

Supreme Court Impacts in Public Health Law: 2022-2023

Public Health and the Law

James G. Hodge, Jr.,¹
Leila Barraza,² Jennifer
L. Piatt,¹ Erica N. White,¹
Summer Ghaith,¹ Samantha
Hollinshead,¹ Lauren
Krumholz,¹ Madisyn
Puchebner,¹ and
Emma Smith¹

1: ARIZONA STATE UNIVERSITY, PHOENIX, AZ, USA, 2: UNIVERSITY OF ARIZONA, PHOENIX, AZ, USA.

Keywords: Supreme Court, Constitution, Public Health, Agency Deference, Vaccinations

Abstract: In another tumultuous term of the United States Supreme Court in 2022-2023 a series of critical cases implicate instant and forthcoming changes in multiple fronts that collectively shift the national public health law and policy environment.

The first edition of this column focused on the Supreme Court's impacts on public health law last year suggested "[SCOTUS'] role in adjudicating public health laws and policies may have reached its zenith."¹ That conclusion seemed defensible considering the Court's blockbuster decisions in 2022 rejecting federal vaccine mandates in *OSHA*,² rescinding rights to abortion in *Dobbs*,³ instating the major questions doctrine in *West Virginia*,⁴ and expanding Second Amendment rights to possess guns in *Bruen*.⁵ After another tumultuous term in 2022-2023, the second edition of this column underscores SCOTUS's continued effects. As President Biden surmised on June 29, 2023, the current Court has "done more to unravel basic rights and ... decisions than any court in recent memory."⁶

As examined across ten critical public health law themes below, SCOTUS (1) upended affirmative action policies, (2) skirted past social media

liability for misinformation, (3) reduced criminal liability for cyberthreats, (4) opened health care and public health agencies to newfound claims, (5) injected itself into medication abortion debates, (6) denied executive authority to forgive federal student loan debts, (7) re-defined the breadth of First Amendment religious freedoms, (8) assessed discriminatory impacts of racial redistricting, (9) rejected federal obligations to assure water rights for tribal nations, and (10) avoided resolving immigration policies tied to public health emergency powers. For a Court persistently mired in controversy and disapproval among Americans,⁷ this term breaks new ground yet again in the ever-changing public health legal landscape.

Affirmative Action and Equal Protection. In companion cases brought against Harvard University and the University of North Carolina-Chapel Hill, SCOTUS was asked to overrule precedent enabling higher education institutions to consider race as a factor in student admissions through affirmative action programs. On June 29, 2023, a majority of the Court led by Chief Justice John G. Roberts, Jr. did exactly that, citing Fourteenth Amendment equal protection principles.⁸ In another seismic shift in constitutional law, it held that collegiate admissions programs may "never use race as a stereotype or negative,"⁹ subjecting affirmative action programs to strict judicial scrutiny. Although uni-

About This Column

James G. Hodge, Jr., J.D., LL.M., serves as the section editor for *Public Health and the Law*. He is the Peter Kiewit Foundation Professor of Law and Director, Center for Public Health Law and Policy, Sandra Day O'Connor College of Law, Arizona State University (ASU).

James G. Hodge, Jr., J.D., LL.M., is the Peter Kiewit Foundation Professor of Law and Director, Center for Public Health Law and Policy, Sandra Day O'Connor College of Law, Arizona State University (ASU). **Leila Barraza, J.D., M.P.H.,** is Associate Professor, Mel and Enid Zuckerman College of Public Health, University of Arizona. **Jennifer L. Piatt, J.D.,** is Center Co-Director and Research Scholar. **Erica N. White, J.D.,** is a Center Research Scholar. **Summer Ghaith, J.D., M.D. Candidate, Samantha Hollinshead, J.D. Candidate, Lauren Krumholz, J.D. Candidate, Madisyn Puchebner, J.D., and Emma Smith, J.D. Candidate,** are Legal Researchers, ASU Center for Public Health Law and Policy.

