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SCOTUS in the time of COVID: The evolution of justice dynamics during Oral arguments

Eve M. Ringsmuth[1] | **Matthew Sag**[2] | **Timothy R. Johnson**[3] | **Tonja Jacobi**[2]

[1]Department of Political Science, Oklahoma State University, Stillwater, Oklahoma, USA

[2]Emory University School of Law, Atlanta, Georgia, USA

[3]Department of Political Science and Law, University of Minnesota Twin Cities, Minneapolis, Minnesota, USA

Correspondence
Timothy R. Johnson, Department of Political Science and Law, University of Minnesota Twin Cities, 1414 Social Sciences 267 19th Avenue South, Minneapolis, MN 55455, USA.
Email: trj@umn.edu

Abstract
We assess changes in oral arguments at the US Supreme Court precipitated by the COVID-19 pandemic and the degree to which those changes persisted once the justices acclimated to the new procedures. To do this, we examine whether key attributes of these proceedings changed as the Court experimented with telephonic hearings and subsequently returned to in-person oral arguments. We demonstrate that the initial telephonic forum changed the dynamics of oral argument in a way that gave the chief justice new power and reconfigured justices' engagement during these proceedings. However, we also show that the associate justices adapted to this new institutional landscape by changing their behavior. The findings shed light on the consequences of significant, novel disruptions to institutional rules and norms in the government and legal system.

1 | INTRODUCTION

In early 2020, the public health threat posed by the COVID-19 pandemic forced institutions, both public and private, to reevaluate how to safely conduct their work. Courts across the US met via Zoom, Skype, or telephone, and many legislative and executive bodies did the same. The US Supreme Court was no exception. After initially delaying all sessions when it was unclear how long the pandemic would last, it soon became apparent that the Court had to find a means to, at a minimum, address the most pressing pending cases, which concerned issues ranging from Congress' ability to subpoena the president's tax records (*Trump v. Mazars*[1]), employers' religious rights under the First Amendment (*Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*[2]), and states' abilities to control presidential electors (*Chiafalo v. Washington* and *Colorado Department of State v. Baca*[3]). To this end, the Court announced on April 13, 2020, that it would hear oral arguments remotely via telephone conference beginning

in May 2020.[4] When the pandemic had still not subsided by October 2020, the justices decided to maintain this practice through the new term.[5] The Court subsequently returned to in-person oral arguments for the October 2021 term while carrying over some of the structural changes made during the period of telephonic oral arguments.[6]

We posit that the Court's move to such sessions and back again is a salient example of how major institutions adapt to ongoing crises. As a part of the shift to remote arguments in May 2020 (the end of the 2019 October term), the Court's response to the pandemic included major procedural changes to its proceedings. First, rather than the normal free-for-all in which justices ask questions (nearly) whenever they like (see, e.g., Johnson, 2004; Johnson et al., 2009; Johnson et al., 2021), the justices changed the rules so that they spoke in order of seniority (see Jacobi et al., 2021). Second, the chief justice acted as the moderator (Jacobi et al., 2021). That is, the chief had the ability to end one justice's turn and move on to the next justice's line of questions. The adoption of these new rules represented a significant departure from typical oral argument protocol in which justices jockeyed for the opportunity to engage with attorneys.

Third, when the Supreme Court returned to hearing oral arguments in person for the 2021 October term, it merged aspects of the telephonic structure with the traditional format. After the initial 2 min attorneys are allotted for opening statements, each oral argument session began with an unstructured period during which time any justice could ask a question of the advocate. The session then culminated with a second segment during which justices had the opportunity to ask any final questions in order of seniority.[7] These changes in oral argument protocols provide a unique opportunity to investigate and track the impact of institutional rule changes. In particular, we are in a position to examine what initially happened after the new structure was imposed, as well as whether the initial pattern held as time went on and those involved gained experience with the new rules. We therefore ask an important and timely question: *to what extent did the changes in oral argument procedures alter the dynamics of the Court's consideration of cases?*

To answer this question, we begin by building our argument around the confluence of several topics covered in the literature: how oral argument affects the Court's decision-making process, how institutional norms and rules affect the behavior of political actors, and how these political actors adapt to new institutional settings, and the role of the chief justice during oral arguments. We then describe the data we use to determine how, if at all, the new format altered justices' behavior. From there, we offer an empirical analysis of the changes to the Court's oral argument rules, examining the evolution of oral argument dynamics from all orally argued cases since Justice Brett Kavanaugh ascended to the bench in October 2018, including the transition to telephonically argued cases and the return to in-person arguments during the 2021 term.

2 | SUPREME COURT ORAL ARGUMENT

Oral argument plays an essential role in Supreme Court decision-making because it represents the first and best opportunity for justices to actively seek out information they deem relevant to their decision-making process (see, e.g., Johnson, 2004). This is important because, as McGuire (1998, p. 522) notes, "[o]ne constant in all litigation… is the justices' need for reliable information-data and clarity about the nature of the legal principles in conflict that will enable them to maximize their policy designs in the most informed manner." Further, scholarship demonstrates that the quality of the attorneys relaying this information has a direct impact on how justices decide case outcomes (Johnson et al., 2006).

In addition to gathering information, a substantial literature demonstrates that justices use oral argument to learn about each other's preferences, to try to alter one another's views of a case, and to engage in preliminary negotiations about the final decision. That is, justices listen

to their colleagues' comments with an ear toward determining how coalitions may form and how their ideological allies and opponents might vote in a given case (Black et al., 2012; Jacobi & Sag, 2019a). Justices, in turn, use this information to begin building coalitions for the opinion-writing process (Black et al., 2012; Johnson, 2004).

