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Supreme Court Brief

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Marcia Coyle

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Good morning and welcome to Supreme Court Brief. The justices are now on their December break and will return for arguments Jan. 11. Pandemic-related filings still have a strong presence on the docket. We take a look at the Trump administration's latest move in an abortion-related pandemic challenge. If you're still puzzling over a gift for a SCOTUS fan, take a look at our list of newly published court-themed books. Kannon Shanmugam is on a roll, having recently secured his fifth cert grant this term.

Thanks for reading, and your feedback is welcome and appreciated. Contact Marcia Coyle at mcoyle@alm.com and follow her on Twitter [@MarciaCoyle](https://twitter.com/MarciaCoyle).



Abortion Rights Amid the Pandemic

Although much recent attention has focused on religious organizations asking the Supreme Court to end covid-19 restrictions, an abortion-related pandemic [case](#) has been on the docket since August.

The Trump administration returned to the Supreme Court on Tuesday in its effort to enforce certain requirements on women seeking medication abortions during the pandemic.

Back in August, the Trump administration asked the justices to stay an injunction blocking the Food and Drug Administration from enforcing a rule that requires women to travel in person to pick up the medication abortion drug, mifepristone, at a hospital, clinic or medical office, even if they have already been evaluated. A Maryland federal district court had issued a nationwide injunction against the rule.

In October, the court, with Justices **Samuel Alito Jr.** and **Clarence Thomas** dissenting, [said](#) it would hold the government's application in abeyance in order to get a more comprehensive record from the district court. In his dissenting opinion, Alito wrote: "While COVID–19 has provided the ground for restrictions on First Amendment rights, the District Court saw the pandemic as a ground for expanding the abortion right recognized in *Roe v. Wade*."

The district court on Dec. 9 upheld its earlier decision.

In the government's latest [filing](#), acting Solicitor General **Jeffrey Wall** argues, "The district court adhered to its view that a nationwide preliminary injunction is warranted, despite newly available evidence showing that in states where requirements of in-person visits have remained in effect as a matter of state law, the number of abortions provided during the pandemic has in fact increased as compared to the equivalent period in 2019."

That data, Wall wrote, proves that continued enforcement of the FDA's requirement during the pandemic does not create a substantial burden on

abortion access and is constitutional under the court's abortion decision in *Planned Parenthood v. Casey*. Wall wants the court to stay the district court injunction pending action by the U.S. Court of Appeals for the Fourth Circuit and the Supreme Court, "if necessary." But, he said, "At a minimum, this court should stay the nationwide scope of the injunction"

Julia Kay of the ACLU Reproductive Freedom Project, is counsel to the American College of Obstetricians & Gynecologists which challenged the FDA rule.



Books for Supreme Court Fans

This year has produced some interesting reading about the Supreme Court and law. If you're looking for a holiday or birthday gift for the SCOTUS nerd in your life (or, you are the SCOTUS nerd), here are some 2020 books—written by some familiar names—that might catch your interest.

>> *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court* (Gateway Editions). This book by Ilya Shapiro, director of Cato

Institute's Center for Constitutional Studies, came out Sept. 22, just four days before the nomination of Justice Amy Coney Barrett.

>> *The Religion Clauses: The Case for Separating Church and State* (Oxford University Press). Erwin Chemerinsky, dean of the University of California Berkeley School of Law, and Howard Gillman, chancellor of the University of California, Irvine, tackle one of the hottest topics in the Roberts court.

>> *Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy* (Yale University Press). Election law scholar Richard Hasen of the University of California Irvine School of Law examines factors that threatened the integrity of the 2020 presidential election.

Also out this year:

>> *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America* (Penguin Press). Author: Adam Cohen, a member of the New York Times editorial board and a senior writer for Time magazine

>> *Shortlisted: Women in the Shadows of the Supreme Court* (New York University Press). Authors: Renee Knake Jefferson of the University of Houston Law School and Hannah Brenner Johnson, vice dean of California Western School of Law

>> *The Cycles of Constitutional Time* (Oxford University Press). Author: Jack Balkin of Yale Law School

>> *Law and Leviathan: Redeeming the Administrative State* (Belknap Press). Author: Cass Sunstein and Adrian Vermeule of Harvard Law School

>> *The Supreme Court's Role in Mass Incarceration* (Routledge). Author: Bill Pizzi, emeritus University of Colorado Law School

>> *Abortion and the Law in America: Roe v. Wade to the Present* (Cambridge University Press). Author: Mary Ziegler, Florida State University College of Law

>> *The Conscientious Justice: How Supreme Court Justices' Personalities Influence the Law, the High Court, and the Constitution* (Cambridge University Press). Authors: Ryan Black, Ryan Owens, Justin Wedeking and Patrick Wohlfarth

>> *Hamilton and the Law* (Cornell University Press). Edited by Lisa Tucker of the Thomas R. Kline School of Law at Drexel University, with essays by Supreme Court advocates and experts including Gregory Garre, Elizabeth Wydra, Neal Katyal, Rebecca Tushnet, Erwin Chemerinsky, John Q. Barrett, Michael Gerhardt and Kermit Roosevelt III.



