also violates separation of powers doctrine.<sup>367</sup> Third, the President’s power has limits. Finally, federal funding wholly separate from immigration cannot be withheld or threatened to be withheld—as in the case of COVID-19 relief—based on the President’s disapproval of the sanctuary city’s local strategies related to community building and immigration.

In *City of Chicago v. Sessions*,<sup>368</sup> the Seventh Circuit heard an appeal from a grant of a preliminary injunction in favor of the City of Chicago against then-Attorney General Sessions. In defining the scope of its review, the court emphasized that its role was not to assess or opine on the optimal immigration policies for our nation, but rather to engage with one of the “bedrock principles of our nation,” which “rests at the heart of our system of government” and is placed above or transcends political ideology and affiliation.<sup>369</sup> Simply put, like the challenges to President Trump’s executive orders on immigration,<sup>370</sup> the separation of powers principle resided at the heart of this case. According to the court, “the founders of our country well understood that the concentration of power threatens individual liberty and established a bulwark against such tyranny by creating a separation of powers among the branches of government.”<sup>371</sup>

The court found that Attorney General Sessions brandished the “sword” of federal funding to “conscript state and local authorities to aid in federal civil immigration enforcement.”<sup>372</sup> As we noted above, “the power of the purse rests with Congress, which authorized the federal funds at issue and did not impose any immigration enforcement conditions on the receipt of such funds.”<sup>373</sup>

<sup>366</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>367</sup> *Cf.* *City of Arlington v. FCC*, 569 U.S. 290, 291 (2013) (“[W]ith administering congressional statutes, both the[] power to act and how . . . to act is authoritatively prescribed by Congress, so that when they act improperly . . . what they do is *ultra vires*.”).

<sup>368</sup> 888 F.3d 272 (7th Cir. 2018).

<sup>369</sup> *Id.* at 277.

<sup>370</sup> *See supra* subsection III.A.2 (describing the Trump Administration’s attempts at using federal funds to effectuate their desired immigration policies).

<sup>371</sup> *City of Chicago*, 888 F.3d at 277.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*; *see also id.* at 283 (“The power of the purse does not belong to the Executive Branch. It rests in the Legislative Branch.”).

Indeed, the court stated, “Congress repeatedly refused to approve of measures that would tie funding to state and local immigration policies.”<sup>374</sup>

Attorney General Sessions defended the new policy on the ground that “[n]othing in the statute supports the counterintuitive conclusion that applicants can insist on their entitlement to federal law enforcement grants even as they refuse to provide the most basic cooperation in immigration enforcement, which the Attorney General has identified as a federal priority.”<sup>375</sup> As the court noted that “repeated mantra evinces a disturbing disregard for the separation of powers,”<sup>376</sup> and a profound incapacity to appreciate constitutional law.

The court’s finding that the Attorney General violated separations of power speaks directly to a foundational principle in American government. According to the court, “[w]e are a country that jealously guards the separation of powers, and we must be ever-vigilant in that endeavor.”<sup>377</sup>

Similarly, in *City of Los Angeles v. Barr*,<sup>378</sup> the Ninth Circuit affirmed a district court’s preliminary injunction entered against the DOJ with similar underlying facts as those presented in *City of Chicago v. Sessions*, which we shall not repeat. The court found that “when an agency is charged with administering a congressional statute, ‘both [its] power to act and how [it is] to act [are] authoritatively prescribed by Congress.’”<sup>379</sup> In other words, “[a]n agency ‘literally has no power to act . . . unless and until Congress confers power upon it.’”<sup>380</sup> Thus, the court’s finding was not inconsistent with that of the Seventh Circuit.

The case is instructive as DOJ mounted an alternative defense, claiming that its authority derived from the 2005 amendment to the statute creating the Byrne JAG. Under the revised statute, the Assistant Attorney General is permitted to “plac[e] special conditions on all grants,”<sup>381</sup> which DOJ claimed authorized the new conditions placed on the Byrne JAG funding.<sup>382</sup> The panel held that some narrow, independent authority did arise from the statute, such as DOJ’s authority to “place special conditions” and determine “priority purposes for formula grants.”<sup>383</sup> However, the court rejected DOJ’s broad

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374 *Id.* at 277.

375 *Id.* at 283.

376 *Id.*

377 *Id.* at 277.

378 941 F.3d 931 (9th Cir. 2019).