Specifically, scholars have demonstrated that the relative number of questions and words directed at attorneys is a substantively significant predictor of who will win a case (see, e.g., Jacobi & Sag, 2019a; Johnson et al., 2009). Justices even tip the scales by showing the same patterns when they make fun of one side or the other (Jacobi & Sag, 2019b). Beyond counts of justices' speaking turns, the emotional content of the language that justices use during oral argument indicates how they may decide cases they hear. In particular, their "words, and the emotions behind them," can provide observers valuable insights into justices' "intentions, motives, and desires" (Black et al., 2011, p. 573; Dietrich et al., 2019).

3 | INSTITUTIONS AND ORAL ARGUMENT

As justices participate in oral argument, they follow institutional norms and rules of behavior that dictate how they interact with their colleagues. By institutions we mean, generally, the formal or informal rules that structure interactions between social actors (Knight, 1992; North, 1990). Further, when rules and norms change, existing scholarship has demonstrated that social and political actors respond by adapting their behavior (see e.g., Dovers & Hezri, 2010; Johnson, 2004; Knight, 1992; March & Olsen, 1996; North, 1990). In the general context of the Court, institutions may constrain justices' behavior insofar as the rules of the game may prevent them from always acting how they would like to act or always making decisions that equate with their most preferred outcomes. The reason for this is simple: the Court must at least have the aura of acting in a fair, nonpolitical manner (Epstein & Knight, 1998).

Among various institutions governing the Court (e.g., following precedent, ensuring there is a case or controversy before they can decide a case), a key institutional feature is that in a collegial body justices treat one other with respect during their decision-making process (see, e.g., Black et al., 2012, 2018; Houston et al., 2021; Johnson, 2004; Maltzman et al., 2000). This is most clearly evidenced by how they interact with one another during conference (Black & Johnson, 2019; Rehnquist, 1987), as they craft their written opinions (Maltzman et al., 2000), and when they announce decisions from the bench (Blake & Hacker, 2010; Johnson et al., 2009).

Norms are especially important when the public is able to observe the Court, in part because it is so rare to see the justices' actions. Specifically, we are interested in the role that rules and norms of behavior play in the Court's most public display—the oral arguments justices hear in cases they decide. In terms of rules, attorneys are traditionally allotted 30 min (in most instances) to argue their case, and they must answer questions posed to them by the justices (Johnson, 2004).[8] In terms of norms, justices may ask questions at any time, but they try to not interrupt one another if at all possible (Jacobi & Sag, 2019a; Johnson et al., 2009; but see Jacobi & Schweers, 2017), thereby presenting the Court as a fair and collegial body.

4 | THE CHIEF JUSTICE AND ORAL ARGUMENT

During traditional oral arguments, the chief justice's primary authority lies in determining how strictly to enforce the time allocated to each attorney (Johnson & Gregory, 2016). Justices generally determine for themselves how, when, and for how long to engage during these proceedings. While the chief justice can certainly attempt to quell an overbearing colleague, if that colleague is truly unwilling to yield the floor, the chief has traditionally had little recourse. Prior

to the recent period of telephonic hearings, Roberts was considered relatively light-handed in his control during oral argument, especially compared to his predecessor, Chief Justice William Rehnquist (Johnson & Gregory, 2016). As one commentator noted, "The Rehnquist-to-Roberts transition has altered the style of the Court. The atmosphere is more relaxed, and the Chief Justice is decidedly more laid back" (McGough, 2005, B-7). Thus, prior to the switch to the telephonic format, justices generally self-monitored their speaking terms without the chief justice's direct intervention.

5 | THE IMPACT OF NEW ORAL ARGUMENT RULES

This stands in stark contrast to the role of the chief during the telephonic hearings. Specifically, in the telephonic era, Roberts spoke first after an attorney's 2 min of uninterrupted argumentation.[9] This allowed the chief to exercise key control over how long an advocate had to speak freely and to frame the case through his questioning—a potentially important agenda setting power (see, e.g., Black et al., 2012). The chief then called on each associate justice in order of seniority. As a result, each associate could only speak once introduced by the chief. This dismantled the justices' previous practice of self-regulating their dialogues with attorneys which, in turn, gave Roberts unprecedented control over the proceedings. As Jacobi et al. (2021) note, the chief also had the authority to cut off an advocate's turn before introducing the next justice and to determine whether the prior justice was allowed to ask any final follow-up questions. Alternatively, justices had the ability to voluntarily end their speaking turn.

By guaranteeing each justice a dedicated opportunity to engage with the advocates, the new oral argument procedure was more equitable on its face in terms of speaking time. However, its implementation hinged on the chief justice in a way that far exceeded his normal role during traditional oral argument. By endowing the chief with such discretion and the authority to move to the next justice, the new telephonic oral argument procedure empowered the chief to shape the content and tenor of the Court's public consideration of each case. This leads us to hypothesize that *the new structure of telephonic oral arguments—including the chief justice's larger role—altered the associate justices' patterns of engagement*.

