

INTRODUCTION

For the last few years, the Arizona Supreme Court has been a reliable vote in favor of corporate interests. The justices have generally made it harder for injured workers to find justice and easier for corporations to protect their bottom lines.

In Arizona and other states, judicial decision-making has significant impact on people's lives, but unlike the policy-making work of state legislatures, the judiciary often receives little public scrutiny. This is especially true in the realm of corporate power, where low-profile, wonky-seeming cases can dramatically re-write the public's ability to hold employers accountable, check corporate abuses, or rein in corporate greed.

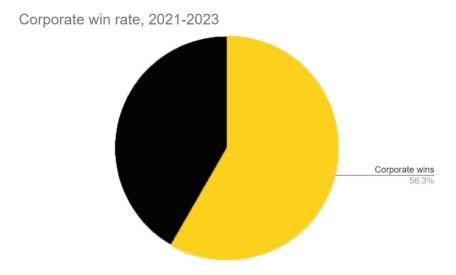
This report aims to shine a light on the Arizona Supreme Court's decision-making in recent years, analyzing the extent—and potential causes—of its turn toward corporations and explaining the impact this has had. It takes cases like *Eva Cornell v. Desert Financial Credit Union*, in which the court allowed a bank to <u>unilaterally change</u> its terms of services to require arbitration when a customer tried to fight "overdraft fees" in court, and understands them not just as contract disputes, but as meaningful cases worthy of the public's attention. Further, it takes the higher-profile decisions from the Arizona Supreme Court, like when the justices made it <u>more difficult for voters to propose taxes</u> on the wealthy, and places them in a larger context.

To do this, this report analyzes 91 rulings by the court from 2004 through 2023 in cases involving corporations, employers, or healthcare providers on one side and individuals who were injured or wronged on the other side. Over the entire 20-year period, the court favored injured people in more than half of the cases. But beginning in 2021, as then-governor Doug Ducey appointed more pro-corporate justices, the court took a sharp pro-corporate turn.

Over the last three years, the court has ruled in favor of corporate parties in 58% of the cases. Three of the court's seven justices are former corporate lawyers, and four worked as prosecutors. These justices have consistently ruled in favor of corporations. In 2022, the court made it much harder to use "punitive damages" to punish extremely negligent actions by a corporation. The justices said that such damages can only be employed if a defendant corporation acted with an "evil mind," and they unanimously ruled that the defendant must intentionally create "an unreasonable risk of physical harm." The court emphasized that a defendant "must have actually appreciated the severity of the risk before consciously disregarding it" to face punitive damages.

This is a stark difference from previous years. From 2014 through 2016—the high-water mark for individuals seeking justice in the Arizona Supreme Court in recent years—the court actually ruled against corporations in two-thirds of the cases.

But this pro-worker majority was undone by politicians who expanded the court and manipulated the state's judicial nominating commissions. The result of that manipulation is a high court that could stand in the way of progress for working people for years to come. This strategy is likely to pay off for conservative, pro-corporate interests who are increasingly out-of-step with the people of Arizona. As Democratic state senator Martin Quezada said, "The state is turning blue, and that is a good way to maintain a backstop through the judicial system."



In the following sections, this report will describe the previous pro-worker majorities on the court, analyze how politicians ended this majority, and conclude with suggestions for how Arizonans can fight the corporate takeover of their judiciary.

ENDING A PRO-WORKER MAJORITY

The court's current majority is the result of years of political manipulation of the state's judicial selection system, which used to serve as a model for other states. Before the pro-corporate majority took power in December 2016, the court actually ruled in favor of injured people in well over half the cases. That version of the court was composed entirely of justices who, over the course of our study, each individually ruled for injured people more often than corporations or employers.²

In one example of the impact of this pro-worker majority, the justices ruled in 2015 that the family of a man whose workplace injury contributed to his death <u>was entitled to collect interest</u> on workers compensation death benefits. The employer had to pay interest for four years, from the date it first learned of the claim, providing meaningful economic relief to the worker's family over the objections of the corporation.