versities are already pivoting admissions policies in light of the Court's decision,¹⁰ projected diminutions in diversity manifest their own societal health-related impacts. The Court's renouncement may extend further, however, to restrict race-based determinations in other settings, including public health data collections,¹¹ allocations of health resources, and distribution of government benefits. Rising adversities of race-neutral approaches to public health interventions tailored to specific at-risk groups are profound.¹²

ously, SCOTUS rejected certiorari in another case regarding a platform's removal of anti-vaccine misinformation.¹⁶ Against a backdrop of rampant misinformation online and the rise of artificial intelligence risking public health and safety,¹⁷ the Court's *laissez-faire* approach to social media liability may warrant additional consideration.

Civil Rights and Public Health Authority Liability. The Federal Nursing Home Reform Act (FNHRA) of 1987 sought to standardize nurs-

grievance procedures may mitigate increased lawsuits.

Cyberbullying and Protected Speech. First Amendment freedoms of speech do not protect persons making "true threats" of violence against others from criminal prosecution.²¹ In *Counterman v. Colorado*, the defendant argued that sending multiple disturbing social media messages directed at a public figure did not warrant prosecution under state law criminalizing menacing communications. *Counterman*

As examined across ten critical public health law themes below, SCOTUS (1) upended affirmative action policies, (2) skirted past social media liability for misinformation, (3) reduced criminal liability for cyberthreats, (4) opened health care and public health agencies to newfound claims, (5) injected itself into medication abortion debates, (6) denied executive authority to forgive federal student loan debts, (7) re-defined the breadth of First Amendment religious freedoms, (8) assessed discriminatory impacts of racial redistricting, (9) rejected federal obligations to assure water rights for tribal nations, and (10) avoided resolving immigration policies tied to public health emergency powers. For a Court persistently mired in controversy and disapproval among Americans, this term breaks new ground yet again in the ever-changing public health legal landscape.

Online Misinformation and Liability. In February 2023, SCOTUS heard oral arguments in two cases against Twitter and Google challenging the scope of internet platforms' statutory immunity in suits concerning federal regulation of algorithms disseminating content to service users.¹³ Concerned about judicial ramifications of narrowing immunity,¹⁴ the Court focused on the standard of liability under anti-terrorism laws. On May 18, it held that absent "knowing" and "substantial" action, Twitter was not liable for "aiding and abetting" a terrorist organization by merely allowing known, affiliated users on its platform.¹⁵ Ramifications of potential liability for online misinformation in the case brought against Google were unaddressed. Previ-

ing home care by requiring facilities receiving Medicaid funds to "protect and promote" residents' rights.¹⁸ In *Health and Hospital Corporation of Marion County v. Talevski*, SCOTUS considered whether constitutional claims under 42 U.S.C. § 1983 can be brought to enforce FNHRA rights.¹⁹ A negative finding would have curtailed beneficiaries' abilities to enforce rights under Medicaid and other social programs.²⁰ On June 8, 2023, however, the Court upheld private parties' abilities to recover funds for alleged violations, finding FNHRA "unambiguously" granted such rights under valid uses of congressional spending authorities. Although local nursing homes and other entities may face new liability under *Talevski*, FNHRA's administrative appeals and

claimed his conviction was unconstitutional because the state did not prove he knew or intended that his messages were threatening. On June 28, the Supreme Court agreed. Writing for a 7-2 majority, Justice Elena Kagan determined that government must prove a mental state of recklessness — i.e., a speaker is aware that his statements could be interpreted as threatening — to sustain a "true threat" prosecution and overcome free speech protections.²² *Counterman's* recklessness requirement heightens the government's burden of proof, complicating thousands of prosecutions for domestic violence, cyber-harassment and other acts impacting public health and safety.²³ As one commentator surmised,