379 *Id.* at 938 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013)).

380 *Id.* (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)).

381 34 U.S.C. § 10102(a)(6).

382 See *City of Los Angeles*, 941 F.3d at 939 (“DOJ argues that by amending the statute, Congress gave the Assistant AG the authority to impose notice and access conditions as ‘special conditions’ on Byrne JAG awards.”)

383 *Id.*

claim that that § 10102(a)(6) granted authority to require that all recipients of Byrne JAG funding comply with notice and access conditions.<sup>384</sup>

First, the court found that notice and access conditions were not “special conditions,” as the DOJ claimed. This is because they were not “conditions triggered by specific characteristics not addressed by established conditions.”<sup>385</sup> Second, the court held that “priority purposes must be chosen from among the various possible purposes of a Byrne JAG award as set forth” in the law, and that the DOJ lacked the statutory authority to unilaterally impose broad conditions.<sup>386</sup> Thus, “because none of the DOJ’s proffered bases for statutory authority gave” Attorney General William Barr the “power to impose” the revised conditions of the grant, the new provisions were unlawful.<sup>387</sup>

Similar results have been reached by other courts, including in *City of Philadelphia v. Sessions*,<sup>388</sup> *Oregon v. Trump*,<sup>389</sup> and *City of San Francisco v. Sessions*,<sup>390</sup> each of which also enjoined the federal government from enforcing their quid pro quo policy against administering Byrne JAG funds. In these cases, the courts recognized that the irreparable harms accompanying “constitutional injuries” cannot be adequately remedied with monetary damages alone.<sup>391</sup> Rather, the public interest is “better served” when jurisdictions are not coerced into choosing between Byrne JAG funding and “losing hard-fought goodwill amongst the immigrant community.”<sup>392</sup>

Despite a general consensus among courts that the Trump Administration’s treatment of the Byrne JAG Program was overbroad, coercive, and violative of separation of powers,<sup>393</sup> a split has recently emerged among jurisdictions. In

<sup>384</sup> *Id.* at 939-40 (“[I]n effect, we would have to conclude that Congress amended § 10102(a)(6) for the purpose of expressly authorizing the Assistant AG to exercise certain powers that do not exist. We decline to do so . . .”).

<sup>385</sup> *Id.* at 942.

<sup>386</sup> *Id.*; *see also id.* (“Because the notice and access conditions meet neither of these definitions, DOJ lacked statutory authority to impose them under § 10102(a)(6).”).

<sup>387</sup> *Id.* at 945. The panel in *Los Angeles v. Barr* held that because none of the DOJ’s proffered bases for statutory authority gave the Attorney General or the Assistant Attorney General the power to impose the notice and access conditions, the conditions were ultra vires. *Id.*

<sup>388</sup> 309 F. Supp. 3d 289, 321 (E.D. Pa. 2018) (“[T]he Access and Notice Conditions exceed the authority delegated by Congress in 34 U.S.C. § 10102(a)(6).”).

<sup>389</sup> 406 F. Supp. 3d 940, 959 (D. Or. 2019) (quotation marks and alterations omitted) (“Plaintiffs must choose between accepting the award with the conditions or forgoing the award in favor of maintaining their policy preferences.”).

<sup>390</sup> 897 F.3d 1225, 1231 (9th Cir. 2018) (holding that Article I of the Constitution “exclusively grants the power of the purse to Congress, not the President”) (first citing U.S. CONST. art. I, § 9, cl. 7; and then citing U.S. CONST. art. I, § 8, cl. 1).

<sup>391</sup> *Oregon*, 406 F. Supp. 3d at 974.

<sup>392</sup> *Id.* at 975 (quoting *City of Phila.*, 309 F. Supp. 3d at 341-42).