While we argue that the autonomy of the associate justices was curtailed by the new argument structure, scholars have consistently demonstrated that political actors can and do adapt to institutions when rules and norms change (see, e.g., Dovers & Hezri, 2010; Johnson, 2004; Knight, 1992; March & Olsen, 1996; North, 1990). Actors continue to pursue their goals but, recognizing the interdependent nature of collective decision-making and how institutional rules and norms shape outcomes, they adapt their strategies for doing so in response to institutional change (see, e.g., Black et al., 2012). The Court's continued use of the telephonic format in the 2020 term allows us to examine whether the justices adapted after their initial exposure to the rigidity of the new format and the chief's increased authority.

We argue that the norms of collegiality and self-policing present during traditional oral arguments were disrupted by the hierarchical nature of the new telephonic format (e.g., Litman & Jacobi, 2020). Though they were permitted to speak primarily seriatim when called on by the chief under the new format, the associate justices had the option to end their turn voluntarily before the chief could intervene to move on to the next justice. While cutting one's turn short has disadvantages, we argue that doing so allows a justice to control the narrative of her turn while also demonstrating a commitment to the Court's norm of collegiality. Indeed, the Court prides itself on having a respectful and apolitical institutional culture. The structure of telephonic argument provides an opportunity for the justices to exhibit the norm of collegiality by self-regulating their interactions with the advocates, which in turn creates an orderly transition and facilitates their colleagues' engagement. While there is a potential incentive for justices to squeeze as much time in with an advocate as possible, *we expect that*

associate justices were more likely to end their turns voluntarily when hearing (*telephonic*) *cases in the 2020 term than when hearing* (*telephonic*) *cases in the 2019 term*, *shifting strategies as they adjusted to this new structure* (*and the chief's new role*).

6 | DATA

To test our expectations about how changes to the Court's oral argument procedures may have altered the dynamics of justices' public consideration of cases, we constructed a dataset derived from the transcripts of all arguments from the 2018 to 2021 terms, beginning with when Justice Kavanaugh joined the Court. This time period allows us to examine how justices initially responded to these procedural changes and whether the pattern continued as time went on and those involved gained experience under the new rules.[10]

More specifically, the data comprise 244 cases in total: in-person cases from the 2018 term ($N = 65$)[11]; in-person oral arguments ($N = 48$) and the 10 initial telephonic cases from the 2019 term; the 58 telephonic cases from the October 2020 term; and the 63 cases from the 2021 October term. In these 244 cases, there were approximately 61,000 speech episodes (i.e., speaking turns) and more than 3 million words spoken by the justices and advocates.[12] Table 1 provides a comparison of key summary statistics.[13] These data suggest that the shift to telephonic arguments is associated with substantive changes across two key measures: duration of speaking turns and number of words spoken. These measures capture the nature and extent of engagement during oral argument, indicating a substantive shift during the initial telephonic cases.

It is immediately evident and striking that the evolution of oral argument dynamics supports our first hypothesis. Despite Roberts' significant efforts to keep the arguments moving, the initial telephonic hearings were longer than the traditional in-person hearings held in 2018 and 2019. Specifically, these in-person arguments averaged approximately 60 min, while the 2019 and 2020 telephonic cases averaged 83 and 79 min, respectively. These differences between in-person and telephonic proceedings are statistically significant, $p < .01$.[14] While the average oral argument duration continued to fluctuate slightly after the 2019 telephonic cases, these differences are not statistically significant.

Indeed, when the Court returned to in-person arguments, the trend of longer proceedings continued. The reason is simple: while justices were allowed to pose questions at will to advocates during the 2021 term, the Court also continued the telephonic-era practice of allowing justices to ask additional questions (in order of seniority) once the unstructured time was exhausted. This increase in the length of the argument session is important because it provides justices and advocates an opportunity to exchange more information. Such dialogues clearly

TABLE 1 Aggregate oral argument turn and speaking duration data (2018–2021 Terms).

Term	Cases (term)	Turns (term)	Turns Per case	Words (total)	Minutes (total)	Minutes (mean)	Words (mean)
2018 In-Person	65	15,436	237	691,137	3887	60	10,633
2019 In-Person	48	11,523	240	520,994	2923	61	10,854
2019 Telephonic	10	2170	217	134,885	835	83	13,489
2020 Telephonic[a]	58	13,962	241	758,855	4607	79	13,084
2021 In-Person[a]	63	18,048	286	910,631	5221	83	14,454
All Cases	244	61,137	251	3,016,502	17,474	73	12,503

[a]Demarcates cases heard with a new format.

play a critical role in the coalition formation process and, ultimately, in the final decision reached by the Court (e.g., Black et al., 2012; Johnson, 2004; Johnson et al., 2006).

Further, the average number of words spoken during oral argument increased in telephonic cases compared with in-person cases. For example, in the 2019 term, in-person cases averaged 10,854 words per case, while telephonic cases averaged 13,489. This increase of 2635 more words represents a 24% change (a statistically significant difference, $p < .01$). The average number of words then decreased slightly for 2020 telephonic cases to 13,084, remaining higher than that of the in-person cases by about 2000 words per case (with the difference between the in-person cases and cases heard during the two telephonic periods being statistically significant, $p < .01$). Again, however, the difference between the initial and subsequent telephonic cases is not statistically significant.

Paralleling the descriptive findings, when the Court resumed in-person arguments for the 2021 term—which included the second round of questioning—the average number of words per oral argument continued at a higher rate than was the norm prior to the switch to telephonic proceedings (difference statistically significant, $p < .01$), corresponding to increased opportunities for information gathering and persuasion during oral arguments (Johnson et al., 2006; Ringsmuth et al., 2013).

