



# United States: Federal and State Executive Responses to COVID-19

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# United States: Federal and State Executive Responses to COVID-19

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**SUMMARY** The executive branches of federal and state governments in the United States have authority to enact rules and regulations designed to implement, enforce, and carry out laws passed by Congress. The executive branch generally relies on government agencies to perform these actions. Typically, the process is lengthy, including time for public comment and congressional oversight. Under certain circumstances, however, exceptions can apply to the process, allowing agencies to act immediately, lawfully bypassing normally longer regulatory procedures.

Although emergency rulemaking has been used in response to previous emergent situations, the COVID-19 pandemic has resulted in emergency rulemaking affecting every jurisdiction in the United States. The functional effects of emergency rulemaking are wide-ranging and can be contentious. The nature of emergency rulemaking creates difficulties for oversight at both the federal and state level. The rules and regulations enacted under the emergency framework will shape current and future generations as the United States begins to recover from COVID-19's economic and societal impacts.

## I. Introduction

The COVID-19 pandemic has presented many opportunities for government intervention through both the use of emergency powers and the conventional legislative process. The executive branches of the federal and state governments have broad authority to enact regulations without regular legislative branch oversight during a public health emergency. Federal and state governments have enacted rules, regulations, and legislation in response to the pandemic. The response by all levels of government to this complex situation could create new precedents, solidify current legal theories and principles, and result in complex litigation.

This report outlines the regulatory authority of federal executive branch agencies within the United States, first by describing the legal framework of the regulatory process, including interactions among the legislative, executive, and judicial branches. Second, this report analyzes examples of emergency action taken by federal executive agencies under pandemic-related legislation as well as existing statutes to illustrate the responses agencies have made during the pandemic. Third, examples of executive directives by the President are introduced to demonstrate the scope of powers the federal executive has during national emergencies. Fourth, executive orders from different states are presented to examine the powers given under state constitutions and statutes. Finally, emergency actions by state legislatures are analyzed to highlight some specific issues arising from the pandemic that fall under state government authority, and to illuminate state legislative oversight of state executive and judicial branches.

## II. Regulatory Process Overview

Executive agencies are given authority to regulate aspects of American society through the Administrative Procedure Act (APA).<sup>1</sup> An agency creates a new regulation (or modifies an existing one) when directed by Congress, or when the agency, under its delegated legal authority, determines a regulation should be implemented or amended.

### A. Formal and Informal Rulemaking

Federal agencies generally engage in two types of rulemaking—formal and informal. Formal rulemaking is triggered when Congress directs the agency to create a rule by statute. It involves a hearing before an administrative law judge in which the agency and interested parties present evidence in support of, or in opposition to, the proposed rule.<sup>2</sup> Informal rulemaking is the more common procedure. An agency uses this process when modifying, changing, or creating rules it has promulgated previously.<sup>3</sup> Generally, agencies allow a limited period for interested parties to offer insight on the proposed rule.

### B. Exceptions

One exception to the rulemaking process occurs when an agency creates an emergency rule. Under these circumstances, an agency must demonstrate that following the typical rulemaking process would be contrary to the public interest.<sup>4</sup> Agencies have invoked the COVID-19 pandemic as a basis for rulemaking under this exception because it is a public health crisis. (See Section II, below, for examples of emergency rulemaking at the federal level.) Similar to an emergency rule, agencies may also promulgate a temporary rule, which acts as a final rule for enforcement purposes, but is still open for public comment for later review. (See Section II. A. for an example of temporary rulemaking.)

Other exceptions exist under the Congressional Review Act (CRA).<sup>5</sup> Under the CRA, Congress requires federal agencies to submit to it a copy of each newly promulgated rule. The CRA gives Congress the ability to nullify a rule by passing a joint resolution. The President can, however, veto such a joint resolution and thereby allow the rule to go into effect. Another exception under the CRA is available for imminent threats to health or safety.<sup>6</sup> For this exception to apply, the President must issue an executive order making a determination that a rule must go into effect immediately because of an imminent threat to health or safety.<sup>7</sup>

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<sup>1</sup> Administrative Procedure Act, 5 U.S.C. §§ 500-596, <https://perma.cc/ENY2-7P67>.

