



## ESSAY

# What the Pandemic Can Teach Climate Attorneys

Sara C. Bronin\*

## Introduction

The COVID-19 pandemic has caused more rapid changes to the law than most of us have seen in our lifetimes. These changes have remade, and in many cases severed, our social and economic connections to each other, in ways unprecedented except during war.

As many have argued, climate change is also a dire emergency, requiring an equally sweeping legal response. Rising seas, raging wildfires, and dramatic hurricanes have already destroyed lives and communities. We may be a few years away from irreversible devastation.<sup>1</sup>

Yet we have not seen even a fraction of the legal reforms needed to reverse our march toward climate apocalypse. The explanation for our inaction on climate is simple. Unlike COVID-19, the climate crisis will not manifest as one swift, simple, time-limited threat that might generate immediate consensus. Rather, the climate crisis will unfold through a series of crises that may appear, deceptively, to be geographically limited and causally unrelated. Climate change is COVID-19 in slow motion, but with less clarity and far greater destructive capacity.

Lawyers, like legislators and executive branch leaders, are responding to the coronavirus pandemic with creativity and improvisation. We may find that attorneys seeking to address climate change will be able to learn valuable lessons from the legal response to COVID-19.

Part I of this Essay, echoing a point that has already been made many times now, explains why, on a practical level, COVID-19 and climate are intertwined. Part II argues that climate attorneys should focus on coronavirus lawsuits,

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\* Thomas F. Gallivan Chair of Real Property Law and Faculty Director of the Center for Energy and Environmental Law, UConn Law School. The author would like to thank Professor Joseph A. MacDougald for his insightful feedback on drafts of this Essay, and students Libby Reinish and Carly Sirota for legal assistance.

1. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT (2015) (explaining the urgent need to dramatically change human behavior).

which could be more consequential to climate progress than recent executive or legislative action. Part III of the Essay identifies three specific types of lawsuits climate attorneys should track. And Part IV concludes with a thought for attorneys as we weather this pandemic—and a warming planet—together.

## I. Climate and COVID-19

On many practical levels, climate and the COVID-19 pandemic are intertwined. Without diminishing the tragic nature of the global pandemic, it is worth pointing out that our response to the coronavirus may have short-lived environmental benefits. It may also change the politics of climate policy in long-lasting ways. Climate change will likely increase the risk of future pandemics, forcing us to factor pandemic preparedness into climate mitigation and preparation work. Finally, the coronavirus demonstrates that it is possible, in the end, for fact to triumph over denial.

Our responses to the pandemic have had positive climate impacts. With three billion people subject to some form of mobility restrictions today, pollution has dramatically decreased. As a result, our water and air are cleaner, and hundreds of thousands of lives have been saved.<sup>2</sup> Birdsongs are returning to soundscapes, and bikers are experiencing the freedom of carless streets.

The climate impacts of the pandemic may have political and health implications. People who like the temporary environmental results may start to advocate to make them permanent. For example, people may start advocating for reducing our reliance on cars and creating better public transit, biking, and walking infrastructure. On the other hand, COVID-19-related concerns about population density and mass transit may undermine important progress that has been made in recent years to attract people to urban life.

Climate change may be exacerbating inter-species interaction that makes pandemics like COVID-19 more likely. We are in the midst of a massive redistribution of earth's species.<sup>3</sup> This redistribution has put humans in closer contact with animals that potentially carry disease.<sup>4</sup> We are also seeing the

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2. See, e.g., Marshall Burke, *COVID-19 Reduces Economic Activity, Which Reduces Pollution, Which Saves Lives*, G-FEED (Mar. 8, 2020, 11:21 PM), <https://perma.cc/8PEZ-8D3R> (estimating that two months of COVID-19-related pollution decreases saved the lives of up to 4,000 kids under five and 73,000 adults over seventy in China alone); Joe Wallen, *India's Cleaner Lockdown Air Could Save 650,000 Lives*, THE TELEGRAPH (May 11, 2020, 2:35 PM), <https://perma.cc/9Q97-AJJK> (describing the results of a study "compar[ing] the average annual concentration of six pollutants in 22 Indian cities with the reduced average concentration during the first month of [the COVID-19] lockdown").