This similar pattern, observed across two key measures (i.e., duration and number of spoken words), indicates a substantial change in the dynamics of oral arguments beginning with the May 2020 telephonic cases. In what follows, we further examine the consequences of the shift to telephonic oral arguments by assessing the extent to which the new protocols altered the norms of justice participation in these proceedings.

7 | RESULTS

In this section, we turn to justices' behavior during the five time periods that comprise our data. Our first question of interest lies in the extent to which the chief justice's newly created control over speaking turns during the telephonic oral arguments changed who spoke, and for how long. To examine this, we analyze the data in a number of ways.

As noted above, the in-person oral argument format allows justices to ask questions at any point following the initial 2 min of uninterrupted time allotted to attorneys. Thus, justices are empowered to self-select when and how they question the advocates. Consistent patterns in justices' oral argument engagement emerged during in-person arguments, with some justices such as Sonia Sotomayor, Stephen Breyer, and (previously) Antonin Scalia and Ruth Bader Ginsburg (in her early tenure on the bench) being known for their loquaciousness, while others such as Justice Clarence Thomas spoke substantially less often (with Justice Thomas often not speaking at all across several terms [Johnson et al., 2021]). Therefore, by examining the relative speaking time for each justice, Figures 1 and 2 provide insight into the extent to which the rule change, which empowered the chief justice to end associate justices' turns, altered the well-established norms of justices' engagement during oral arguments. The top row of Figure 1 shows the average speaking time (in seconds) of justices during arguments during the 2018 and 2019 in-person sessions.[15] The second row shows data for arguments from the initial (2019 term) and subsequent telephonic cases (2020 term), and the final row shows data for the period following the return to in-person oral arguments during the 2021 term.

Consider, first, the 2019-term telephonic cases. The new structure used during these sessions—which gave Chief Justice Roberts unprecedented control over justices' speaking time—disrupted some of the decades-old core norms of in-person arguments. Indeed, the rank order of which justices controlled the most time was reconfigured in significant ways. For example, Justice Samuel Alito commanded the largest share of time, whereas he previously held only the fourth position. In contrast, Breyer moved from the top to the fourth position. Relatedly,

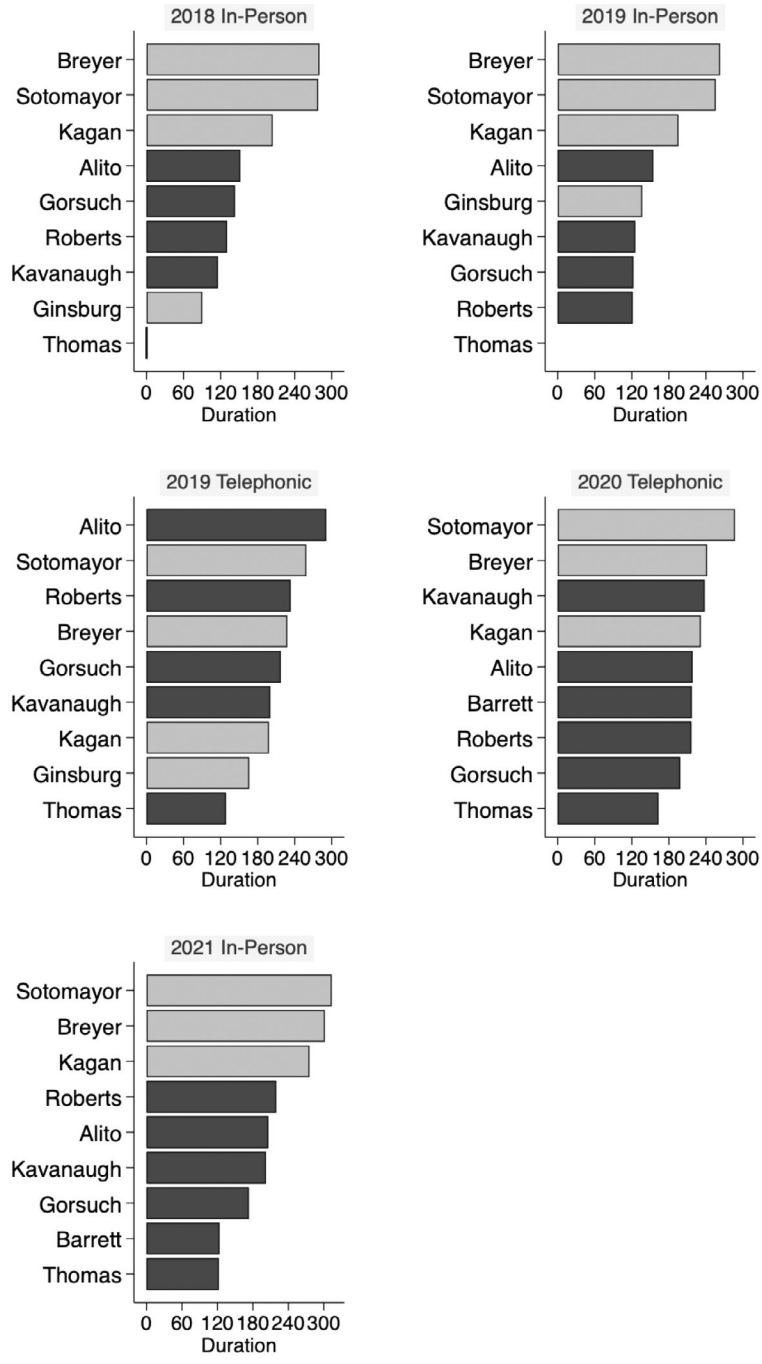

FIGURE 1 Average duration (in s) of justice speaking time (2018–2021).