In 2004, the court ruled in favor of an <u>injured NASCAR driver</u> who claimed that racetrack employees didn't extinguish a fire quickly enough after he was in a crash. The drivers had signed a document stating that they assumed the risk of any crash, even if the racetrack was negligent. But the justices ruled that this contract violated a constitutional mandate that juries must decide if a person assumed the risk of injury. The court explained that this mandate had been introduced at the constitutional convention by "progressive, labor-friendly individuals," and they wanted to avoid what happened in other states, where courts had "thwarted efforts by injured employees to recover on tort claims against employers."

²See the Appendix.

The high court's pro-worker majority lasted until 2016, when the Republican-led legislature added two seats to the high court. This allowed Governor Doug Ducey, a lame-duck Republican, to fill the seats and create a new, pro-corporate majority.³ Ducey appointed Justices John Lopez, a federal prosecutor who had previously worked for a massive corporate law firm, and Andrew Gould, who has since left the court to join a massive corporate law firm. All five justices at the time opposed the expansion.

Lawmakers who added the new seats argued that a larger court could more quickly give businesses "clarity on the law," according to a 2020 article in Politico. This comment suggested that lawmakers were more concerned with how courts impact businesses than they were with how the judiciary affects workers. Republicans denied any political motive but also acknowledged that they wouldn't have expanded the court if a Democrat had been governor.

Adding two seats to the state supreme court was already a significant change, but it wasn't enough for those who wanted to entrench pro-corporate rule in the state. In order to ensure that those new seats were filled with Ducey's preferred judge, the governor had to flout the state's constitutional rules, undermining Arizona's long-standing judicial selection system.

For decades, Arizona's "merit selection" system served as a model of how to choose judges. Then-state senator <u>Sandra Day O'Connor sponsored</u> the amendment that created the system in 1974. Before the amendment, the governor had unfettered authority to choose anyone when vacant seats arose.

The merit selection system was intended to minimize the role of politics in the process, while still allowing voters to decide whether to keep judges on the bench through "retention" elections. In this system, nominating commissions vet applicants for judicial seats and recommend a list of the most qualified to the governor, who must choose an appointee from the list.

The constitution says that the appellate nominating commission's 16 members <u>must be diverse</u>, and no political party should have more than seven members, which is a majority. But when he was governor, Ducey <u>bent or broke the rules</u> for appointing judges.

At one point in 2019, during Ducey's second term, <u>more than two-thirds</u> of the commissioners were Republicans, and zero were Democrats. This version of the commission approved a nominee-Justice William Montgomery—whom it had previously rejected as unqualified. Ducey had appointed seven Republicans and five registered independents linked to the GOP, in addition to leaving several seats vacant after Democrats left—entirely disregarding the constitution's requirements for diversity and bipartisanship. But Ducey's chosen judges had the final say on state law, and the governor faced no repercussions.

These power grabs happened around the same time that conservative politicians in other states, including Iowa, Florida, and Tennessee, pushed for <u>more control over appointing</u> judges. In fact, Ducey's predecessor, Republican Jan Brewer, had signed a bill that the Brennan Center for Justice warned could lead to <u>less qualified nominees</u>, but the state supreme court <u>struck it down</u>. A year earlier, voters had rejected a similar effort to weaken the merit selection process on the ballot.

³This happened the same year that Republican politicians in Georgia expanded the state supreme court to <u>create</u> a <u>conservative majority</u>. North Carolina lawmakers considered doing the same thing <u>after voters elected a progressive majority</u> in November 2016, but they backed down amid intense protests.

Ducey had more success than his predecessor. In addition to his changes to the high court, in 2022, Arizona lawmakers added six seats to the Court of Appeals and allowed him to appoint six appellate judges in his final days in office. This left the court with 26 judges. Four of Ducey's lame-duck appointees had experience as prosecutors, and two had worked as corporate lawyers.

The power grabs were effective. As of March 2024, nearly three-quarters of Arizona's appellate judiciary has been appointed by Ducey. And a proposed constitutional amendment would, if approved by the voters, keep Ducey's judges in power until they reach the mandatory retirement age.