<sup>393</sup> *See, e.g., City of Chi. v. Barr*, 961 F.3d 882, 896 (7th Cir. 2020) (“The Attorney General cannot rely on a provision encouraging communications as to criminal justice matters as authority to deny funds for disclosures related only to civil matters.”); *City of Providence v. Barr*, 954 F.3d 23, 39 (1st Cir. 2020) (“We do not read the Byrne JAG statute to grant the DOJ such sweeping

February 2020, a three judge panel of the Second Circuit reversed a lower court ruling which had enjoined DOJ's policy.<sup>394</sup> Unlike its sister circuits, the panel agreed with the government's argument that immigration conditions on the Byrne JAG funds were statutorily authorized, rejecting the view that the Attorney General's authority vis-à-vis the program was "exceptionally limited."<sup>395</sup> The plaintiff petitioned the full court for en banc hearing, but with four judges dissenting their appeal was denied.<sup>396</sup>

In our view, the Second Circuit made two fundamental errors in upholding the conditions imposed by the DOJ. First, the Trump DOJ guidelines are at odds with well-established principles in constitutional law, namely separation of powers. The Constitution speaks plainly on matters of spending: Article I "exclusively grants the power of the purse to Congress."<sup>397</sup> Thus it is Congress, not the Executive, that may "grant federal funds to the States . . . ensur[ing] that the funds are used by the States to 'provide for the . . . general Welfare' in the manner Congress intended."<sup>398</sup> This is not an academic or lofty concept but rather one rooted in the foundation of constitutional law, and the court need not assume the plaintiff's version of the facts or interpretation of law to apply it.

Second, it is for Congress to decide the conditions imposed by grants. Congress did not impose restrictive conditions in the Byrne JAG grant program. Nor did Congress authorize the Attorney General to assume authority and power over its resource allocations. Indeed, Congress did not grant the Attorney General the authority to revise the application process such that it changed the nature of the grant. These issues were not granted rigorous review by the Second Circuit panel and by denying an en banc review, the court left the plaintiffs with no avenue for relief but to seek Supreme Court review.

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authority."); *City of Los Angeles v. Barr*, 941 F.3d at 945 ("Because none of DOJ's proffered bases for statutory authority gives the Attorney General or the Assistant AG the power to impose the notice and access conditions, the conditions are ultra vires."); *City of Phila. v. Att'y Gen.*, 916 F.3d 276, 291 (3d Cir. 2019) ("[T]he Attorney General exceeded his statutory authority in promulgating the Challenged Conditions.").

<sup>394</sup> *New York v. U.S. Dep't of Just.*, 951 F.3d 84, 123 (2d Cir. 2020).

<sup>395</sup> *Id.* at 103.

<sup>396</sup> *New York v. U.S. Dep't of Just.*, 964 F.3d 150 (2d Cir. 2020) (mem.); *see also id.* at 157 (Pooler, J., dissenting from denial of rehearing en banc) (calling the court's refusal to reconsider this case "[a]stonishing[]").

<sup>397</sup> *City of S.F. v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018); *see also* U.S. CONST. art I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").

<sup>398</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) (quoting U.S. CONST. art. I, § 8, cl. 1).



### C. *Undermining the Public Health: Denying COVID-19 Relief*

Even as the coronavirus pandemic swept through the country, President Trump continued to respond to local governments' pleas for financial support by threatening to withhold aid to "cities that limit cooperation between local law enforcement and federal immigration authorities . . ." <sup>399</sup> As we have shown, this kind of pressure campaign is nothing new. However, it has become particularly disconcerting and cruel "in the throes of the pandemic" as thousands of Americans have died and cities and states urgently went to action, trying to save lives. <sup>400</sup>

Sadly, we saw the President's potential denial of funds associated with pandemic relief as not a possibility but on the scale of probability. We based our judgement on President Trump's plain words.

In the height of the pandemic, President Trump stated, "I don't think you should have sanctuary cities if they get that kind of aid." <sup>401</sup> The President insisted that sanctuary cities should be denied federal funds to combat the pandemic if they do not meet the demands of immigration law enforcement and collaborate with ICE. He told reporters, "[i]f you're going to get aid to the cities and states for the kind of numbers you're talking about, billions of dollars, I don't think you should have sanctuary cities." <sup>402</sup> He claimed, "all they do is make it very hard for law enforcement." <sup>403</sup> Given the President's executive order to deny federal funds to sanctuary cities, as well as efforts by the DOJ, we express why denying pandemic relief to sanctuary cities would strike a cruel blow.

The harms we continue to see are multifold, including interfering with the objective nature of evaluating public health and responding to it; undercutting confidentiality and trust in the physician-patient relationship; undermining screening and treatment objectives; and chilling interest and follow through in seeking care. These concerns are rendered more visible in the wake of COVID-19.

