

# Gorsuch's Crusade Against Vaccine Mandates Could Topple a Pillar of Public Health

[Dahlia Lithwick](#) and [Mark Joseph Stern](#) Dec 15, 2021 5:07 PM



Associate Justice Neil Gorsuch in Washington on April 23. Erin Schaff/Pool/AFP via Getty Images

First, the good news: It does not appear that a majority of the Supreme Court is prepared to find that religious liberty claims require an exemption to COVID vaccine mandates everywhere and anywhere. This is profoundly good news given that COVID rates appear to be [spiking yet again](#) as we prepare to enter the holiday season. Twice now, in six weeks, a six-justice majority [has flicked away](#) claims from [religious health care workers](#) who

assert a First Amendment right to refuse vaccination against the coronavirus. Two of these justices, Brett Kavanaugh and Amy Coney Barrett, have certainly left the door open to changing their minds. For the time being, though, these two junior justices appear to be unwilling to exacerbate the pandemic in the name of religious liberty.

Now the bad news: Three justices, led by Neil Gorsuch, say there is a [First Amendment right to refuse the vaccine on religious grounds](#). Worse, they are defending this position with dangerously broad and overheated rhetoric that undermines the constitutional foundation of *all* vaccine mandates. Gorsuch, along with Justices Clarence Thomas and Sam Alito, has rejected the principle that preventing the spread of communicable diseases qualifies as an inherently compelling state interest. And he is fighting to transform litigation over religious exemptions into an elaborate game of chutes and ladders the government will always lose. These radical and polarizing arguments may have alienated Kavanaugh and Barrett for now. But they are swiftly gaining purchase among extremist lower court judges, who are seizing on Gorsuch's dissents to swat down mandates—all while toppling a pillar of public health in the process.

## Subscribe to the Slatest Newsletter

A daily email update of the stories you need to read right now.

Most of the states that imposed vaccine mandates against COVID already grant religious exemptions. In these states, many people who had previously expressed no opposition to vaccines have exploited this accommodation to avoid getting a COVID shot. For instance, a single pastor (who is also a Republican politician) in Tulsa, Oklahoma, [uploaded a religious exemption form](#) for any anti-vaxxers to use; more than 35,000 people downloaded it

within three days. Maine and New York, by contrast, refused to carve out similar religious exemptions from laws requiring health care workers to undergo vaccination. Doctors and nurses in both states sued, alleging that the government had violated their free exercise of religion.

On Oct. 29, the Supreme Court declined to grant emergency relief that would have created religious exemptions to Maine's mandate. Then, on Tuesday, the court rebuffed a request to create such exemptions in New York. In both cases, [Gorsuch penned a furious dissent](#) accusing the majority of abandoning the Constitution. In both cases, Thomas and Alito joined his side. These 23 pages contain a head-spinning number of dubious claims about the law and the facts. For example, Gorsuch insisted that the presence of *medical* exemption but not a religious exemption constitutes discrimination against religion. He implied that once a state allows *anyone* to remain unvaccinated for legitimate health reasons, it must then allow anyone to remain unvaccinated because of their faith. Leaving aside the fact that these exemptions aren't really comparable, his reasoning ignores the fact that the number of people who claim religious exemptions exceeds the number of people who claim medical exemptions [by orders of magnitude](#). The justice dismissed this comparison as an irrelevant "numbers game."

But Gorsuch's most alarming argument is more fundamental: He openly scorned the notion that the government's interest in halting the spread of a lethal global virus is always "compelling." While the justice begrudgingly acknowledged that limiting COVID is a compelling interest *today*, he added that it "cannot qualify as such forever." Pointing to the development of vaccines and treatments, he suggested that state efforts to fight COVID will no longer qualify as "compelling" in the very near future because if these treatments work, people won't get sick and die. "If human nature and history teach anything," he concluded with a grandiose flourish, "it is that civil liberties face grave risks when governments proclaim indefinite states of

emergency."

As Northwestern University law professor Andrew Koppelman has [explained](#), this logic is terrifying on its face.\* The Supreme Court has increasingly [applied](#) the highest standard of judicial review, known as "strict scrutiny," to any infringement on free exercise rights, forcing the government to prove again and again that it has a "compelling" interest in burdening religion. The government automatically flunks this test any time the court determines that it lacks such an interest. So Gorsuch, along with Thomas and Alito, are preparing to rig the game against COVID restrictions: With every passing day, goes the logic, the government's interest becomes less compelling. With every life saved, the urgency of saving future lives diminishes.