“[t]he Court just handed stalkers and harassers ... a new weapon.”²⁴

FDA Regulation of Mifepristone. Following *Dobbs*, anti-abortion interests have sought to further limit access by targeting medication abortion. On April 7, 2023, Texas federal district court Judge Matthew Kacsmaryk found unlawful the Food and Drug Administration’s (FDA) 2000 approval of the prominent abortifacient, mifepristone, imperiling its availability nationwide.²⁵ That same day, another federal district judge in Washington State, Judge Thomas O. Rice, reasoned FDA had actually overly-restricted mifepristone and ordered its continued availability in several states.²⁶ Facing these conflicting decisions, and following a preliminary Fifth Circuit appellate order declining to block much of Judge Kacsmaryk’s ruling,²⁷ FDA asked SCOTUS for clarification. On April 21, the Court temporarily stayed Judge Kacsmaryk’s ruling pending either its own resolution of the case or its denial of certiorari.²⁸ With over 50 percent of U.S. abortions now accomplished through medication,²⁹ a SCOTUS ruling restricting mifepristone’s availability could substantially diminish abortion access nationally and wreak havoc on FDA approval processes across a spectrum of other drugs impacting the public’s health.

Major Questions on Emergency Powers and Student Debt. In August 2022, President Biden extended the federally-guaranteed student loan repayment and interest pause in effect since the inception of the COVID-19 pandemic in March 2020.³⁰ Coextensively, he promised to forgive up to \$20,000 per qualified borrower under his authority to “waive or modify” loan requirements via the Higher Education Relief Opportunities for Students (HEROES) Act.³¹ Large-scale loan forgiveness was designed to soften economic harms, especially among low-income Black borrowers, and help decrease racial wealth inequities.³² In response to challenges by borrowers ineligible for maximum relief and 6 states alleging

monetary harms, the Court invalidated President Biden’s program on June 30, 2023. While the pandemic qualified as an “emergency” authorizing program changes, reasoned the Court, allowing billions in loan forgiveness was too “staggering” to be sustained under the HEROES Act.³³ Relying on its major questions doctrine (requiring precise congressional authorization for regulations of economic and political significance), the Court scaled back agency authorities in other ways as well. It rejected agency interpretations of the scope of “waters of the United States” under the Clean Water Act³⁴ and agreed to revisit the *Chevron* framework for judicial deference to agency expertise in its next term.³⁵ Ongoing restrictions of agency innovations via the Court limit public health responses, particularly in politically-charged areas of reproductive rights, immigration, and climate change.

Free Exercise of Religion. Though SCOTUS denied review of a First Amendment Free Exercise challenge to state and local vaccine mandates on January 17, 2023,³⁶ its continued fervor for religious freedoms surfaced two key decisions this term. In *Groff v. Dejoy*,³⁷ a unanimous Court determined on June 29 that employers have to demonstrate a “substantial” undue burden on their businesses to fail to reasonably accommodate employees’ religious practices pursuant to Title VII of the Civil Rights Act.³⁸ A divided Court buttressed religious freedoms further in *303 Creative LLC v. Elenis*, holding that the First Amendment enabled a Colorado business engaged in an “expressive activity” to refuse to develop a wedding website based on a customer’s sexual orientation.³⁹ Resolving an unaddressed question from its *Masterpiece Cakeshop* decision in 2018,⁴⁰ the Court essentially endorsed First Amendment freedoms to discriminate against persons based on their sexual orientation. As Justice Sonia Sotomayor wrote in dissent, specific businesses now have “a constitutional right to refuse to serve members of a protected class,”⁴¹ raising the spec-

ter of continued societal inequities grounded in religious liberty.