#### 1. *Undermining Patient Confidentiality*

Ultimately the quid pro quo the Trump Administration sought impeded on the very foundations of public health goals, law, and bioethics. Demanding that local governments provide unfettered access to nondocumented

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<sup>399</sup> Priscilla Alvarez, *Trump Renews Threat to Withhold Federal Funds from Sanctuary Cities Amid Pandemic*, CNN (Apr. 30, 2020), <https://www.cnn.com/2020/04/30/politics/trump-sanctuary-city-coronavirus/index.html> [https://perma.cc/J556-RN4M].

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

noncitizens not only interferes with the manner in which sanctuary cities organize their relationships with immigrant communities, but also threatens the public's health by imposing a constraint or condition on confidentiality. In addition, it is not a novel or new concept in law that to protect the public's health, confidentiality is a key component.

Trust sits at the heart of the physician-patient relationship, and courts have long recognized the importance of a physician's duty "to give the well-being of their patients the highest priority."<sup>404</sup> In a line of cases dating back to *Canterbury v. Spence*,<sup>405</sup> courts have drawn from this duty to enumerate the fiduciary responsibilities medical providers owe to their patients. These duties include obtaining the patient's informed consent for medical treatments and procedures,<sup>406</sup> maintaining confidentiality and withholding information from third parties,<sup>407</sup> making decisions based on the patient's best interest,<sup>408</sup> and disclosing potential conflicts of interest, including with the state.<sup>409</sup>

Healthcare is thus one area the President's immigration policies should not reach given the important concerns related to protecting the public's health. The very nature of "outing" an individual runs counter to sound public health policy generally and especially during a health crisis. In essence, to protect the broader health of the community, sanctuary and non-sanctuary cities should desire for citizens and noncitizens, documented and nondocumented, to come forward without fear of civil or criminal retribution, punishment, or shaming.

The threats also strike us as particularly cruel given the deadly nature of COVID-19. To deny funding for law enforcement initiatives under Byrne JAG or other grant program significantly impacts the economic health of a jurisdiction and deeply constrains its ability to fund law enforcement and other initiatives. Denying funds related to the public's health is simply deadly and immoral.

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<sup>404</sup> Thomas L. Hafemeister & Sarah P. Bryan, *Beware Those Bearing Gifts: Physicians' Fiduciary Duty to Avoid Pharmaceutical Marketing*, 57 KAN. L. REV. 491, 492 (2009).

<sup>405</sup> 464 F.2d 772 (D.C. Cir. 1972). *Canterbury* is a classic case that, among other things, established a physician's duty to obtain a patient's informed consent prior to beginning treatment. *Id.* at 782.

<sup>406</sup> *Id.* (establishing that patients have a right to give their informed consent prior to receiving any treatment); see also *Matthies v. Mastromonaco*, 733 A.2d 456, 463 (N.J. 1999) (recognizing that "[l]ike the deviation from a standard of care, the physician's failure to obtain informed consent is a form of medical negligence.").

<sup>407</sup> See *MacDonald v. Clinger*, 446 N.Y.S.2d 801, 802 (App. Div. 1982) (calling "the confidentiality of the relationship" between the doctor and patient "a cardinal rule of the medical profession").

<sup>408</sup> See World Med. Ass'n, *WMA Statement on Patient Advocacy and Confidentiality* (May 19, 2020), <https://www.wma.net/policies-post/wma-statement-on-patient-advocacy-and-confidentiality> [<https://perma.cc/4KEV-KS88>] ("Medical practitioners have an ethical duty and a professional responsibility to act in the best interests of their patients . . .").

<sup>409</sup> See Lois Snyder, *American College of Physicians Ethics Manual, Sixth Edition*, 156 ANNALS INTERNAL MED. 73, 88 (2012) (describing the duty to disclose conflicts of interest).