<sup>2</sup> Id. §§ 556-557.

<sup>3</sup> 5 Id. § 553.

<sup>4</sup> Id. § 553(b)(B).

<sup>5</sup> Congressional Review Act, 5 U.S.C. §§ 801-808, <https://perma.cc/A6FV-5KR5>.

<sup>6</sup> Id. § 801(c)(2).

<sup>7</sup> Id. § 801(c)(2)(A).

### C. Presidential and Judicial Authority

The President may authorize rulemaking through executive orders, and the judiciary may determine whether an agency provided sufficient reasoning to support its rule. For example, through executive order, the President may direct an agency to perform a specific action. As with other rulemaking procedures, the agency's actions must adhere to the APA's requirements. An agency may also be called upon to act under an executive order based on authority vested in the President by Congress.<sup>8</sup>

The judiciary, when reviewing rules and regulations that are being challenged or enforced in court, gives a high level of deference to agencies. Generally, an agency need only show a reasonable level of justification for its actions.<sup>9</sup>

### D. State Authority

Most states have a similar framework for executive actions, under their own versions of the APA.<sup>10</sup> Along with the powers listed in a state's administrative procedures, individual governors have broad powers under their respective state constitutions or statutes to protect citizens during a disaster or emergency.<sup>11</sup> One matter in particular over which governors have authority is implementing quarantines, or lockdowns, of their citizens. That power is generally delegated to the state's health department or health agency.

## III. Federal Responses to COVID-19

### A. Family First Coronavirus Response Act

Congress enacted the Families First Coronavirus Response Act (FFCRA) on March 18, 2020.<sup>12</sup> This law allows small businesses to provide employees with more paid time off during the pandemic, so employees can adhere to guidelines created in the interest of public health. The FFCRA also authorized the Department of Labor (DOL) to determine how best to implement this statute's requirements. In response, the DOL created a temporary rule (set to expire on December 31, 2020) to execute the congressional action.<sup>13</sup>

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<sup>8</sup> A thorough explanation of the President's authority to engage in rulemaking with executive orders can be found in a July 2018 Congressional Research Service (CRS) report: Valerie C. Brannon, Cong. Res. Serv., LSB10172, *Can a President Amend Regulations by Executive Order?* (July 18, 2018), <https://perma.cc/KFY7-ACMW>.

<sup>9</sup> *Kisor v. Wilkie*, 588 US \_\_\_, 139 S. Ct. 2400 (2019), <https://perma.cc/BQ9P-DFZU>.

<sup>10</sup> See, e.g., Washington State Administrative Procedure Act, Wash. Rev. Code § 34.05 (1988), <https://perma.cc/S2UB-AX24>; Massachusetts State Administrative Procedure, Mass. Gen. Laws ch. 30A, §§ 1-25 (1954), <https://perma.cc/B69P-9R7M>.

<sup>11</sup> See, e.g., Ariz. Rev. Stat. § 26-303 (2015), <https://perma.cc/B74M-TYSZ>; Conn. Gen. Stat. (2010) § 28-9, <https://perma.cc/MA3W-GRRT>.

<sup>12</sup> Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, <https://perma.cc/QD64-6QWY>.

<sup>13</sup> 85 Fed. Reg. 19,326 (Apr. 6, 2020), <https://perma.cc/FF93-MUZV>; corrected by 85 Fed. Reg. 20,156 (Apr. 10, 2020), <https://perma.cc/Z71J-7WFR>.