Thomas, who is known for his total lack of participation in traditional arguments (Johnson et al., 2021), consistently engaged with the advocates during the telephonic proceedings. Given that justices use oral argument to begin the coalition–formation process (Black et al., 2012), this reordering and this change in Thomas's behavior suggest that some perspectives and policy

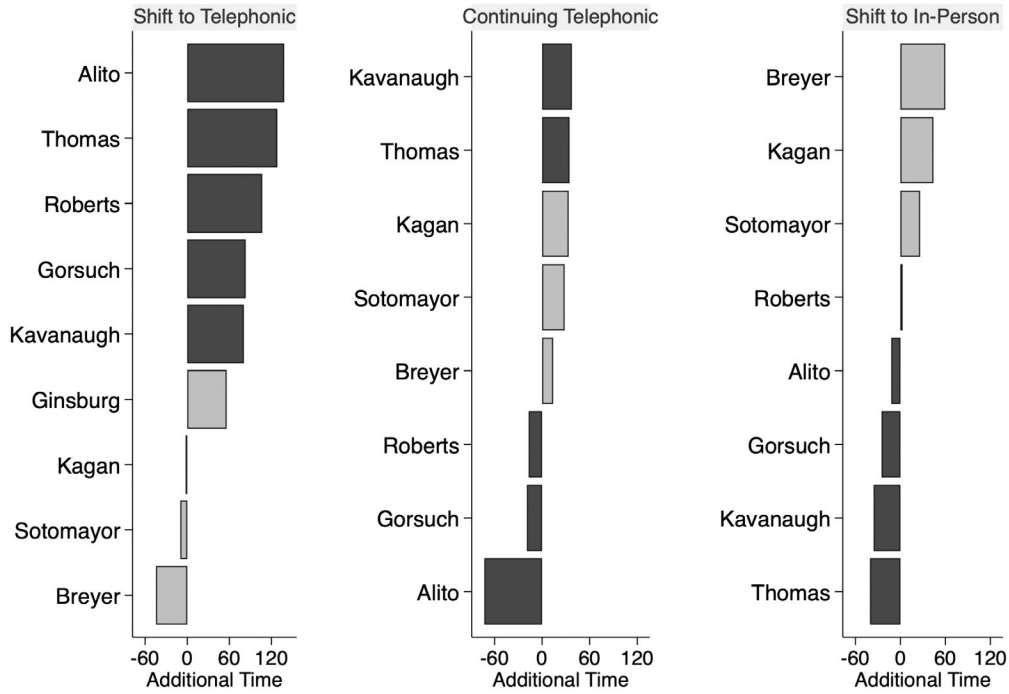

FIGURE 2 Differences in justices' speaking duration (in s, 2018–2021).

positions might have received greater attention during the initial telephonic cases compared with the in-person cases. Overall, conservative justices (shown in black) tended to maintain or gain time during the 2019-term telephonic sessions, while the liberal justices (shown in gray) spoke less relative to their conservative colleagues.[16]

Figure 2 further illustrates the trend of conservative justices' increased participation during telephonic arguments. It compares the justices' relative speaking duration across key time periods. The first panel depicts which justices gained speaking time and which lost speaking time in the transition from in-person to telephonic oral arguments (2019 average telephonic speaking time minus average speaking time across 2018 and 2019 in-person cases). The second panel shows how the dynamics in telephonic cases changed from 2019 to 2020 (average speaking time in 2020 minus the same in 2019). The third panel shows how the justices once again adapted following the return to in-person arguments (2021 in-person average speaking time minus the 2020 average telephonic speaking time). For each panel, the justices whose bars appear to the right of zero are beneficiaries (they participated more), while those whose bars lie to the left of zero participated less.

Clearly, the justices did not equally gain speaking time in a manner proportionate to the increased overall length of speaking time depicted in Table 1 (i.e., beginning with the telephonic cases in the 2019 term). Instead, there is a notable ideological pattern as to who gained the most, with all conservative justices benefiting from the move to telephonic argument. The three justices whose speaking time stayed about the same or decreased were all in the liberal coalition (Kagan, Sotomayor, and Breyer).

As the justices' accrued experience with the new telephonic forum, however, the dynamics again began to change. When comparing speaking time in the 2019-term telephonic cases with speaking time in the 2020-term cases, both Figures 1 and 2 indicate another reconfiguration in the distribution of justices' speaking time. Recall that the Court used the same structure for the

2020-term cases; that is, it continued to hold arguments via telephone, the justices continued to question the advocates in order of seniority, and the chief justice retained his ability to verbally intercede and move on to the next justice's turn. Despite operating under the same rules, the justices' behavior changed noticeably. Figure 2 shows that the remaining liberal justices gained speaking time following Justice Ginsburg's death, while three of the conservative justices lost speaking time, most notably Justice Alito, who went from the biggest gainer to losing the most time. Justices Kavanaugh and Thomas continued to gain ground, but at much closer to parity with Justices Kagan and Sotomayor.

Then, the third panel shows that the shift back to in-person cases has a distinct ideological pattern as to who gained and who lost speaking time. Indeed, the three liberal justices gained significant speaking time, contrasting with the advantage gained by conservative justices in the 2019-term telephonic arguments.

