

EQUAL JUSTICE UNDER LAW

THE SUPREME COURT'S 2020-2021 TERM

A Changed Court Threatens Our Health and Our Rights



Introduction

The Supreme Court begins its new term in October 2020 with the American people already voting on who will control the White House and the Senate next year, while Republicans race to further stack the Court before our ballots can be counted. They see their chance to finally destroy the protections of the Affordable Care Act through the courts while they cynically tell their constituents they want to protect coverage for preexisting conditions.

Health care is but one of many major issues before the Court this term—a term without the powerful voice of Ruth Bader Ginsburg for the first time in more than a quarter century. The justices will also be hearing cases on police violence, voting rights, religious liberty, LGBTQ+ equality, and limiting abuses of power by President Trump. In addition, the Court could well accept a case for the 2020-21 term that could directly challenge *Roe v. Wade*, giving Trump a chance to see the Court fulfill both his primary objectives of destroying the ACA and overruling *Roe*.

Confirming anyone chosen by President Trump and the far right to replace Justice Ginsburg would create a lopsided 6-3 imbalance against the very idea that the Constitution and the civil rights laws passed by Congress are meant to advance justice and equality. Even more profoundly, the conservative movement is finally approaching a goal it has sought for decades: a radical reinterpretation of the Constitution that would actually prohibit our elected representatives from passing laws that provide us a social safety net and protect us from the untrammled power of large corporations.

Moreover, there is a strong chance that the Court will be called upon in 2020 or in January 2021 to resolve election-related conflicts that could determine the outcome of the presidential election, as well as races for other offices. President Trump has stated that the only way he could lose reelection would be through Democratic fraud, that he may well rely on the Supreme Court to try to hold on to power, and that he wants his latest nominee, Amy Coney Barrett, on the Court in time to hear his election-related lawsuits. The Supreme Court may play a role at least as powerful—and corrupt—as in 2000, when five conservative justices stopped officials from counting ballots in Florida and handed the election to George W. Bush.

A look at specific cases already on the Court's docket for 2020-21 is below.

Health Care

California v. Texas (oral arguments Nov. 10): Republicans at various levels of government across the country have worked to advance this [meritless](#) lawsuit to end guaranteed health insurance regardless of preexisting conditions, as well as eliminate every other health benefit provided by the Affordable Care Act. This is during a pandemic that has [killed more than 200,000 people](#) in the U.S. and has already left seven million of us with COVID-caused preexisting conditions that insurance companies could use to deny us coverage without the ACA.

The case was ginned up by more than two dozen Republican state attorneys general after Republican majorities in the House and Senate reduced the ACA's tax penalty for not having health insurance to zero. Congress made that change in 2017 while leaving the rest of the law mostly unchanged. The mandate that Republicans claimed for years made the law unconstitutional came to an end. But now Republicans are claiming that the *absence* of an enforceable requirement to buy health insurance makes the ACA unconstitutional.

In 2012, the Supreme Court upheld the individual mandate as a constitutional exercise of Congress's taxing authority (while also ruling that it was not an authorized exercise of Congress's constitutional authority to regulate interstate commerce). Now, led by Texas, the Republican AGs argue that reducing the tax penalty to zero means the mandate is no longer a tax and therefore has no constitutional basis. Even more bizarrely, they urge the Court to strike down the entire ACA because Congress would not have wanted the ACA to exist without the mandate—even though Congress showed exactly the opposite in 2017 when it eliminated the mandate but kept the rest of the law.

Adding Republican fingerprints to this attack on health care, the Justice Department—which is responsible for defending federal laws in the courts—moved to support the lawsuit when Trump became president. The legal argument was so weak that career Justice Department officials refused to sign the brief. It was signed instead by a [political appointee](#) who was quickly rewarded with a lifetime federal judgeship on a court of appeals. And when this case was heard by the Fifth Circuit Court of Appeals, it was another Trump-nominated judge—Kurt Engelhardt—who cast the deciding vote in a 2-1 panel ruling against the ACA.