Shanmugam's Fifth Cert Grant This Term

Buried in Friday night's drama over the order in the Texas election challenge was an order granting review in a major securities class certification case.

Kannon Shanmugam of **Paul, Weiss, Rifkind, Wharton & Garrison**, is counsel of record for Goldman Sachs in the [case](#), *Goldman Sachs Group v. Arkansas Teacher Retirement System*. It is his fifth cert grant this term.

Shanmugam's Paul Weiss team includes lawyers **Stacie Fahsel**, **Joel Johnson**, **Kristina Bunting**, **Sarah Prostko** and **Caroline Williamson**.

Lawyers from **Sullivan & Cromwell** were on the brief with the Paul Weiss attorneys.

The plaintiffs in the securities challenge are represented in the Supreme Court by **Goldstein & Russell** partner **Thomas Goldstein**. On the brief in opposition to review were also lawyers from New York's **Labaton Sucharow** and **Robbins Geller Rudman & Dowd** in San Diego, California.

The plaintiffs [claim](#) that Goldman Sachs made false and misleading statements about how it was avoiding conflicts of interests in the mortgage-backed securities it sold. A divided U.S. Court of Appeals for the Second Circuit upheld class certification.

Goldman Sachs' lawyers [argue](#) it should have been able to rebut the presumption of classwide reliance by pointing to the generic nature of the alleged misstatements to show they had no impact on the price of the securities. It also asks the court to decide whether a defendant who tries to rebut the presumption has only a burden of production or also the ultimate burden of persuasion.

Shanmugam's petition drew a number of supporting amicus briefs, including from financial economists, the Securities and Financial Markets Association and former SEC officials and law professor. Law firms on those briefs included **Wilkie, Farr & Gallagher; Alston & Bird; Fried, Frank, Harris, Shriver & Jacobson; Vinson & Elkins; Shearman & Sterling; and Simpson Thatcher & Bartlett.**



Supreme Court Headlines: What We're Reading

Was SCOTUS Unanimous in Tossing Texas Election Suit on Standing? Alito a Cipher. "Were Alito and Thomas saying they would allow the suit to be filed, but then they would dismiss it on the standing issue?" [[ABA Journal](#)] David Lat has more [here](#) at his new Original Jurisdiction site.

The Supreme Court Rejects Opportunity to Roll Back Marriage Equality. "The court's decision ensures that same-sex couples in Indiana will remain the lawful parents of their own children, ending the state's six-year-long crusade to remove their names from their children's birth certificates." [[Slate](#)]

Judicial Independence Must Be Preserved in Our Federal Courts. "We need to rethink how judicial nominees are selected. A president must of course look for individuals with conviction, knowledge, and experience. Americans do not want judicial nominees to have empty minds but rather open minds. How can a president deliver that? Not as Trump and his team have done by nominating perhaps brilliant but confirmed ideologues, and those as young as possible, so they will sit for decades," Charles Fried writes. [[The Hill](#)]

Supreme Court Won't Revive Kansas Voting Law Requiring Proof of Citizenship. "The Supreme Court declined Monday to revive a Kansas law that required showing

specific proof-of-citizenship documents before registering to vote, ending a fight that had continued for years." [\[The Washington Post\]](#)

Time's Up Is Refrain as Supreme Court Chafes at Remote Arguments. "Free-wheeling exchanges have yielded to a more rigid format where each justice gets just a few minutes to ask questions in order of seniority." [\[Bloomberg\]](#)

Oil Companies Fight to Get Climate Cases Before Supreme Court. "Some of the world's largest oil companies are hoping to convince the U.S. Supreme Court to decide whether they should be held liable for climate change." [\[Houston Chronicle\]](#)

TRENDING STORIES

['A Nightmare Out Here': Another Texas Lawyer Dies of COVID-19](#)

TEXAS LAWYER

[Tom Girardi's Assets Frozen After Judge Issues \\$2M Contempt Order](#)

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[Rising Associate Bonuses See Mixed Reaction From Corporate Counsel](#)

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[Ex-Jones Day Associates Drop Gender Bias Class Action Claims](#)

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[The Future of Boies Schiller Is Female](#)

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