## 2. Chilling the State's Relationship with Patients.

National professional medical organizations stress the value and importance of physicians prioritizing their patients' needs above all else, including law enforcement. The governing bodies of the American Medical Association (AMA) and the American Public Health Association (APHA) charge their membership with prioritizing the public's health.<sup>410</sup> They have stated unequivocally that the role of public health professionals must be first and primarily to serve patients' needs and not law enforcement goals.<sup>411</sup>

In *Ferguson v. Charleston*, the Supreme Court held that a state hospital's policy requiring diagnostic tests to obtain evidence of a pregnant woman's drug use for law enforcement purposes constitutes an "unreasonable search" if the patient has not provided consent to the procedure.<sup>412</sup> In that case, a team of hospital employees comprised of doctors and nurses at the Medical University of South Carolina (MUSC) conspired to provide pregnant patients' confidential medical information to police and prosecutors for criminal law enforcement purposes.<sup>413</sup> The AMA, APHA, and similar medical societies submitted amicus briefs in the case, cautioning against states' efforts to conscript physicians and nurses into serving as informants against patients and those seeking medical services, because it confuses the role of healthcare providers, misleads patients without providing any notice, and potentially chills the physician-patient relationship.<sup>414</sup>

The AMA and APHA are not alone in opposing law enforcement's interference with the provider-patient relationship. For example, the National Medical Association (NMA), Association for Medical Education

<sup>410</sup> See Motion for Leave to File Brief as Amicus Curiae and Brief Amicus Curiae of the American Medical Association in Support of Neither Party at 1, *Ferguson v. Charleston*, 532 U.S. 67 (2001) (No. 99-936), 2000 WL 1506967 [hereinafter Brief of the AMA] ("The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health . . ."); Motion of the American Public Health Association et al. for Leave to File Brief as Amici Curiae in Support of Petitioners at 30, *Ferguson v. Charleston*, 532 U.S. 67 (2001) (No. 99-936), 2000 WL 33599645 [hereinafter Brief of the APHA] ("APHA strives to improve public health for everyone by proposing solutions based on research, helping to set public health practice standards, and working closely with national and international health agencies.").

<sup>411</sup> See Brief of the AMA, *supra* note 410, at 3-4 ("[R]equiring physicians to act as agents of law enforcement . . . undercuts the physicians' ethical obligation to act as patient advocates and protectors."); Brief of the APHA, *supra* note 410, at 18 ("Even the *possibility* that treatment professionals will share personal medical records and test results with police . . . does lasting harm to the relationships necessary for medical care and is injurious to the broader public health."); see also Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781, 829-33 (2014) ("Medical organizations are particularly concerned about the corrosive effects of law enforcement's invasive reach into maternal health.").

<sup>412</sup> 532 U.S. 67, 67 (2001).

<sup>413</sup> *Id.*

<sup>414</sup> See *supra* notes 410-11.

and Research in Substance Abuse (AMERSA), South Carolina Medical Association (SCMA), American College of Obstetricians and Gynecologists (ACOG), and American Nurses Association (ANA) were among the organizations to join an amicus brief in *Ferguson* in support of the indigent female plaintiffs who were criminally targeted by law enforcement at MUSC.<sup>415</sup> The SCMA specifically stated it “opposes policies and practices that undermine patient confidentiality and weaken the trust between health care providers and patients that promotes positive treatment outcomes.”<sup>416</sup> Likewise, the Society of General Internal Medicine (SGIM) warned “[t]he failure to maintain proper patient confidentiality (at the heart of MUSC’s policy) will not only discourage women from seeking this vital care but may well interfere with physicians’ ability to provide it when sought.”<sup>417</sup>

For similar reasons, counties and cities have prevented disclosure of the immigration status of their patients. Forcing communities to disclose the immigration status of an individual seeking care places not only that person’s health at risk, but that of the broader community. During a pandemic, this is particularly problematic. If an individual with COVID-19 symptoms fears that seeking medical care will lead to deportation, arrest, or some other punishment, she may avoid seeking medical evaluation and treatment, thereby placing her health at risk and those with whom she lives, works, and encounters.

### 3. Public Health Strategy

Simply put, the goals of public health during a viral pandemic ought to be controlling its spread, respecting science, and protecting civil liberties. Sound public health practice involves detection, prevention, containment, response, and control.<sup>418</sup> One of the key ways to aggressively control the spread of COVID-19 (and most communicable diseases) is through voluntary contact tracing,<sup>419</sup> yet contact tracing becomes virtually impossible if people refuse to come forward or their friends or family members refuse to disclose

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<sup>415</sup> Brief of the APHA, *supra* note 410.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Identify Strategies to Reduce Spread of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/strategies-to-reduce-spread.html> [<https://perma.cc/7DFK-AYR6>].