3. Greta T. Pecl et al., *Biodiversity Redistribution Under Climate Change: Impacts on Ecosystems and Human Well-Being*, 355 SCIENCE 1389, 1389 (2017).

4. Neela Banerjee, *Q&A: A Harvard Expert on Environment and Health Discusses Possible Ties Between COVID and Climate*, INSIDE CLIMATE NEWS (Mar. 12, 2020), <https://perma.cc/H87B-L2GU> (citing Dr. Aaron Bernstein (Interim Director of

*footnote continued on next page*

proliferation of certain disease-vector insects.<sup>5</sup> While we do not know whether COVID-19 itself was caused by climate migration, the threat of climate-exacerbated viruses is real.

The pandemic is also previewing climate-related disruptions. The dramatic upheaval we are experiencing as a result of COVID-19 will pale in comparison to the seismic shifts we will experience without swift action on climate. Drought, flooding, fires, storms, and winds are all projected to dramatically increase if our planet keeps warming.<sup>6</sup> We must consider what our response to extreme weather disaster would look like in a time of pandemic. Refugee-packed stadiums will not be the answer.

Finally, the pandemic reveals that our behavior can make a difference. We have listened to scientists, who have told us that we can bend the curve of COVID-19 infections.<sup>7</sup> In fact, our stay-at-home strategy appears to be working, saving hundreds of thousands of lives.<sup>8</sup> Maybe we will listen more carefully to scientists who tell us that lifestyle changes—including driving less, using less energy, or consuming less red meat—can mitigate climate change.<sup>9</sup> The science of climate change, and the ways human can slow it, has been clear for decades, and in many ways is even clearer than the emerging scientific consensus about this pandemic. Whether and how we incorporate needed behavioral changes into the law is an important question for climate attorneys.

As noted in the Introduction, there are two critical differences between COVID-19 and the climate crisis: the scale at which they play out and the clarity of the impact of human action on each. COVID-19 is swift, with clear and certain consequences; climate change is slow, and difficult to understand for the general public. However, there are more similarities between them, including the existential crisis they both pose to humanity and the ability of science to address them. Climate attorneys must become familiar with the factual similarities, so that they can use the outcomes of COVID-19 lawsuits to influence climate litigation in a favorable way.

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Harvard’s Center for Climate, Health, and the Global Environment) as stating that we do not know yet whether COVID-19 resulted from climate-required migration of animals, but noting a connection between migration and pathogen transmission).

5. *Illnesses on the Rise*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/SVS7-99ZK> (archived May 10, 2020) (noting that between 2004 and 2016, “[t]he number of reported cases of disease from mosquito, tick, and flea bites has more than tripled”).

6. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 1, at 8, 15, 67, 69.

7. See, e.g., Vivien Williams, *COVID-19: Flattening the Curve*, MAYO CLINIC (Mar. 16, 2020), <https://perma.cc/A4CH-SGCG> (explaining the importance of flattening the curve).

8. Michael Greenstone & Vishan Nigam, *Does Social Distancing Matter?* 1 (Becker Friedman Institute for Economics at UChicago, Working Paper No. 2020-26, 2020), <https://perma.cc/7RZ3-8P9B> (estimating that 1.7 million lives would be saved with social distancing, between March and October).

9. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 1, at 29.

## **II. Why Focus on Courts?**

With the practical interrelatedness of COVID-19 and climate in mind, we turn now to the legal relationship. During the COVID-19 pandemic, governments at all levels have responded. Mayors, governors, and the President have asserted the authority of the executive branch through closures of businesses, public spaces, and transportation systems.<sup>10</sup> City councils, state legislatures, and Congress have passed relief packages and relaxed legal requirements.<sup>11</sup> Though many courts are closed, the judicial branch is seeing a sharp uptick in filings of lawsuits related to the pandemic.<sup>12</sup>

Of all the current and pending changes in the executive, legislative, and judicial branches, however, lawsuits related to COVID-19 and the government's response may be of the greatest relevance for attorneys seeking to address climate change. Here's why.

