

SCOTUS Public Health Law Updates (“PHLU”)

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SCOTUS impacts in public health law and policy are diverse and extensive. In each edition of SCOTUS PHLU (pronounced “flu”), the Center selects specific highlights or developments surrounding the Court’s influence in the field, which it annually assesses in the [Journal of Law, Medicine & Ethics](#).



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SCOTUS ON THE FIRST AMENDMENT

Opinion Analysis: *Lindke v. Freed*

On March 15, SCOTUS [held](#) that a public officials’ social media account use qualifies as state action triggering First Amendment protections when (1) the officials have been empowered to speak for the government, and (2) they use their governmental authority in the posts in question. Plaintiffs must show that communicating with the public was “actually part” of officials’ job descriptions and that they used their accounts to publish announcements not otherwise available.



Argument Recap: *Murthy v. Missouri*

On March 18, the Court heard [arguments](#) concerning whether the Biden Administration’s 2021 advisory encouraging social media platforms to take down COVID-19 misinformation was coercive in violation of the First Amendment. Some questioning focused on standing, as no social media posts are imminently at risk of censure under the advisory. On the merits, Justices Kavanaugh and Kagan suggested that it is extremely common for government to encourage the media to suppress speech. Chief Justice Roberts wondered whether the actions of one agent or agency are attributable to the entire federal government, as the fact that government is “not monolithic” may “dilute the concept of coercion significantly.”

Argument Recap: *NetChoice v. Paxton*

On February 26, the Court heard [arguments](#) on whether states can regulate content moderation policies of social media platforms depending in part on the extent to which platforms merely transmit users’ speech or have editorial discretion, like a newspaper. Most of the Justices seemed to agree that social media platforms are analogous to newspapers and protected by the First Amendment. However, Justices Thomas and Alito questioned whether content moderation was censorship, challenging the government to identify precedents addressing whether the First Amendment protects the “right to censor.” Questions also surfaced as to the intersection of Section 230 of the Communications Decency Act, which protects platforms from liability for users’ content.

Argument Recap: *NRA v. Vullo*

On March 18, SCOTUS heard [arguments](#) as to whether a public official who encourages regulated entities to avoid doing business with controversial organizations, like the National Rifle Association, violates organizations' First Amendment rights. NRA argued that this case is analogous to *Bantam Books v. Sullivan* (1963) finding First Amendment violations where the government indirectly threatens private intermediaries to suppress or penalize speech. In this case, Vullo, the former head of the New York Department of Financial Services, argued that this was "an exercise of legitimate law enforcement" and not coercion. Justice Kagan queried how warning of reputational risks was equivalent to coercion when financial institutions regularly consider such risks.



"[I]f gun companies or gun advocacy groups impose that kind of reputational risk, isn't it a bank regulator's job to point that out?"

-Justice Elena Kagan

MIFEPRISTONE: *FDA v. ALLIANCE FOR HIPPOCRATIC MEDICINE*

On March 26, the Court assessed whether FDA's actions making medication abortion drug mifepristone more easily accessible are challengeable by anti-abortion physicians and organizations. While the challengers argued on the merits in briefings that FDA's actions were unlawful in failing to account for important evidence, the Court seriously questioned whether they even had standing to bring the suit. Justice Gorsuch took issue with the requested remedy of a nationwide injunction altering mifepristone's access, expressing concern over how such injunctions have been increasingly used in recent years. Justices Thomas and Alito drew attention to the Comstock Act, an 1873 federal law criminalizing the mailing of abortifacients, contraceptives, and other "immoral" materials. The Court also observed how federal laws already provide conscience protections for providers with religious objections to abortion.

Concerns with Standing:

"Just simply by using resources to advocate their position in court, you say now, causes an injury. That seems [. . .] easy to manufacture." - Justice Thomas

"Is that it?" - Justice Barrett on what additional costs the challenging organization could point to for organizational standing purposes.

"I'm assuming that [. . .] if this had been unsafe in a grossly visible way [. . .] that some doctor who was prescribing it would have challenged the lack of an in-person [visit]." - Justice Sotomayor

RECENT AND UPCOMING ORAL ARGUMENTS

RECAP: *BECERRA V. SAN CARLOS APACHE & NORTHERN ARAPAHO TRIBE*

On March 25, SCOTUS heard [arguments](#) on whether the Indian Health Service (IHS) is required to pay "contract support costs" for administrative expenses of insurer-funded care under the Indian Self-Determination and Education Assistance Act (ISDA). The Justices questioned how ISDA contracts work, the Act's legislative history, and whether IHS has historically paid for contract support costs. Recognizing the impact of tribal health disparities and chronic IHS underfunding, the Justices seemed concerned about whether absorbing these costs would further IHS' statutory mandate to promote the health of tribes. The government argued that having to repay these costs could lead to large budget cuts for other IHS-funded health programs. Justice Sotomayor pushed back, stating ". . . it's not as if all of this money is bringing us a luxury healthcare spa. It's actually bringing us to a fairly minimal level of healthcare for tribal members."

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