Racial Gerrymandering and Voting Rights. The federal Voting Rights Act (VRA) § 2 prohibits denying equal voting access “on account of race or color.”⁴² In *Allen v. Milligan*, SCOTUS assessed a VRA challenge to an Alabama redistricting map containing only 1 majority-Black legislative district out of 7 (14%), despite Black Alabamians making up 27% of the state’s population. In a 5-4 decision issued on June 8, 2023, SCOTUS reaffirmed § 2 precedents asking whether a politically cohesive minority population could “constitute a majority” in a “reasonably configured” additional district, where the majority otherwise sufficiently thwarts minority voting choice.⁴³ The Court rejected Alabama’s attempts to satisfy § 2 by using “race-blind” computer-developed maps as benchmarks.⁴⁴ To the extent voting is a social determinant enabling citizens to shape governing bodies and health systems, “[m]ore voting access” lends to “better health outcomes.”⁴⁵ *Allen* helps ensure that the VRA § 2 continues to limit state suppression of minority voting communities.

Water Rights and Tribal Nations. An 1868 treaty between the federal government and Navajo Tribe recognized tribal sovereignty, designated its reservation as a “permanent home,” and established federal fiduciary duties.⁴⁶ Against the backdrop of a severe water shortage crisis in the West, the Court considered in *Arizona v. Navajo Nation* whether the treaty also “reserved water rights.”⁴⁷ On June 22, 2023, Justice Brett Kavanaugh opined for the majority that the treaty’s plain meaning did not convey an “additional [federal] duty to take affirmative steps to secure water” for the Tribe.⁴⁸ In dissent, Justice Neil Gorsuch and three others argued the Court’s rigid textual interpretation of the treaty failed to consider the Nation’s existing water rights or federal fiduciary responsibilities.⁴⁹ Already disproportionately affected by water shortages, the Navajo Nation (and other

Indigenous peoples) face profound health repercussions, including food insecurity and infection risks, given uncertainties over long-term water availability.⁵⁰

Public Health Emergency Powers and Immigration. Title 42 of the Public Health Service Act authorizes the Centers for Disease Control and Prevention (CDC) to restrict immigration to prevent the spread of infectious diseases. In March 2020, CDC issued a “Title 42” order limiting immigration during the COVID-19 pandemic.⁵¹ After CDC announced its order would end in May 2022, 24 states sued to retain it. Substantial conflicting orders among federal courts led SCOTUS to enter the fray in *Arizona v. Mayorkas* to assess the applicability of Title 42 related to immigration policy.⁵² While the case was subsequently mooted with the lifting of CDC’s order and rescission of the national public health emergency declaration on May 11, 2023,⁵³ profound immigration issues remain. On June 23, the Court determined in *United States v. Texas*⁵⁴ that states lacked standing to contest executive immigration prosecutorial authorities. A new immigration rule proposed by the Department of Homeland Security requiring migrant asylum seekers to first apply for protections in other countries prior to entry in the U.S. may invoke SCOTUS’ assessment in its forthcoming term.⁵⁵

Note

The authors have no conflicts of interest to disclose.