The temporary rule explains the reasoning behind the rule's creation and the goals of the statute the rule seeks to fulfill.<sup>14</sup> The DOL did not go through the typical rulemaking process because it created a temporary rule. Relying on the good cause requirements under 5 U.S.C. § 553(b)(B), the DOL supported its decision to move forward without notice and comment by stating that the pandemic created an immediate need for action related to family and medical leave, and that adhering to the normal process would have obstructed the goal of offering immediate relief for families. The DOL specifically noted:

The COVID-19 pandemic has escalated at a rapid pace and scale, leaving American families with difficult choices in balancing work, child care, and the need to seek medical attention for illness caused by the virus. To avoid economic harm to American families facing these conditions, a decision to undertake notice and comment rulemaking would likely delay final action on this matter by weeks or months, and would, therefore, complicate and likely preclude the Department from successfully exercising the authority. . . . Moreover, such delay would be counter to one of the FFCRA's main purposes in establishing paid leave: enabling employees to leave the workplace now to help prevent the spread of COVID-19.<sup>15</sup>

The rule's practical implications are described on the DOL's website, which provides a fact sheet.<sup>16</sup> The fact sheet explains to the general public the FFCRA's protections as they relate to the DOL's purview. In short, the rule provides guidance on who is affected by the rule (employees), the reasons the rule applies to those individuals (hardship caused by their own or a close relative's sickness), and the resulting effect on the employee (in this instance, monetary compensation).<sup>17</sup>

## **B. Coronavirus Aid, Relief and Economic Security Act**

On March 27, 2020, the President signed into law the Coronavirus Aid, Relief and Economic Security (CARES) Act.<sup>18</sup> One key piece of this legislation authorized the Department of Education (DOE) to provide colleges and universities with the ability to supply their students with financial aid, through the Higher Education Emergency Relief Fund (HEERF), due to hardship experienced because of the COVID-19 pandemic. The DOE was granted the authority to determine eligibility requirements for students to receive the money from HEERF.

The rule adopted by the DOE provides reasoning for the rule's creation, as well as the justification for waiving the standard notice and comment period.<sup>19</sup> For this particular rule, the DOE had to define the term "student" due to an ambiguity in the legislation. The DOE further

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<sup>14</sup> FFCRA § 5111.

<sup>15</sup> 85 Fed. Reg. 19,342 (Apr. 6, 2020), <https://perma.cc/2XAQ-5ESH>.

<sup>16</sup> *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, US Dep't of Lab. Wage & Hour Division, <https://perma.cc/8HEG-KSVP>.

<sup>17</sup> A more in-depth explanation is available from an April 2020 CRS report: Sarah A. Donovan & Jon O. Shimabukuro, Cong. Res. Serv., IF11487, *The Families First Coronavirus Response Act Leave Provisions* (Apr. 2, 2020), <https://perma.cc/E7PQ-AQPM>.

<sup>18</sup> Coronavirus Aid, Relief and Economic Security Act, Pub. L. No. 116-136, <https://perma.cc/T2Z8-X9PY>.

<sup>19</sup> 85 Fed. Reg. 36,494 (June 17, 2020), <https://perma.cc/AK7J-4WSR>.

determined that the waiver of notice and comment was justified because of the need to provide students with financial assistance as quickly as possible. The DOE, relying on 5 U.S.C. § 553(d)(3), found that the suspension of the notice and comment period also justified making the rule effective immediately.<sup>20</sup>

### **C. Paycheck Protection Program and Health Care Enhancement Act**

In response to the COVID-19 pandemic, Congress also enacted the Paycheck Protection Program and Health Care Enhancement Act on April 24, 2020.<sup>21</sup> This law, in part, authorized the Small Business Administration (SBA) to provide direct payments to eligible small businesses through the Paycheck Protection Program (PPP). PPP loans are designed to allow small businesses to continue paying employees during the potential economic downturn caused by the COVID-19 pandemic. The SBA was authorized to provide loans through June 30, 2020.

The interim final rule provides the bases for the rule's creation, as well as its intended goals.<sup>22</sup> The rule statement explains the reasoning for moving forward without notice and comment; in this instance, the exception was triggered because the CARES Act authorizes the SBA to implement the PPP without a notice and comment period. However, the SBA continued soliciting comments in anticipation of further guidance. The statement also reasoned that the rule would take immediate effect because, at the time of the rule's creation, PPP applications were open only until June 30, 2020.<sup>23</sup> The initial rule authorized the program through June 30, 2020; however, on July 6, 2020, the program was extended through August 8, 2020.