This deeply cynical and legally bankrupt lawsuit would have no chance of success in ordinary times. But these are not ordinary times. The Roberts Court's extreme rulings over the years, Trump's anti-ACA [litmus test](#) for his

Supreme Court nominees, the previous records of his far-right justices as well as nominee Amy Coney Barrett, and the corrupt way that Republicans have worked to fill vacancies on the high court all combine to put our access to health care at grave risk. As [two experts](#) recently put it, a case “that once looked like a Hail Mary would stand a real chance of success.”

Voting Rights

Brnovich v. Democratic National Committee. This case and its companion case (*Arizona Republican Party v. Democratic National Committee*) challenge two barriers to voting set up by Arizona Republicans. Under one of the state laws, Arizona does not count provisional ballots cast in person on Election Day outside of the voter’s designated precinct, even for statewide officers on every ballot throughout the state. Communities of color are more likely to live in areas whose voting sites change with frequency, creating confusion as to where to vote. Moreover, they are also more likely to move frequently and rent rather than own, factors that lead to more frequent changes in precinct voting sites.

The other provision being challenged—a ballot-collection law that limits who can handle another person’s completed early ballot—criminalizes ballot delivery methods more often used in communities of color than among white voters. For instance, only 18 percent of Native American voters in the state have home mail service, and some must travel 45 minutes to two hours just to get to the nearest mailbox. Moreover, Black, Latino, and Native American Arizonans are less likely to have the transportation and flexible work hours needed to return an early ballot in person. The lower court found that the main “evidence” Republican legislators who pushed this law had of fraud in ballot collection was a “racially charged” video made by a Republican county chair that did not actually show anything illegal.

Both laws disproportionately make it harder for Black, Latino, and Native American Arizonans to vote. The Ninth Circuit concluded that they both violate the Voting Rights Act due to their racially discriminatory impact. The court also analyzed the history of the ballot collection law and concluded that Arizona Republicans passed it with the intent to discriminate in violation of the Fifteenth Amendment. But now the newly strengthened far right majority on the Supreme Court may help their fellow Republicans in Arizona suppress the vote.

Holding Trump Accountable

Department of Justice v. House Committee on the Judiciary (oral arguments Dec. 2): This case comes from Trump's efforts to hide information about the Mueller investigation. The Special Counsel investigated Russian interference in the 2016 presidential election, including any links or coordination with the Trump campaign. He also gathered evidence on whether Trump obstructed justice in connection with his investigation. The Special Counsel's report to Congress had many redactions to protect grand jury secrecy, which the House Judiciary Committee sought access to as part of its impeachment inquiry into President Trump. Specifically, the committee sought three categories of grand jury material: (1) the portions of the Mueller report that had been redacted to prevent disclosure of grand jury testimony; (2) any grand jury transcripts or exhibits referenced in those redactions; and (3) grand jury transcripts or exhibits that relate directly to:

- Trump's knowledge of efforts by Russia to interfere in the 2016 election;
- Trump's knowledge of any links or contacts between people associated with his campaign and Russia, including with respect to Russia's election interference efforts;
- Trump's knowledge of any potential criminal acts by him or any members of his administration, his campaign, his personal associates, or anyone associated with his administration or campaign; or
- actions taken by former White House Counsel Don McGahn during the campaign, the transition, or his time as White House Counsel.

Generally, grand jury testimony cannot be disclosed under the law. But that law has an exception: a judge can authorize disclosure of grand jury material if it is needed in connection with a "judicial proceeding." An impeachment inquiry is just that kind of judicial proceeding: Impeachment in the House and trial in the Senate are specifically established in the Constitution to try a president for high crimes and misdemeanors. Exercising her authority under the law, a federal judge agreed to turn over the requested grand jury material over the objections of the Justice Department, acting as Trump's lawyers. The decision was affirmed by the D.C. Circuit Court of Appeals. The Supreme Court will now consider the administration's argument that impeachment is not a "judicial proceeding" as the Justice Department works to keep vital national security information from Congress.