The absence of change to the formal oral argument rules suggests that informal dynamics facilitated this shift in justices' behavior during the 2020-term cases. Indeed, with the notable exception of Thomas, who continued his more active engagement, Figure 2 shows that the relative gains in speaking time for each justice during the 2020-term telephonic oral arguments largely reversed the effects of the changes brought about by moving to the telephonic forum, with oral argument once again more closely resembling the 2019-term in-person cases. Thus, the evidence suggests that the chief justice, the associate justices, or both, altered the way they engaged in these proceedings. This is consistent with our expectation, outlined in the theory section, that norms of collegiality and self-governance led to these changes.

As noted above, the chief justice's gatekeeping authority under the telephonic oral argument rules contrasted sharply with the norms of traditional in-person arguments, which allowed justices to decide for themselves when to speak and for how long. Further, the rigid structure of the telephonic oral argument protocols provided considerable discretion for the chief justice. These changes were noted by both scholars and the public (e.g., Jacobi et al., 2021; Litman & Jacobi, 2020). While it is indisputable that some remote argument was essential to permit the justices to continue to carry out their duties during the early months of the COVID-19 crisis, the specific forum employed during the 2019-term telephonic cases was less dynamic, more hierarchical, and more advantageous to the Court's conservative bloc.

Thus, the contrast between traditional in-person oral argument proceedings and the proceedings of the 2019-telephonic cases challenged the Court's cultivated image as a fair and impartial body (Epstein & Knight, 1998). Public perception of justices' behavior during oral arguments is important, since these proceedings are the only public forum at the Supreme Court, and the Court relies on its historically positive reputation to ensure that its decisions are followed (e.g., Gibson & Nelson, 2015; Johnson, 2004).

Despite the strictures of the telephonic seriatim questioning format, a mechanism that could be used to facilitate self-governance and collegiality, and therefore a positive image of the Court, emerged. While associate justices could not begin a dialogue with an attorney without the chief's permission, the telephonic argument format created an opportunity for a justice to explicitly (and voluntarily) end her speaking turn without the chief justice's involvement. Intentionally passing the baton to the next justice before the chief steps in—rather than working to maximize speaking time—exhibits self-restraint and respect for one's colleagues. Thus, we expect to find that the associate justices adapted to the rigidity of the telephonic rules and the chief's enhanced discretion by voluntarily ending their speaking turns when they reconvened in the same telephonic format for the October 2020 term.

To test this hypothesis, we examine whether the manner in which a justices' speaking time with an advocate terminates shifted once the Court began using the telephonic oral argument structure. Under the telephonic argument protocols, a justice could continue speaking or listening to an advocate until the chief interceded to announce that it was the next justice's turn, or the justice could voluntarily wrap up by explicitly indicating that he or she had no more

questions. The most common way justices voluntarily ended their turns (which we refer to as "episodes" in the data section) was simply to say, "Thank you." Sometimes the justices made comments that indicated that they were voluntary ending their time, such as by saying, "I have no more questions."[17] Voluntary terminations did not typically occur within the traditional in-person argument format because other justices were permitted to interrupt at will with additional questions or comments.

When we consider the telephonic cases, we find that the proportion of voluntary endings increases for all justices from the 2019-term to the 2020-term: 26 percent of exchanges ended voluntarily during the initial telephonic cases, while 58 percent did so in subsequent cases (difference statistically significant, $p < .01$). This suggests that the associate justices adapted to the new telephonic oral argument rules not by pressing for as much time as possible but instead by self-monitoring the amount of time they spent speaking with advocates. Further, by the 2020-term telephonic cases, self-monitoring had become a common practice, with over half of all justices' turns ending voluntarily.

Figure 3 displays the proportion of speech episodes for each justice that ended voluntarily. We again find evidence of significant shifts in the dynamics of oral argument. This figure also shows that all justices maintained or increased the proportion of voluntary endings in the 2020 term, which supports our expectations (only Breyer roughly maintained his prior rate of voluntary endings, but maintained a high rate, ending his own turns with attorneys approximately 43 percent of the time during the 2020-term telephonic cases.[18]) (differences statistically significant, $p < .01$).[19] Alito evidenced the greatest increase in self-monitoring, increasing his proportion of voluntary endings from 0.18 to 0.79. Importantly, the increase in voluntary endings decreased the need and opportunity for Chief Justice Roberts to exercise discretion in managing oral argument time. Instead, the associate justices simply tended to self-regulate their own engagement.

The justice with the next smallest change after Breyer was Gorsuch, whose change in the proportion of voluntary endings increased by 0.39 (0.35–0.74), approximately doubling his prior rate. In other words, Figure 3 suggests that, overall, justices' actions significantly shifted during the 2020-telephonic cases in a manner that promoted the norms of self-monitoring and collegiality on the Court.