<sup>419</sup> *See, e.g.*, Cassandra D. Kelly-Cirino, John Nkengasong, Hannah Kettler, Isabelle Tongio, Françoise Gay-Andrieu, Camille Escadafal, Peter Piot, Rosanna W. Peeling, Renuka Gadde & Catharina Boehme, *Importance of Diagnostics in Epidemic and Pandemic Preparedness*, 4 *BMJ GLOBAL HEALTH* 1, 1 (2019) (stating that diagnostics are fundamental for successful outbreak containment); Mark D. Perkins, Christopher Dye, Manica Balasegaram, Christian Bréchet, Jean-Vivien Mombouli, John-Arne Røttingen, Marcel Tanner & Catharina C. Boehme, *Diagnostic Preparedness for Infectious Disease Outbreaks*, 390 *LANCET* 2211, 2211 (2017) (stating that outbreak detection and surveillance are critical for diagnostic preparedness and response).

that they have been in contact with a person who might be vulnerable to harsh immigration policies. This will certainly be the case if public health officials in jurisdictions throughout the United States were forced to “out” or disclose the immigration status of their patients or on the other hand, deny them medical services because of their noncitizen, nondocumented status—as the former President’s immigration policies sought to do.

Moreover, keeping the public’s health safe means engaging in broad scale public health strategies that engage the full community, including noncitizens and nondocumented persons. Indeed, the public’s health relies on broad participation. This is the underlying, well-accepted, science of herd immunity.<sup>420</sup> Thus, treating the condition of one just one group of people—say, only American citizens—to the exclusion of others is not enough. To keep a community safe necessitates broadscale participation in public health strategies, especially during a global pandemic.<sup>421</sup>

President Trump’s policy was particularly dangerous during COVID-19, when states, counties, and cities are focused on public health strategies to protect their communities. Those public health strategies rely on cooperation and collaboration not only with citizens and people legally documented to be in the United States, but also those community members who are noncitizens and nondocumented. Prioritizing the President’s immigration orders contravenes this important public health purpose and strategy.

## CONCLUSION

The President is not above the law, and neither are federal agencies. President Trump’s immigration strategy imposed unconstitutional conditions on local governments that refused to comply with his mandates. By withholding funds to these jurisdictions, the President violated fundamental constitutional law principles. The collateral damage lingers. Our position is that federal funding that has nothing to do with immigration enforcement cannot be conditioned on a jurisdiction’s compliance with federal immigration policy. Presidential administrations cannot threaten to withhold federal funds merely because a sanctuary city or county chooses an immigration strategy

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<sup>420</sup> See *Vaccines Protect Your Community*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Feb. 2020), <https://www.vaccines.gov/basics/work/protection> [<https://perma.cc/3TJK-RVYZ>] (asserting that herd immunity keeps individuals and communities healthy).

<sup>421</sup> See Umair Irfan, *The Case for Ending the Covid-19 Pandemic With Mass Testing*, VOX (Apr. 13, 2020), <https://www.vox.com/2020/4/13/21215133/coronavirus-testing-covid-19-tests-screening> [<https://perma.cc/BX3N-ZNQW>] (summarizing literature outlining the routes of the pandemic); Nir Eyal, Marc Lipsitch & Peter G. Smith, *Human Challenge Studies to Accelerate Coronavirus Vaccine Licensure*, 2020 J. INFECTIOUS DISEASES 1752, 1752 (noting that a widely available vaccine will be necessary to end the pandemic).

with its local immigrant communities with which the President disapproves or finds weak, distasteful, or offensive.<sup>422</sup>

Stated differently, the President may not usurp, or command powers not granted to the executive in the United States Constitution. Nor may the President seize such powers simply because the President has the authority to issue executive orders. As the President is not above the law, neither are the President's executive orders or federal agencies. We recognize that the Trump Administration's legal battles and political hostility toward sanctuary cities predate the coronavirus pandemic.

Yet, the Administration's demands that sanctuary cities comply with ICE or risk denial of federal grants, especially during times of health crisis, was not only an unlawful violation of separation of powers, but it also served to undermine the public's health and trust in medical providers. In short, it created an unconstitutional *quid pro quo*. As we view the matter, President Trump's immigration policies potentially threatened federal funding for child protective services, public health, and other essential services for which counties across the country receive and rely upon funds designated by Congress.

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<sup>422</sup> See, e.g., *Cnty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1202 (N.D. Cal. 2017), *aff'd in part, rev'd in part sub nom. City of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).