References

- J.G. Hodge, Jr., et al., “Supreme Court Impacts in Public Health Law: 2021-2022,” *Journal of Law, Medicine & Ethics* 50, no. 3 (2022): 608-612, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4154457> (last visited July 12, 2023).
- Nat’l Fed’n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022).
- Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).
- West Virginia v. EPA*, 142 S. Ct. 2587 (2022).
- N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).
- C.R. Wootson, Jr., “Biden Sharply Criticizes Supreme Court After Affirmative Action Case,” *The Washington Post*, June 29, 2023, available at <<https://www.washingtonpost.com/politics/2023/06/29/biden-blasts-supreme-court-affirmative-action/>> (last visited July 12, 2023).
- “Supreme Court,” *Gallup*, Sept. 2022, available at <<https://news.gallup.com/poll/4732/supreme-court.aspx>> (last visited July 12, 2023).
- Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. ____ (2023).
- Id.*
- N. Anderson and S. Svrluga, “Without Affirmative Action, How Will Colleges Seek Racial Diversity?” *The Washington Post*, July 1, 2023, available at <<https://www.washingtonpost.com/education/2023/07/01/affirmative-action-colleges-racial-diversity/>> (last visited July 12, 2023).
- K. Krisberg, “Changes to Race, Ethnicity Data Collection Will Impact Health,” *The Nation’s Health* 53, no. 4 (2023): 1-19, available at <<http://www.thenationhealth.org/content/53/4/1.2>> (last visited July 12, 2023).
- M. A. Williams and L. O. Gostin, “Will There be a Supreme Assault on Public Health?” *STAT*, Oct. 3, 2022, available at <<https://www.statnews.com/2022/10/03/will-there-be-a-supreme-court-assault-on-public-health/>> (last visited July 12, 2023).
- N. Totenberg, “Supreme Court Showdown for Google, Twitter and the Social Media World,” *NPR*, Feb. 21, 2023, available at <<https://www.npr.org/2023/02/21/1157683233/supreme-court-google-twitter-section-230>> (last visited July 12, 2023).
- R. Barnes et al., “Supreme Court Considers if Google is Liable for Recommending ISIS Videos,” *The Washington Post*, Feb. 21, 2023, available at <<https://www.washingtonpost.com/technology/2023/02/21/gonzalez-v-google-section-230-supreme-court/>> (last visited July 12, 2023).
- Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023).
- Word of God Fellowship, Inc. v. Vimeo, Inc.*, 205 A.D.3d 23 (N.Y. Gen. Term 2022), cert. denied, 142 S. Ct. 746 (Jan. 23, 2023).
- J. G. Hodge, Jr. et al., “Public Health Risks of Artificial Intelligence: Law & Policy Implications,” *O’Neill Institute for National and Global Health Law*, July 6, 2023, available at <<https://oneill.law.georgetown.edu/public-health-risks-of-artificial-intelligence-law-and-policy-implications/>> (last visited July 12, 2023).
- 42 U.S.C. § 1396r (2021).
- See Transcript of Oral Argument, *Health and Hosp. Corp. v. Talevski*, No. 21-806 (U.S. argued Nov. 8, 2022), available at <https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-806_d18f.pdf> (last visited July 12, 2023).
- R. Rudowitz and L. Sobel, “What is at Stake for Medicaid in Supreme Court Case *Health & Hospital Corp v. Talevski*?” *KFF*, Oct. 28, 2022, available at <<https://www.kff.org/policy-watch/what-is-at-stake-for-medicaid-in-supreme-court-case-health-hospital-corp-v-talevski/>> (last visited July 12, 2023).
- Virginia v. Black*, 538 U.S. 343 (2003).
- Id.*
- A. Durkee, “Supreme Court Overturns Stalker’s Conviction in First Amendment Case Over ‘True Threats,’” *Forbes*, June 27, 2023, available at <<https://www.forbes.com/sites/alison-durkee/2023/06/27/supreme-court-sides-with-stalker-in-first-amendment-case/?sh=18c0ecf66534>> (last visited July 12, 2023).
- T. Lorenz, “Supreme Court’s Ruling on Online Harassment Outrages Victims, Advocates,” *The Washington Post*, June 29, 2023, available at <<https://www.washingtonpost.com/technology/2023/06/29/supreme-court-harassment-ruling-first-amendment/>> (last visited July 12, 2023).
- All. for Hippocratic Med. v. FDA*, No. 22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023).
- Washington v. FDA*, No. 23-CV-3026-TOR, 2023 WL 2825861 (E.D. Wash. Apr. 7, 2023).
- All. For Hippocratic Med. V. FDA*, No. 23-20362, 2023 WL 2913725 (5th Cir. Apr. 12, 2023).
- Danco v. All. for Hippocratic Med.*, 143 S. Ct. 1075 (2023).
- R.K. Jones et al., “Medication Abortion Now Accounts for More than Half of All US Abortions,” *Guttmacher Institute*, Feb. 24, 2022, available at <<https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions>> (last visited July 12, 2023).
- K. Lobosco, “Trump Allows Borrowers to Suspend Student Loan Payments for Two Months,” *CNN Politics*, March 20, 2020, available at <<https://www.cnn.com/2020/03/20/politics/student-loan-payments-suspend-coronavirus/index.html>> (last visited July 12, 2023).
- White House, FACT SHEET: President Biden Announces Student Loan Relief for Most Borrowers Who Need It Most, Aug. 24, 2022, available at <<https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/>> (last visited July 12, 2023).
- C. Eaton et al., Student Debt Cancellation Is Progressive: Correcting Empirical and Conceptual Errors, *Roosevelt Institute* 2021, available at <<https://rooseveltinstitute.org/wp-content/>>