Executive actions being taken to address COVID-19 will not be sustained long-term. They have included limitations on movement, commandeering businesses and property, and canceling elections. They have also granted agencies wide discretion to waive procedural and substantive requirements. As a result, the Environmental Protection Agency has announced it will suspend enforcement for some environmental compliance and violations,<sup>13</sup> while state agencies in places like Connecticut are able to rewrite their substantive and procedural rules during the pandemic.<sup>14</sup> Most of us are likely only complying with these orders because they are limited in time. If maintained beyond a time-bound emergency, such executive actions would threaten the nature of our democracy in fundamental ways.

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10. *See, e.g.*, NED LAMONT, STATE OF CONN., Exec. Order No. 7H (Mar. 20, 2020) (ordering closure of nonessential businesses in Connecticut); MURIEL BOWSER, OFFICE OF THE MAYOR, GOV'T OF D.C., Exec. Order No. 2020-053 (Mar. 24, 2020) (ordering closure of non-essential businesses in Washington, D.C.); LATOYA CANTRELL, PROCLAMATION No. 2020-02602 (Mar. 16, 2020) (ordering closure of many public accommodations in New Orleans).
  11. *See, e.g.*, *COVID-19 in Congress*, GovTRACK.US, <https://perma.cc/Z32L-A9XT> (archived May 13, 2020); *COVID-19: Local Action Tracker*, NAT'L LEAGUE CITIES, <https://perma.cc/QX2D-9M8E> (archived May 13, 2020) (identifying over one thousand actions taken by local legislatures); *State Action on Coronavirus (COVID-19)*, NAT'L COUNCIL ST. LEGISLATURES, <https://perma.cc/M8MN-3T5N> (archived May 13, 2020) (documenting state legislative action in all fifty states, the District of Columbia, Guam, the U.S. Virgin Islands, and Puerto Rico).
  12. *See* Donna Higgins, *Roundup: First COVID-19 Suits Filed; States and Feds Weigh Legislation*, THOMSON REUTERS (Mar. 13, 2020), <https://perma.cc/K2KR-ZDRB> (listing recently filed COVID-19-related class-action, FOIA, shareholder, and negligence suits).
  13. *EPA Announces Enforcement Discretion Policy for COVID-19 Pandemic*, ENVT'L PROT. AGENCY (Mar. 26, 2020), <https://perma.cc/U32Z-AXES>.
  14. *See, e.g.*, NED LAMONT, STATE OF CONN., EXEC. ORDER NO. 7M, PART 3 (Mar. 25, 2020), <https://perma.cc/XUA6-PX8M> (giving all state agencies, boards, and commissions the ability to waive time and "decision-making requirements" for 90 days).

Legislative actions, too, are by and large limited in time and directly related to the political moment we are in today. It's one thing to have a politically fractured Congress come together to pass a \$2 trillion relief package when unemployment numbers are approaching those of the Great Depression and all but the most essential businesses are closed down. It would be altogether another thing to muster the same political will to address the climate crisis when the consequences seem so far off. Scholars have said climate change legislation is particularly challenging given the long horizon for reaping the benefits and the rewards.<sup>15</sup> Indeed, the scale and scope of legislation needed to impact climate change would dwarf that of even those laws that have transformed environmental law, including the National Environmental Policy Act and the Clean Air Act.<sup>16</sup> The failure of the Green New Deal to gain traction in Congress also suggests that there is little political appetite, at least on the national level, for similarly sweeping changes.

While the executive and legislative actions being taken in response to COVID-19 may not be easily replicable, or even desirable, in the fight against climate change, the courts are already hearing cases that may have a powerful impact – for better or worse – on governments' and citizens' ability to respond effectively to the climate crisis. And they're worth watching.

### **III. Lawsuits to Watch**

The difference between the courts and executive and legislative action is that once legal precedent is established, the precedential principles can be used by attorneys to shape subsequent cases. As noted in Part I, there are factual similarities between the pandemic and the climate crisis. Accordingly, attorneys may be able to use judicial outcomes from COVID-19 disputes in later climate suits.