### **D. Emergency Funding: Coronavirus Preparedness and Response Supplemental Appropriations Act**

The Coronavirus Preparedness and Response Supplemental Appropriations Act was signed into law on March 6, 2020.<sup>24</sup> It provided \$8.3 billion in emergency funding to federal agencies to respond to the COVID-19 pandemic. The supplemental appropriations provided by this Act are supporting the development of a vaccine, funding different agencies to serve the general population, and supporting activities at US embassies and other overseas facilities. A key

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<sup>20</sup> The information provided in the *Federal Register* is available on the department's website at <https://perma.cc/SGW8-2YDS>. Information on eligibility and process, as well as university requirements, is available for student review. CRS also provides a more in-depth discussion of this particular rule in a recent report: Rebecca R. Skinner et al., Cong. Res. Serv., R46378, *CARES Act Education Stabilization Fund: Background and Analysis* (June 3, 2020), <https://perma.cc/EG7L-RZTD>.

<sup>21</sup> Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, <https://perma.cc/WES4-3G7L>.

<sup>22</sup> 85 Fed. Reg. 20,817 (Apr. 15, 2020), <https://perma.cc/M4KX-SY9A>.

<sup>23</sup> The SBA provides supplemental materials at <https://perma.cc/R9JJ-D64Q>, and CRS provides more in-depth analysis of the PPP in a recent report, Robert Jay Dilger, Cong. Res. Serv., R41146, *Small Business Administration 7(a) Loan Guaranty Program* (Apr. 30, 2020), <https://perma.cc/XF9Q-PC2A>.

<sup>24</sup> Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, <https://perma.cc/B9H9-UFMM>.

component of the law is making telehealth a more viable option to help safely build the capacity of the medical system within the United States.

### **E. Emergency Rulemaking Under Existing Law: Magnuson-Stevens Act**

The Magnuson-Stevens Fishery Conservation and Management Act is a law that provides for observation of fishing vessels to enforce catch limits.<sup>25</sup> The National Oceanic and Atmospheric Administration (NOAA) previously had been delegated the authority to execute this law, and had created regulations detailing its enforcement process. Due to the COVID-19 pandemic, NOAA issued a temporary rule, bypassing the notice and comment period.<sup>26</sup>

The temporary rule allows NOAA to waive the use of observers on fishing vessels in certain instances. Relying on 5 U.S.C. § 553(d)(3), the agency made findings that the rule needed to go into effect immediately due to the risk to both fishermen and observers if the agency were to adhere to the typical notice and comment process, specifically noting the ongoing public health issues caused by the global pandemic. The justification focused on balancing the need to protect individuals while still maintaining the integrity of the fishery.

The practical effects of this regulation are not as easy to see, because its effects are less far-reaching than the examples above. However, NOAA has posted guidance on its website detailing the reasons for the emergency rule.<sup>27</sup>

### **F. Executive Direction Under the Stafford Act**

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) provides the President with significant powers during a national emergency. One such power under this act is the ability to utilize federal funds in support of individual state National Guard units. In a series of executive memoranda, the President has committed federal resources to support National Guard operations in several states during the pandemic response. For example, the President issued a memorandum directing the Department of Defense and the Department of Homeland Security to fund 100% of the costs associated with deploying National Guard troops to the states to support the COVID-19 response.<sup>28</sup>

### **G. Executive Order Under the Defense Production Act**

The Defense Production Act of 1950 (DPA) provides the President with the power to implement regulatory changes through power vested in him by Congress and delegated by him to different federal agencies. In the example of Executive Order No. 13,917, the President authorized the US

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<sup>25</sup> Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891, <https://perma.cc/CGE8-65AV>.

<sup>26</sup> Emergency Measures to Address Fishery Observer Coverage during the COVID-19 Coronavirus Pandemic, 85 Fed. Reg. 17,285 (Mar. 27, 2020), <https://perma.cc/PQ5W-T48H>.

<sup>27</sup> IB 20-29: *Notification on Waiver of Observer Coverage Requirements in the Partial Coverage Category*, NOAA (Mar. 27, 2020), <https://perma.cc/J7UK-QFSC>.