If all this sounds like the Supreme Court's [decision](#) to gut the Voting Rights Act's preclearance provision because it successfully suppressed racist voting laws, it's because the logic is the same. As Justice Ruth Bader Ginsburg pointed out then, scrapping a law because of its success is "like throwing away your umbrella in a rainstorm because you are not getting wet." Throwing out an umbrella for keeping you dry is bad enough. Now Gorsuch seems to be suggesting that the more effective those umbrellas are, the less government interest there can be in requiring them. As Koppelman notes in his piece, Gorsuch seems to be floating the principle that we can soon achieve some acceptable rate of unnecessary death, such that the state will no longer have a compelling interest in preventing these deaths at all.

And his logic extends far beyond this pandemic. Gorsuch seems to think that unless a disease is actively killing tens of thousands of Americans a month, the state cannot curb its spread in a manner that hampers "religious liberty." Under this theory, mandatory vaccination laws for all kinds of diseases—polio, smallpox, measles—would be suspect, particularly if those diseases no longer ravage the population. (Never mind that these diseases have been

largely eradicated in the United States because of vaccine mandates.) And states [like California and New York](#) could no longer refuse religious exemptions to school vaccination rules. In his dissent, Gorsuch felt no compunction about accusing New York Gov. Kathy Hochul of anti-religious hate. Condemning Hochul for declaring that "God wants" everyone to get vaccinated, the justice proclaimed that this comment "exudes suspicion" and "animosity" toward "those who hold unpopular religious beliefs" in violation of the First Amendment.

Gorsuch's theory may not have won over a majority of the Supreme Court just yet. But it is already blazing its way through the lower courts as a clarion cry on behalf of religious dissenters who believe they are being singled out for hostile treatment by state officials seeking to do nothing more than save lives. Three different judges appointed by Donald Trump have [already](#) approvingly [cited this passage](#) in decisions halting federal vaccines mandates. Their opinions are also bristling with hostility toward government efforts to slow down the spread of a disease that has [now claimed 800,000 American lives](#), as well as [unscientific skepticism](#) toward the very efficacy of vaccines. ("One could query how an 'emergency' could prompt such a 'deliberate' response," wrote one Trump judge; "if boosters are needed six months after being 'fully vaccinated,' then how good are the COVID-19 vaccines, and why is it necessary to mandate them?" asked another.)

One lower court judge has taken Gorsuch's ideas a step further. Dissenting this week from a [decision](#) allowing United Airlines' COVID-19 vaccine mandate for employees to remain in place, Judge James Ho of the 5<sup>th</sup> U.S. Circuit Court of Appeals made Gorsuch sound almost reasonable. In a six-page dissent, Ho, a Trump appointee, described United's vaccine mandate as proof of a "calloused approach to" and "apparent disdain for" people of faith. Ho's dissent was full of his usual Newsmax flourishes: "To hypothesize that the earthly reward of monetary damages could compensate for these

profound challenges of faith is to misunderstand the entire nature of religious conviction at its most foundational level." He noted that "as if all this weren't enough, to top it all off, United is forcing this crisis of conscience on the eve of Christmas—one of the holiest times of the year, the season when Christians cherish devoting their hearts and souls to both faith and family alike, not to choosing between the two."

It seems that the one thing as contagious as a lethal virus is a quotable, inflammatory piece of judicial hyperbole. In each of their vaccine rulings, the judges tasked with balancing two competing interests—that of the state in quelling a deadly disease, and the religious liberty of religious adherents—opt to reduce the former interest to a cartoonish version of evil. In their worldview, the state actors proposing the vaccine mandates exult in shaming the faithful. Such characterizations are not only inflammatory and irresponsible, but they also serve to normalize a dangerous narrative about state public health actors while whipping up religious animus where none exists. This narrative has deadly consequences: More Americans may die as a result of the idea that religious liberty is paramount. It also means that more people may die because powerful jurists are infecting the public discourse with fact-free, [medically discredited](#) analysis that pits people of faith and their religious liberties against the health of everyone else.

Correction, Dec. 15, 2021: This piece originally misidentified the university where Koppelman is a professor. It is Northwestern University, not Northwest University.