During the coronavirus pandemic, there have been at least three types of lawsuits that climate attorneys should watch and learn from: failure-to-protect suits, misinformation suits, and takings suits. For example, numerous organizations have already sued departments of corrections and prison authorities at the federal, state, and local levels for failure to protect incarcerated people from the virus. A nonprofit is suing Fox News for disseminating misinformation that has led to deaths. Business owners and out-of-work employees are suing the government for shutting down businesses.

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15. See, e.g., Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1157 (2009) ("Climate change legislation is peculiarly vulnerable to being unraveled over time for a variety of reasons, but especially because of the extent to which it imposes costs on the short term for the realization of benefits many decades and sometimes centuries later.").

16. See National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-12 (2018); Clean Air Act, 42 U.S.C. §§ 7401-7671q (2018).

These and similar suits could set important precedents, and at minimum teach important lessons.

#### A. Failure to Protect Suits

The theory that governments have failed to protect people from known threats is a theory that has been used, unsuccessfully to date, in climate suits. If successful in the COVID-19 context, the legal precedent created could advantage climate attorneys.

Recent suits in this vein have been brought by civil liberties and prison reform advocates against correctional authorities all over the country, from Los Angeles County to Kentucky to Connecticut.<sup>17</sup> These suits seek emergency action to release certain incarcerated persons from prisons to reduce their risk of catching or spreading COVID-19. They have been filed on behalf of prisoners held on small bonds for nonviolent crimes, those whose release is imminent, and those at high risk of infection, including those with autoimmune conditions and the elderly. Their attorneys argue that plaintiffs' rights are being violated because they are at risk of certain, but avoidable, bodily harm.

The failure-to-protect suits are reminiscent of the *Juliana v. United States* lawsuit, in which the plaintiffs (mostly children) claimed that the federal government failed to protect them against climate change, despite knowing of its dangers.<sup>18</sup> The *Juliana* plaintiffs claimed that the federal government caused climate instability and enhanced production of fossil fuels in violation of their constitutional rights.<sup>19</sup> The Ninth Circuit dismissed the plaintiffs' claim on

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17. See, e.g., City News Service, *LA County Sued over Danger to Jail Inmates from COVID-19*, NBC LOS ANGELES (Apr. 25, 2020, 9:12 AM), <https://perma.cc/944V-SEKS>; Jason Riley, *Kentucky Inmates Sue for Release from Green River Prison Due to COVID-19 Outbreak*, WDRB.COM (Apr. 29, 2020), <https://perma.cc/D9F7-2KKP>; see also Edmund H. Mahony, *U.S. Judge Backs Prison Inmates in Danbury on COVID-19 Suit, Orders Warden to Move Fast on Requests for Release*, HARTFORD COURANT (May 12, 2020), <https://perma.cc/5KG3-4YLM> (indicating that a judge in a federal class action lawsuit issued an order requiring prison officials to evaluate prisoner requests for transfer to home confinement or compassionate release). For a full list of pending lawsuits, see Prison Legal News, *COVID-19 in U.S. Prisons and Jails*, HUM. RTS. DEF. CTR., <https://perma.cc/WJM8-XZD2> (archived May 13, 2020). One suit filed against state prison officials in Connecticut has already been dismissed by a state superior court judge. See Dan Brechlin, *Lawsuit that Called for Reduction of Connecticut Prison Population over Coronavirus Concerns Dismissed*, HARTFORD COURANT (Apr. 25, 2020, 1:38 PM), <https://perma.cc/9FYR-PBY3>.

18. First Amended Complaint for Declaratory and Injunctive Relief at 1, 7, 15-16, 19-23, 25-28, 30-33, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. Sept. 10, 2015) (No. 6:15-cv-01517-TC) [hereinafter *Juliana 2015 Complaint*].

19. *Id.* at 51-63.