- uploads/2021/06/RI_StudentDebt-Cancellation_IssueBrief_202106.pdf> (last visited Sept. 11, 2023).
33. *Biden v. Nebraska*, 600 U.S. ____ (2023).
 34. *Sackett v. EPA*, 598 U.S. ____.
 35. *Loper Bright Enterprises v. Raimondo*, 601 U.S. ____ (2024).
 36. *Lukaszczyk v. Cook Cnty.*, 47 F.4th 587 (7th Cir. 2022), cert. denied sub nom., *Troogstad v. City of Chicago*, 143 S. Ct. 734 (Jan. 17, 2023).
 37. *Groff v. DeJoy*, 600 U.S. ____ (2023).
 38. 42 U.S.C.A. § 2000e (2018).
 39. *303 Creative LLC v. Elenis*, 600 U.S. ____ (2023).
 40. *Masterpiece Cakeshop v. Colorado Civil Rights Comm.*, 584 U.S. ____, 138 S. Ct. 1719 (2018).
 41. *303 Creative LLC v. Elenis*, 600 U.S. ____ (2023).
 42. 52 U.S.C. § 10301 (2014).
 43. *Allen v. Milligan*, 599 U.S. ____ (2023).
 44. *Id.*
 45. “Health & Democracy Index,” *Healthy Democracy Healthy People*, available at <<https://democracyindex.hdhp.us/>> (last visited July 12, 2023).
 46. “Treaty Between the United States of America and the Navajo Tribe of Indians,” *Judicial Branch of the Navajo Nation*, available at <<https://courts.navajo-nsn.gov/Treaty1868.htm>> (last visited July 12, 2023).
 47. *Arizona v. Navajo Nation*, 599 U.S. ____ (2023).
 48. *Id.*
 49. M. Fletcher, “Supreme Court Rules 5-4 Against Navajo Nation in Water Rights Dispute,” *SCOTUSblog*, June 22, 2023, available at <<https://www.scotusblog.com/2023/06/supreme-court-rules-5-4-against-navajo-nation-in-water-rights-dispute/>> (last visited July 12, 2023).
 50. J. Meiners, “As the Supreme Court Debates a Navajo Water Rights Case, Climate Change Adds New Questions,” *Arizona Republic*, May 31, 2023, available at <<https://www.azcentral.com/story/news/local/arizona-environment/2023/05/31/climate-change-adds-questions-in-supreme-court-case-on-navajo-water/70269769007/>> (last visited July 12, 2023).
 51. *Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, Ctrs. For Disease Control & Prevention, (Mar. 20, 2020), available at <https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf> (last visited July 12, 2023).
 52. “Arizona v. Mayorkas,” *SCOTUSblog*, available at <<https://www.scotusblog.com/case-files/cases/arizona-v-mayorkas/>> (last visited July 12, 2023).
 53. M. Ward, “DOJ Says End of Health Emergency Will Terminate Title 42 Policy and Moot Supreme Court Case,” *Politico*, Feb. 7, 2023, available at <<https://www.politico.com/news/2023/02/07/justice-department-immigration-supreme-court-00081668>> (last visited July 12, 2023).
 54. *United States v. Texas*, 599 U.S. ____ (2023).
 55. J. G. Hodge, Jr., “‘Out Like a Lion:’ Terminating the COVID-19 National Public Health Emergency,” *Journal of Law, Medicine & Ethics* 51, no. 2 441-445, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4383405> (last visited July 12, 2023).