<sup>28</sup> Memorandum on Providing Federal Support for Governors' Use of the National Guard to Respond to COVID-19, 2020 Daily Comp. Pres. Doc. 00181 (Mar. 22, 2020), <https://perma.cc/7WAZ-T3XG>.

Department of Agriculture to implement necessary rules and regulations to ensure the continued processing of meat and poultry.<sup>29</sup> Within this statement, the President explained that certain regulations would be superseded for the purposes of this emergency action, and justified his authority to do so under the DPA.

## H. Recent Presidential Actions

On August 8, 2020, President Trump announced one executive order and three presidential memoranda outlining additional COVID-19 relief measures. These executive documents refer to the Stafford Act and outline some of the measures previously implemented in response to the pandemic. The executive order directs the Secretary of the Department of Housing and Urban Development to identify funds to assist renters and homeowners who have been financially impacted by the pandemic fulfill their rental and mortgage obligations.<sup>30</sup>

The first memorandum extends relief from repaying student loans, and waives interest on these loans, through December 31, 2020.<sup>31</sup> This loan repayment deferral program was originally implemented under the CARES Act, and it was set to expire on September 30, 2020.<sup>32</sup> The next memorandum instructs the Treasury Secretary to defer “the withholding, deposit, and payment of the [payroll] tax[.]”<sup>33</sup> This directive applies to pay periods during September 1, 2020, through December 31, 2020, and impacts employees who make less than \$4,000, pretax, every two weeks.<sup>34</sup> The final memorandum directs the Federal Emergency Management Agency and state governments to divert disaster relief funds to compensate individuals who are entitled to unemployment benefits.<sup>35</sup> This memorandum allows for qualifying persons to receive \$400 per week in unemployment benefits through a cost-sharing program, with \$300 federally funded and the remainder paid by state governments.<sup>36</sup>

As of the date of this report, state governments have threatened to commence litigation in response to these measures. The legislative and executive branches are continuing negotiations on further economic relief measures.

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<sup>29</sup> Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (May 1, 2020), <https://perma.cc/DG7R-7GZ5>.

<sup>30</sup> Exec. Order No. 13,945, 85 Fed. Reg. 49,935 (Aug. 8, 2020) <https://perma.cc/6UC6-4D6E>.

<sup>31</sup> Memorandum on Continued Student Loan Payment Relief During the COVID-19 Pandemic, 85 Fed. Reg. 49,585 (Aug. 13, 2020), <https://perma.cc/N3W4-A4NA>.

<sup>32</sup> CARES Act § 1107(a).

<sup>33</sup> Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster, 85 Fed. Reg. 49,587 (Aug. 13, 2020), <https://perma.cc/Y25W-B5XH>.

<sup>34</sup> For more information on payroll taxes, see Donald J. Marples & Molly F. Sherlock, Cong. Res. Serv., IN11230, *Payroll Tax Cuts as an Economic Stimulus Response to Coronavirus Disease (COVID-19)* (Mar. 5, 2020), <https://perma.cc/2HDZ-NZT6>.

<sup>35</sup> Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019, WHITE HOUSE (Aug. 8, 2020), <https://perma.cc/B6RD-JKUY>.

<sup>36</sup> A more thorough analysis of these executive orders and memoranda can be found in Kevin M. Lewis et al., Cong. Res. Serv., LSB10532, *President Trump’s Executive Actions on Student Loans, Wage Assistance, Payroll Taxes, and Evictions: Initial Takeaways* (Aug. 10, 2020), <https://perma.cc/8UKH-5JAP>.

## **IV. State Responses to COVID-19**

State governments across the United States have enacted emergency rules and legislation to respond to the COVID-19 pandemic. In some instances, state governors have issued various orders declaring states of emergency, authorizing executive action. State legislatures also have enacted emergency legislation providing funding for responses to the pandemic and performing oversight over certain executive and judicial actions. Three examples of exercises of state executive authority and three examples of exercises of state legislative authority are provided below.