Trump's Supreme Court justices and lower court judges have reliably tried to protect him from accountability in a variety of contexts. Earlier this year,

Justices Brett Kavanaugh and Neil Gorsuch tried to make it easier for Trump to [resist a state grand jury subpoena](#). At the D.C. Circuit, Trump judges Neomi Rao and Greg Katsas sought to [quash a congressional subpoena of Trump's financial records](#) and significantly curtail Congress' ability to obtain information about the president as part of its legislative function. In [the Michael Flynn case](#), Rao wrote a panel opinion short-circuiting the normal legal process and ordering D.C. District Court Judge Emmet G. Sullivan to dismiss the criminal case against Flynn. And when this very case was at the D.C. Circuit, [Rao tried to protect Trump](#).

With Justice Ginsburg gone, Trump may be more confident of preventing the people's representatives in the House from learning about his campaign's connections with Russian intelligence.

Shredding the Social Safety Net

Collins v. Mnuchin (oral arguments Dec. 9): Congress has long structured independent agencies in order to insulate them from political pressure and allow them to better protect people's health, safety, and financial security. The heads of such agencies cannot be fired by the president without cause. The Roberts Court has already undermined Congress's ability to create independent agencies by striking down this type of protection for an agency with only one director. This advanced two of the far-right's long-term goals: dismantling the nation's social safety net and disabling the federal government's ability to impose reasonable limits on corporations. *Collins v. Mnuchin* has the potential for a changed Court to advance this project even further.

The plaintiffs in the case are three large investor shareholders of Fannie Mae and Freddie Mac, which are federally chartered entities heavily involved in the market for secondary home mortgages. The shareholders contest an action by the Federal Housing Finance Agency (FHFA) that they claim significantly decreased the value of their investments. They urge the justices to strike down the structure of the FHFA as unconstitutional because Congress created it with a single director who cannot be fired by the president without cause—a structure the conservatives [struck down](#) last term in the context of the Consumer Financial Protection Bureau. The shareholders also argue that their remedy is for the Court to nullify the agency action they are contesting. Specifically, both because of the allegedly improper structure of the agency and for other reasons, they claim that the Court should invalidate the

important deal struck by the FHFA to help fund Fannie and Freddie and save the housing market. That is the result urged in the Fifth Circuit by several [Trump judges](#) on that court, who played a key role in the case.

The majority may issue a narrow ruling applicable only to this action by this agency. Alternatively, they may issue an expansive ruling that undermines the independence and even the existence of multi-member independent agencies (like the National Labor Relations Board, the Federal Trade Commission, the Social Security Administration, and the Federal Reserve Board) and the public interest protections they have enacted.

The Trump administration is not defending the constitutionality of the federal agency. Instead, the Supreme Court has appointed an outside attorney to do so.

AMG Capital v. Federal Trade Commission (oral arguments not yet scheduled): In this case and its companion, *FTC v. Credit Bureau Center*, corporations found to have engaged in fraud argue that the FTC cannot make them pay restitution to their victims.

The Federal Trade Commission Act empowers the agency to go to court to stop “unfair methods of competition” and “unfair or deceptive acts or practices.” The corporations in these cases argue that the law limits the FTC to getting court orders to stop unlawful conduct.

Amy Coney Barrett was involved in one of the cases. Initially, a three-judge Seventh Circuit panel (that she had not been on) reversed a circuit precedent and held for the first time that the FTC is limited to getting court injunctions, not restitution. Then a majority of judges on this extremely conservative circuit, including Barrett, voted not to have the entire circuit review the panel’s decision. The dissenters pointed out that the FTC Act does not mention any limits on the type of injunction the agency can get from a court. Therefore, nothing prohibits an injunction that includes an order for restitution. That has also been the conclusion of eight other circuits to consider this issue.