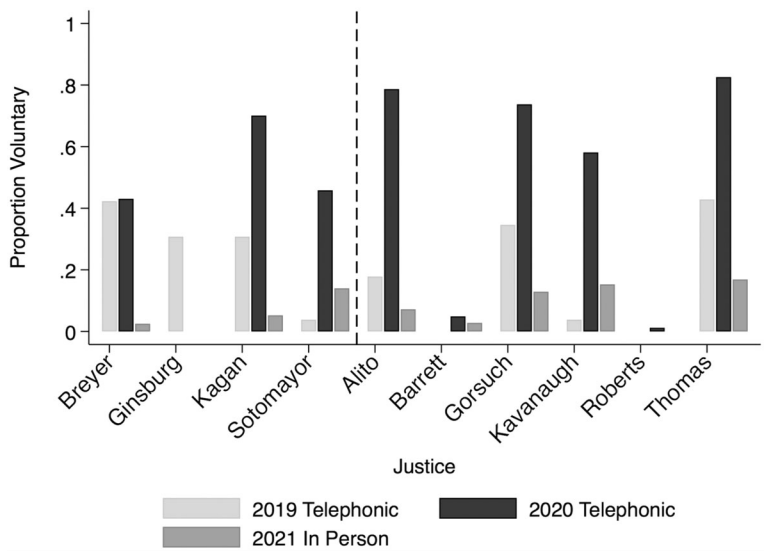

FIGURE 3 Proportion of justices' speaking turns ending voluntarily (2018–2021).

According to the middle row of Figure 1, this shift to more voluntary transitions between justices during the 2020-term telephonic cases corresponded to a more even distribution of justices' speaking time during oral arguments. Indeed, justices' share of oral argument time during the 2020-term telephonic cases more closely approached parity than in any of the in-person or 2019-term telephonic arguments. Part of this may be attributed to Thomas' consistent involvement beginning with the shift to telephonic arguments, but it is not the only force driving the shift toward more equitable engagement.[20] Excluding Justice Thomas, the gap between the justice with the highest and lowest average share of oral argument time is approximately 3 and 2 min, respectively, for the 2018 and 2019-term in-person cases, and 4.5 and 4 min, respectively, when Justice Thomas is included. That gap is far lower in the 2020-term telephonic cases—slightly more than 2 min. The trend toward parity in justices' speaking time began in the 2019-term telephonic cases but peaked in the 2020-term telephonic cases. This increase in voluntary endings and move toward parity, both notable departures from the typical dynamics of traditional in-person oral arguments, represented a way for the justices to demonstrate their commitment to self-regulation and collegiality and paved the way for Chief Justice Roberts to speak less during arguments.

8 | A NEW NORMAL?

When the Supreme Court returned to in-person oral arguments for the 2021 term, it again changed the rules for these proceedings. The Court resumed the free flow of questions from the justices that had been a hallmark of in-person arguments since the mid-20th century. However, it also partially retained the custom from the telephonic format of holding a second round of questioning, during which time justices had the opportunity to ask any final questions in order of seniority. As before, the dynamics of oral argument changed with this new format. The bottom row of Figure 1 shows that Sotomayor, Breyer, and Kagan spoke most during the 2021 term, with the conservative justices following from there. In the aggregate, the justices' speaking times following the return to in-person arguments resemble those of the 2018 and 2019 term in-person cases, with the exception of Justice Thomas, who maintained his vocal engagement during the 2021 term.

Relatedly, the third panel of Figure 2 indicates that the liberal justices gained the most speaking time when the Court resumed in-person arguments—the inverse of what occurred during the shift to telephonic arguments. Figure 3 shows that justices continued to end their speaking turns voluntarily but that this practice decreased substantially with the return of unstructured question time.[21] Indeed, all occurrences of voluntarily ending a turn took place within the second phase of arguments when the justices were able to ask final questions in order of seniority. Thus, the mix of unstructured and structured oral argument time corresponded to what could be a "new normal" if the Court retains this same format for these proceedings in the long term.

9 | CONCLUSION

In the spring of 2020, the US Supreme Court made one of the most dramatic shifts in its long history: holding oral arguments telephonically. We find that this shift had a major impact on how the justices interacted with one another as they adapted to the new rules and reconciled the consequences of these new rules with the Court's established norms of behavior. For example, the duration and average number of words spoken increased during the telephonic cases. At least initially, the Chief exercised his authority under these new rules

to govern the proceedings in a way that departed from previous oral argument norms. This resulted in a reconfiguration of the justices' engagement during oral arguments in terms of the proportion of speaking time used by each justice.

From there, however, the associate justices began to adapt as well—just as the literature on institutions and adaptation suggests they would. When the initial use of the telephonic structure disrupted the norms of collegiality and self-regulation present during traditional oral arguments, the associate justices took steps to restore previous norms. That is, they began to control their own questioning by finishing voluntarily before the chief could intercede to move to the next questioner. Indeed, our analysis indicates that the self-monitoring undertaken by the justices moved the Court substantially closer to parity in terms of justices' participation during the telephonic proceedings. The evidence indicates that justice dynamics during oral arguments adapted based on both institutional rules (e.g., changes to oral argument protocols) and longstanding norms (e.g., collegiality and self-regulation).

Following the Court's return to in-person arguments for the 2021 October term using a mix of unstructured and structured time, we see the continued impact of institutional rules and norms on the justices' behavior. Oral arguments during the unstructured time once again exhibited the dynamism that characterized the previous in-person proceedings, while justices continued to end their speaking turns voluntarily during the structured time. Thus, the evidence suggests that a "new normal," based jointly on institutional rules and the norms of collegiality and self-regulation, may be emerging if the Court retains the same format for these proceedings moving forward.

Given the critical role of oral arguments in coalition formation (see e.g., Black et al., 2012), the changes in the dynamics of these proceedings documented here could have important implications for subsequent stages of the Court's decision-making process. Indeed, without the free flow of ideas, the give-and-take between bench and bar, the interruptions, and the dynamism associated with traditional argument sessions, justices may have needed to learn anew how to use these proceedings to collectively consider a case and begin to form coalitions. The impact of this shift in oral argument dynamics on conference discussion and opinion drafting, therefore, warrants further consideration in future research. As time passes, scholars will be in a position to assess whether the consequences of the changes in oral argument protocols described in this study have altered the manner in which the Court considers cases, as well as the extent to which the most recent trends documented here represent a new normal for Supreme Court oral arguments.