### **A. State Quarantine Order – Ohio**

In early March, Governor Mike DeWine of Ohio issued an executive order declaring a state of emergency.<sup>37</sup> Through this order, he authorized the Ohio Department of Health to implement rules designed to protect the general public. The Health Department then issued an order requiring people to stay at home unless engaged in essential work or activities.<sup>38</sup> This order was issued under the authority of the Governor, however, it was issued by the Director of the Department of Health. Under Ohio law, governors have broad authority to direct departments to take action under states of emergency or public health emergencies.

### **B. State Evictions Halting Order – Illinois**

On June 26, 2020, Illinois Governor J.B. Pritzker issued an executive order halting eviction proceedings within the state.<sup>39</sup> The governor is granted these powers under statute and the Illinois Constitution. This broad-reaching order provided many authorizations, findings, and justifications. Similar to executive orders under federal and state law, the governor can delegate power to other state agencies to carry out these directives.

### **C. Declaration of State of Emergency – Montana**

On March 12, 2020, Governor Steve Bullock of Montana issued an executive order declaring a state of emergency in Montana.<sup>40</sup> Upon issuance of this order, the governor mobilized different state resources to meet urgent needs arising from the pandemic. The order also provided the governor with the power to direct a statewide response to the disease outbreak.

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<sup>37</sup> Ohio Exec. Order No. 2020-01D (Mar. 9, 2020), <https://perma.cc/PT8H-BQXZ>.

<sup>38</sup> Director’s Stay Safe Ohio Order, Ohio Dep’t of Health (Apr. 30, 2020), <https://perma.cc/HSD5-8XND>.

<sup>39</sup> Ill. Exec. Order No. 2020-44 (COVID-19 Executive Order No. 42) (June 26, 2020), <https://perma.cc/BNT3-QQ8H>.

<sup>40</sup> Mont. Exec. Order No. 2-2020 (Mar. 12, 2020), <https://perma.cc/DT5Z-9XKN>.

#### **D. Oversight of Executive Authority – Colorado**

On July 14, 2020, the Colorado General Assembly exercised oversight authority by passing a law requiring the governor to attend regular meetings with the legislature when a disaster or emergency has been declared.<sup>41</sup> The law requires the governor to provide information about the disaster response and answer questions from the legislature. The law further provides that the governor must give notice to the legislature when promulgating any executive order related to the disaster or emergency.

#### **E. Criminal Procedure – New York**

On June 17, 2020, the New York legislature amended its criminal procedure laws to allow witnesses to appear electronically in felony hearings.<sup>42</sup> The law applies while the governor has declared a state of disaster or emergency and will expire on April 30, 2021. The law provides that a witness may appear in this manner if the court finds that it would be an unreasonable hardship for the witness to appear in person. The law also outlines the technological and logistical requirements for an appearance in this manner.

#### **F. Special Funding – Arizona**

On March 28, 2020, the Arizona legislature amended its laws to establish the Crisis Contingency and Safety Net Fund to provide money for the general welfare of Arizona's population.<sup>43</sup> This act provides funding for housing, small business, and food bank operations. It clarifies that the money in the fund may be spent only when the governor has declared a state of emergency, and only for the specific purposes set forth in the act.

#### **V. Conclusion**

The pandemic response is dynamic and changing; it is expected that the federal and state governments' responses will continue to develop. While no one government entity has introduced a comprehensive solution to the COVID-19 pandemic, legislative and executive branches at the federal and state levels have exercised their authority in enacting laws, promulgating rules, exercising oversight, and making emergency declarations to serve their constituents. As the United States recovers from the pandemic, government entities will likely continue to adopt new rules and legislation in an effort to promote the health and financial security of United States citizens and residents.

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<sup>41</sup> 2020 Colorado Sess. Laws 1556 (July 14, 2020), <https://perma.cc/T72L-9Y69>.

<sup>42</sup> N.Y. Crim. Proc. Law § 180.65 (Consol. 2020), <https://perma.cc/K2ZU-BLGC>.

<sup>43</sup> AZ SB1690 (Mar. 28, 2020), <https://perma.cc/KC6G-E2CY>.