CIC Services v. IRS (oral arguments Dec. 1): This case about federal tax enforcement sparked a jeremiad by Trump judges at the circuit level against the federal government and the authority of Congress to effectively address national problems. Trump’s Supreme Court justices are equally antagonistic to the ability of our representatives to impose reasonable limitations on the power that corporations can exercise over us, so this case may trigger them in

the same way.

At issue is a law called the Anti-Injunction Act (AIA). Under the AIA, you can't try in advance to stop a tax or IRS fine, but you can sue after you've paid it. The IRS adopted reporting requirements for "captive insurance companies," which would help it determine whether they were legitimately set up to provide insurance or whether they were simply tax shelters instead. One of those businesses—CIC Services—challenged the disclosure requirements in court. Since the company had not paid any fine yet, the district court dismissed its case—a decision that was affirmed by a three-judge panel of the Sixth Circuit.

When the whole Sixth Circuit voted not to rehear that decision, all six Trump judges dissented: Amul Thapar (who wrote the dissent), Joan Larsen, John Nalbandian, Chad Readler, John Bush, and Eric Murphy. Although it had nothing to do with the case before them, they complained that the IRS "has begun to regulate an ever-expanding sphere of everyday life—from child care and charity to health care and the environment." They also cast the IRS as violating the constitutional separation of powers, an issue that was not relevant to the case and not raised by any party. Even one of their colleagues felt compelled to point out that the Trump judges were "letting their hostility toward the IRS, rather than traditional tools of statutory construction, guide their analysis."

When the Supreme Court hears the case, Trump's justices may very well be as overcome by that same hostility as his Sixth Circuit appointees and use it as an opportunity to advance their ideological agenda.

Religious Liberty and Discrimination

Fulton v. Philadelphia (oral arguments Nov. 4): This case is another step in the far right's effort to transform religious liberty provisions from a shield protecting the free exercise of religion into a sword to deprive other people of their legal rights. In this case, as in so many others across the country, the people targeted for discrimination are same-sex couples: a religiously affiliated foster adoption agency claims a First Amendment right to be exempt from anti-discrimination laws that require such agencies, at least when funded partly by the government, to include such couples as possible foster parents and not discriminate against them. How the Court rules may be greatly affected by the loss of both Justices Kennedy and Ginsburg, who were part of 6-3 and 5-4

majorities recognizing the constitutional rights and inherent dignity of LGBTQ+ people.

The city of Philadelphia partners with private organizations to help identify families and certify that they meet the state’s criteria for foster placement in the child’s best interests. Although the city prohibits discrimination on the basis of sexual orientation, one of the agencies it partners with—Catholic Social Services (CSS)—will not certify that same-sex couples meet the state’s criteria. As a result, the city ended its contract with CSS.

The agency sued, claiming the city penalized it for its religious beliefs, in violation of the Free Exercise Clause, even as interpreted in the 1990 *Employment Division v. Smith* decision. In *Smith*, the Supreme Court held that the First Amendment allows enforcement of a law that burdens religious exercise as long as it is a generally applicable, religiously neutral law. As explained in an amicus brief by the Anti-Defamation League (ADL), People For the American Way Foundation, and others, anti-discrimination laws like Philadelphia’s are common throughout the nation and prohibit discrimination on a number of bases. They are neutral laws of general applicability motivated to end discrimination against protected categories of people.

CSS also urges the Court to overrule *Smith* and restore the previous Free Exercise standard of strict scrutiny of any government practice that substantially burdens free exercise and is not the least restrictive means to achieve a compelling government interest. The ADL amicus brief explains why Philadelphia’s actions would meet even that test: There is a compelling need for statutory protection of members of marginalized communities who have historically experienced widespread and extreme discrimination. And the laws are the least restrictive means of doing that. Allowing CSS to refuse people as long as it refers them to another agency would constitute exactly the injury the law seeks to prohibit—denial of fair consideration due to sexual orientation. Harming the people who the law protects hardly constitutes the “least restrictive means” of protecting them.