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ENDNOTES

[1] 591 U.S. (2020)

[2] 591 U.S. (2020)

[3] 591 U.S. (2020)

[4] The justices and advocates all participated remotely. *Press Release Regarding May Teleconference Oral Arguments*, Sup. Ct. of the U.S. (April 13, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20.

[5] *Press Release Regarding October Oral Argument Session*, Sup. Ct. of the U.S. (September 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-16-20.

[6] *Press Release Regarding Upcoming Oral Argument Sessions*, Sup. Ct. of the U.S. (September 8, 2021), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-08-21.

[7] The authors listened to a sample of these argument sessions to verify this procedure. Jacobi et al. (2021) also demonstrate that the justices used these procedures.

[8] Although it is clear that, beginning in October 2021, the 30-min per side (and 60-min per total argument) allotment seems to no longer hold as a hard and fast rule.

[9] As reported by CNN: https://www.cnn.com/2019/10/03/politics/supreme-court-lawyers-2-minutes/index.html#:~:text=Lawyers%20standing%20before%20the%20Supreme,questions%20right%20off%20the%20bat (accessed June 17, 2022).

[10] We downloaded all the official transcripts from the Supreme Court's website and counted every word spoken by each justice and attorney. This includes partial and repeated words, sentences cut off by an interrupting colleague or attorney, as well as substantively irrelevant content, such as when a justice says something not pertaining to the case (see note 12). These instances are randomly distributed, and existing work demonstrates they do not affect analysis of justices' questions and comments (see e.g., Black et al., 2013; Johnson et al., 2009).

[11] We include only cases from the fourth natural Roberts Court (i.e., only those cases heard after Kavanaugh joined the Court in October 2018). This excludes the first six of the 71 cases argued in the 2018 term.

[12] We define a speech episode, or turn, as every time a justice speaks, regardless of whether it was a question or a statement and including non-substantive comments. As to the first point, a speech episode can be multiple paragraphs or only a few words. The end of a speech episode occurs when another justice or attorney begins speaking. An out of sample example shows the latter point. In a case decided during the 2006 term, Justice Breyer offered this gem: "Sorry, I have laryngitis. Can you hear me all right?" (Transcript of Oral Argument at 14, *Hudson v. Michigan*, 547 U.S. 586 (2006)). A non-substantive statement like Breyer's counts as a speech episode but constitutes random noise in our data (Black et al., 2013; Johnson et al., 2009).

[13] To count the number of words and the number of turns, we included an observation in the dataset for each justice in each case (thus each case has nine distinct rows). We then parsed every unique speech episode (see note 12), which allowed us to calculate the number of speaking turns for each justice per case and across all cases. From there, we used the word count function in Stata (version 16.0). This function (gen count = wordcount) allowed us to count the total number of words each justice spoke per case and across all cases.

[14] The reason for this, as Jacobi et al. (2021) argue, is two-fold. First, Roberts allowed a second round of questioning for each justice, which certainly increased the time taken during the proceedings. Second, because the format was so new, the justices were getting used to how much time they had, and the chief often allowed attorneys and associate justices alike to take as much time as they needed to ask or to answer questions.

[15] To calculate the average speaking time of each justice, we summed each justice's speech episodes (see note 12) and averaged them across all cases per term.

[16] The notable increase in Chief Justice Roberts' speaking time can in part be attributed to his more involved role in managing the new format of oral arguments in the 2019-term telephonic cases (e.g., transitioning between justices' turns).

[17] In contrast, when a justice stops speaking and the next speaker begins without the original speaker explicitly ending their turn, we categorized this as a non-voluntary transition.

[18] Breyer's consistency in the rate of voluntary endings in the 2019 and 2020-telephonic cases is notable compared to the behavior of his colleagues. Unfortunately, we are not in a position to assess the motivations behind this difference, but we note that Breyer's subsequent decrease in the proportion of voluntary endings in the 2021 in-person term parallels that of his colleagues.

[19] Note that Chief Justice Roberts is not the focus of our analysis because he cannot intercede or voluntarily end his turn in the same manner as the associate justices can during telephonic arguments.

[20] As Jacobi et al. (2021) point out, the changes in justices' speaking time had mixed effects. For example, Thomas' increased engagement corresponded to greater equality across individual justice's participation but simultaneously meant that the liberal bloc of justices had a reduced share of time relative to what had been common in traditional in-person arguments.

[21] Figure 3 calculates the proportion of voluntary endings using both the structured and unstructured time of the 2021-term cases. When the structured time is considered in isolation, the proportion of voluntary endings increases substantially, but at levels below those of the 2020-term telephonic cases.

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AUTHOR BIOGRAPHIES

Eve M. Ringsmuth is an Associate Professor of Political Science at Oklahoma State University, where she studies judicial politics, American political institutions, and civic education.

Matthew Sag is a Professor of Law, Artificial Intelligence, Machine Learning, and Data Science at Emory University Law School.

Timothy R. Johnson is Horace T. Morse Distinguished Professor of Political Science and Law at the University of Minnesota.

Tonja Jacobi is a Professor of Law and Sam Nunn Chair in Ethics and Professionalism at Emory Law School.

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