Article III standing grounds,<sup>20</sup> but the plaintiffs have filed for a rehearing en banc.<sup>21</sup>

There are certainly obvious differences between *Juliana* and the COVID-19 suits. In *Juliana*, the plaintiffs alleged a generalized failure by the government to act, whereas in the COVID-19 suits, the injured parties are physically in governmental custody and directly vulnerable to the conditions that this custody affirmatively imposes. But here, we must return to the factual similarities between COVID-19 and the climate crisis: their scale and their ability to be influenced by our actions.<sup>22</sup> To be sure, climate change will unfold much more slowly than the destructive pandemic we are facing today. Yet government action is no less important in stopping the climate crisis, which is entirely preventable. The argument of plaintiffs like those in *Juliana*—again, largely children—is that the government's failure to protect has consequences that will have the same, likely even more devastating, impact of the current crisis, including loss of human life.

When it comes to climate change, the history of warning signs about a warming planet goes back over a century.<sup>23</sup> For COVID-19, the warning signs are more acute and recent. Nonetheless, if any of these failure-to-protect lawsuits are successful, the legal precedent created may help support a *Juliana*-type claim in the future.

## B. Misinformation Suits

The theory that misinformation disseminated by news media is actionable in court should also be watched by climate attorneys. Misinformation in the media about climate change is a well-documented issue, despite overwhelming consensus among scientists that humans are the leading cause of climate change.<sup>24</sup> If suits regarding COVID-19 are successful, this theory could be used to stop the spread of misinformation on climate change as well.

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20. *Juliana v. United States*, 947 F.3d 1159, 1170-73 (9th Cir. 2020) (denying injunctive relief because plaintiffs had not proven that remedying governmental violations of the Constitution would “mitigate the plaintiffs’ asserted concrete injuries” and because “it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs’ requested remedial plan”).

21. Petition for Rehearing *En Banc* of Plaintiffs-Appellees, *Juliana v. United States*, No. 18-36082 (9th Cir. Mar. 2, 2020).

22. It may be important to note here that scholars have raised alarms for years about the impact of climate change on prison conditions. See, e.g., DANIEL W.E. HOLT, COLUMBIA LAW SCHOOL SABIN CTR. FOR CLIMATE CHANGE, HEAT IN U.S. PRISONS AND JAILS: CORRECTIONS AND THE CHALLENGE OF CLIMATE CHANGE 2 (2015).

23. See *Juliana* 2015 Complaint, *supra* note 18, at 51, ¶ 131.

24. See, e.g., John Cook, *Understanding and Countering Misinformation About Climate Change*, in HANDBOOK OF RESEARCH ON DECEPTION, FAKE NEWS, AND MISINFORMATION ONLINE 281, 282 (Innocent E. Chiluwa & Sergei Samoilenco eds. 2019) (describing “decades of ideologically-driven misinformation campaigns”).

One COVID-related misinformation suit that has received national attention is a Washington state court complaint by a nonprofit focused on transparency and ethics against Fox News, Rupert Murdoch, AT&T, and Comcast, among other defendants.<sup>25</sup> The suit alleges that the defendants “act[ed] in the broad stream of commerce [to] knowingly disseminate[] false, erroneous, and incomplete information, which was reasonably relied upon by the public and which had the effect of delaying and interfering with the implementation of effective mitigation and countermeasures against the virus.”<sup>26</sup>

The legal bases for the misinformation claims include Washington’s consumer protection act and the tort of outrage.<sup>27</sup> As is the case with COVID-19 misinformation, climate misinformation can mislead consumers and make them act in ways injurious to themselves, which can give rise to a consumer protection act claim. The tort of outrage may be found where someone by intentional or reckless outrageous conduct causes severe emotional distress.<sup>28</sup> It will be interesting to see whether the Washington court applies this tort to media misinformation.

We are fortunate that, in the case of COVID-19, facts are now prevailing over misinformation across most media outlets, including those named in the Washington suit. However, climate attorneys should keep an eye on the Washington case and other similar lawsuits that will likely follow. On climate, media outlets have often displayed intentional or reckless disregard for the facts.<sup>29</sup> Judicial actions may restore factual media coverage and thus combat the denialism that persistently plagues the climate debate.