The Court’s conservatives have been distorting the meaning of religious liberty in recent years, [as exemplified in the Hobby Lobby case](#). Religious freedom in America has never meant the right to deprive third parties of their legal rights. Justice Ginsburg recognized that. Her proposed replacement likely will not.

Tanzin v. Tanvir (oral arguments Oct. 6): This case addresses the remedies available when the federal government violates someone’s religious liberty.

Specifically, the issue is whether the Religious Freedom Restoration Act (RFRA) permits lawsuits seeking money damages against individual federal employees.

The lawsuit was filed by three American Muslims who were improperly included on the federal government’s “No Fly List.” They allege that FBI agents promised to remove them, but only on the condition that they spy on their fellow American Muslims. Accepting this condition in exchange for a legal right to be removed from the no-fly list would have imposed a substantial burden on their religious exercise, and they sued the agents under RFRA.

RFRA authorizes “appropriate relief” from federal “officials” when the statute is violated. The Trump administration, arguing for the agents, argues that this language does not include lawsuits for damages against federal employees in their personal capacities. But the plaintiffs argue the contrary, noting that the statute contains no such limitation. The Second Circuit agreed with them.

People For the American Way Foundation joined an amicus brief authored by Americans United For Separation of Church and State in support of the victims. As it explains, the history of this case shows how easily the law can be evaded under the government’s interpretation: When the plaintiffs filed their case, they were removed from the no-fly list, making moot any effort for purely injunctive relief. But RFRA was not passed to make it so easy for government employees to escape responsibility for their improper actions. Damages are an essential component of deterring misconduct such as what is alleged to have occurred in this case.

Police Violence and Abuse of Authority

Torres v. Madrid (oral arguments Oct. 14): With chilling frequency, Trump judges have distorted the law to prevent victims of police violence from holding wrongdoers accountable in court. This term, the Supreme Court is considering a case that may open a new avenue for law enforcement to escape liability.

Roxanne Torres was sitting in her car when two individuals approached. According to her lawsuit, she did not hear them identify themselves, but she did hear one of them try to open the car door, and—thinking she was being carjacked—she started to drive away. The individuals were police officers, and they shot at her while she was trying to get away. She was hit twice, but continued to drive, and she eventually got away. She filed a civil rights

complaint against the officers for using unconstitutionally excessive force against her, saying they committed an unconstitutional seizure under the Fourth Amendment.

While the police officers claimed they were justifiably afraid she would hit them with the car, their main defense is about the law: Since Torres got away after being shot, they argue she was never “seized” by them. That, in turn, means there was no seizure to be considered unconstitutional, and her case must therefore be dismissed.

That was the position taken by the lower court, which followed Tenth Circuit precedent from 2010 that then-Judge Gorsuch joined. Under that standard, the constitutionality of police use of force depends on events *after* the force is used. By this reasoning, if the police repeatedly shoot someone who is running away from them, the constitutionality of their action cannot be known until the person either stops or gets away. Not only does that defy logic, it also opens the door to abuses of authority by law enforcement. Other circuits have not followed the Gorsuch precedent. Soon we will know if the Supreme Court will apply it nationwide.

Integrity of the Courts

Carney v. Adams (oral arguments Oct. 5): While many Americans know about the far right’s long-term and highly successful effort to capture and politicize our federal courts, the danger to our state judicial systems often gets less attention. In this case, the Supreme Court is considering a challenge to one way of addressing the problem.