### C. Takings Suits

Several suits have been filed<sup>30</sup> against local and state governments under the theory that government action to shutter businesses to slow the spread of COVID-19 has taken property in violation of the Fifth Amendment of the U.S. Constitution.<sup>31</sup> How courts treat these takings claims can preview how courts

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25. See Complaint for Declaratory Relief and Violation of the Washington State Consumer Protection Act at 1, Wash. League for Increased Transparency & Ethics v. Fox News, No. 20-2-07428-4 (Wash. Super. Ct. Apr. 2, 2020).

26. *Id.* at 1-2.

27. *Id.* at 7-9.

28. See Restatement (Second) of Torts § 46(1) (1965) (recognizing liability when “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another”).

29. See Cook, *supra* note 24, and text accompanying note 24.

30. See, e.g., Complaint at 12, Amato v. Elicker, No. 3:20-cv-00464 (D. Conn. Apr. 3, 2020); Complaint at 24-28, Schulmerich Bells, LLC v. Wolf, No. 2:20-cv-01637 (E.D. Pa. Mar. 26, 2020).

31. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

will treat similarly dramatic government actions that purport to mitigate climate change risks.

Generally speaking, the Fifth Amendment requires compensation when government takes property for public use.<sup>32</sup> But where government aims to prevent a public nuisance, arguably including the spread of a deadly and fast-moving disease, compensation will not be required.<sup>33</sup> Absent novel arguments by plaintiffs that resonate with courts, COVID-19 takings challenges will not be successful.

Yet they are still worth watching, for other reasons. For both coronavirus and climate change, the threats to the public are very real, and government actions that interfere with private property are inevitable. Yet in both cases, no government will be able to handle the level of compensation required to make property owners, including business owners, whole.

If these COVID-19 suits reinforce that not every economic impact is going to be compensable, how will that impact what we do with respect to climate? As climate attorneys, we might argue to maintain the longstanding interpretations of the Fifth Amendment, and communicate broadly that we do not want to get to the point where crushing, radical actions of the kind we are undergoing now will be necessary. At the same time, we should use case outcomes that support widespread government action to push for broader changes that more quickly bring the changes we want to see.

As noted above, politicians may never muster the political will to respond to climate the same way they are responding to COVID-19. It is important for climate attorneys to know, however, how courts will respond to government action if they ever do.

#### **IV. Conclusion**

Even as we navigate the current crisis, we must draw lessons for the future. Climate attorneys should watch the legal response to COVID-19 to understand how we can advance necessary changes.

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32. Cf. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (establishing a test for regulatory takings that balances the economic impact on the claimant, the investment-backed expectations of the claimant, and the character of the government's actions).

33. See *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 538 (2005) (describing the *Lucas* holding as requiring the government to pay compensation "except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property" (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026-32 (1992))); see also *Lucas*, 505 U.S. at 1010, 1026 (confirming a "line of cases recogniz[ing] governmental power to prohibit 'noxious' uses of property . . . without having to pay just compensation" but declining to apply such cases to a taking effecting a total deprivation of economic value, stating that "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated").

Perhaps what we should take to heart most is that during the current pandemic, legislative and executive actions have responded, albeit belatedly, to science. Even the White House and red-state governors have at least partly overcome their early and vocal skepticism or denialism. Predictions about infection rates and the death toll have become too dire to ignore. At the same time, it is worth stating that some important details (like the availability of medical supplies and effectiveness of certain medical treatments) are still being debated within governments. These continued intra-governmental disputes suggest that while we might be optimistic, we should be somewhat guarded.

When it comes to climate change, we must be better at communicating scientific predictions and risk scenarios. And we must also be prepared to learn from the legal lessons that we will learn from this pandemic response. Effective lawyering in the age of climate change will require interdisciplinarity, versatility, and flexibility. Lawyers with those skills have become leaders in writing and interpreting COVID-19-related changes, and in bringing lawsuits whose underlying theories have important implications for climate. In our post-COVID-19 future, those same lawyers will be best positioned to help lead the way.