The Delaware state constitution requires partisan balance on the state courts. To make this happen, it limits the number of state judges belonging to a single party to a “bare majority.” But there is a potential loophole: an otherwise ineligible judge (a member of the majority party) might simply change their party registration to independent or a third party to get around the “bare majority” prohibition, resulting in de facto domination by a single party. To prevent this, Delaware requires all judgeships to be held by members of one of the two major parties—in effect, Democrats and Republicans. The system is being challenged by an individual ineligible for appointment who claims this system violates his First Amendment rights to be eligible for state office regardless of his political beliefs or party membership.

Whatever the outcome of this specific case, it is vital that the Supreme Court recognize the compelling need to preserve public confidence in our judiciary and prevent domination by a single party.

Other Cases the Court May Take Up

The justices are currently considering whether to hear appeals in cases across a wide variety of issues, including reproductive freedom and abortion, voting and elections, medical care for prisoners, the First Amendment, and President Trump's alleged violations of the Constitution's International Emoluments Clause. If the Court accepts any or all of them, it could lead to significant opinions affecting our rights and our democracy. These include:

Dobbs v. Jackson Women's Health Organization. Mississippi anti-choice legislators passed a law banning abortion after 15 weeks, long before viability. This attack on the right to abortion clearly violates Supreme Court precedent. But Mississippi passed this law as a vehicle to have the Supreme Court overrule those precedents. (The state did not even seek oral argument in the Fifth Circuit.) The Fifth Circuit struck down the law, but the Supreme Court has now been asked to hear the case. That is why anti-choice activists fought to get Gorsuch and Kavanaugh onto the Court, just as they are pushing Amy Coney Barrett today.

Lieu v. Federal Elections Commission. This case challenges a key circuit court precedent from 2010 called *SpeechNow v. FEC*, which essentially created Super PACs—entities that accept unlimited contributions for purportedly “independent expenditures.” Decided just a few months after *Citizens United* opened the floodgates to unlimited corporate money in elections, the D.C. Circuit's *SpeechNow* decision held that the federal law prohibiting Super PACs was unconstitutional under the principles set out in *Citizens United*. As a result, a small number of immensely wealthy individuals make multi-million dollar contributions to help bankroll candidates' campaigns for public office. The plaintiffs in this case are not asking the Court to overrule *Citizens United*, but to uphold a federal prohibition on Super PACs even under that case.

Idaho Department of Correction v. Edmo. Over the objection of several Trump judges, the Ninth Circuit ruled that Idaho must provide gender confirmation surgery to a transgender woman in prison with gender dysphoria. The court found that she had established that she would suffer ongoing mental anguish and irreparable harm if she continued to be denied gender confirmation

surgery. Not allowing her to receive the vital and potentially life-saving medical treatment for her gender dysphoria amounted to deliberate indifference and cruel and unusual punishment in violation of the Eighth Amendment, the court found. Idaho officials have petitioned the Supreme Court to reverse the Ninth Circuit and adopt the position of the Trump judges in that case.

McKesson v. Doe. The Fifth Circuit Court of Appeals issued a dangerous decision allowing a police officer to sue Black Lives Matter organizer DeRay McKesson for an injury he sustained during a protest when an unknown person threw a rock at him. The officer had not produced any evidence connecting McKesson to the incident or to any direct or indirect incitements to such violence. Nevertheless, they ruled that McKesson could be sued anyway, if the officer could show that the organizer had been “negligent” in organizing a protest that he “should have known” would turn violent. The ruling violates important Supreme Court precedent on protesters’ First Amendment rights and threatens to subject them to the cost and other burdens of meritless lawsuits intended primarily to intimidate civil rights activists and other protesters.

Blumenthal v. Trump. Numerous members of Congress have sued President Trump for his violations of the Constitution’s International Emoluments Clause, which prohibits the president from accepting foreign gifts without the approval of Congress. Violating the clause has allowed Trump to unlawfully and corruptly enrich himself through the power of his office. A lower court ruled that the senators and representatives do not have standing to sue, and they are asking the Court to review and reverse that decision.