A PRO-CORPORATE MAJORITY'S IMPACT

The Arizona Supreme Court's recent pro-corporate turn comes after Ducey's final three high court appointments. Justices James Beene and William Montgomery favored corporations or employers in around 60% of the analyzed cases, and Justice Kathryn King ruled against injured people in 71% of the cases, by far the highest percentage of any justice. With a pro-corporate majority now in power, injured people are having a hard time holding employers or corporations accountable.

For example, in 2021, the justices <u>overturned a ruling</u> in favor of a woman whose mother was attacked in a nursing home by a fellow resident. The plaintiff had signed a contract that said she couldn't file a lawsuit and had to let a private "arbitrator," rather than a judge or jury in a public proceeding, decide if the nursing home was negligent. This arbitration agreement required her to pay all the costs for both parties, even if she won the case. The lower courts found this agreement "unconscionable" and unenforceable. But the high court decision by Justice Montgomery said the plaintiff hadn't proved that she was denied "meaningful access" to justice.

The justices have ruled for employers in a variety of cases. In 2022, the court ruled against a police officer seeking workers compensation benefits for Post-Traumatic Stress Disorder after observing the scene of a car accident. In that ruling, the court <u>upheld a state law</u> that limits workers' compensation benefits for mental illness to conditions that arise from "unexpected, unusual or extraordinary stress" at work. Justice Ann Scott Timmer's dissent argued that injured workers have a constitutional right to workers' compensation for injuries that occur gradually.

The court ruled 5–2 against the family of a man who <u>died from exposure to asbestos</u> as a child. The decedent's father had worked at the defendant corporation's plant, and his children were exposed to asbestos on his clothing when he came home from work. The court ruled that the corporation wasn't required to do anything to prevent exposure to third parties, even though the company knew of the risk. The dissent summarized the court's decision:

Although the employer created the risk of physical harm—and failed to warn its employees or the persons ultimately injured—the majority concludes that the employer must be immunized from even the prospect of liability, no matter how reckless or otherwise unreasonable its conduct may have been. This result, the majority contends, serves to protect the employer's 'individual liberty.' One would think the children had a greater right to be free from others unreasonably exposing them to risks of debilitating and life-threatening illness.

At the same time, the court has also made it more difficult for citizens to raise taxes on rich people through ballot initiatives. The justices in 2022 kept a proposal to tax the wealthy and fund education off the ballot, stating that it infringed on the legislature's authority over school funding. The court, employing similar reasoning, also struck down a 2020 initiative—approved by the voters—that would have undone a \$2 billion tax cut for the wealthy and given the money to schools.

WHAT YOU CAN DO ABOUT IT

Activists and organizers can act now to demand a judiciary that doesn't put corporate profits over people. They can urge Governor Katie Hobbs to continue appointing lawyers to the bench who have spent their careers fighting for everyday people. People can also encourage lawyers who help people in need to seek out an opportunity to reach the bench through an appointment or election. Hobbs will soon fill seats on the appellate judiciary and in Maricopa County, where an earlier report by the People's Parity Project found that half-of-the-Superior Court judges are former corporate lawyers.

Arizonans can also recommend the names of public interest professionals to serve on Hobbs's nominating commissions. Hobbs has appointed two lawyers to the Commission on Appellate Court Appointments, which is still dominated by Ducey's commissioners. One of Hobbs's appointees is a former public defender, and the other leads the Arizona Center for Law in the Public Interest, an organization dedicated to using the legal system "to hold the government and corporations accountable when they violate the law." These two appointments are a promising start, and public pressure can help ensure that Hobbs's future appointees maintain this sort of pro-people experience.

Organizers and advocates can also demand reforms to keep governors from abusing the merit selection process. In the aftermath of Ducey's power grabs, a state senator proposed an <u>amendment to strengthen the requirements</u> for diversity on the nominating commissions, but legislative leaders never brought the amendment up for a vote. Supporting this and similar legislation is critical to ensuring that future governor's aren't able to stack the deck in favor of corporations in the way that Ducey did.

Most importantly, people throughout the state can learn about their local judges and talk to others about them. They can set up court watching programs, as people in cities across the U.S. have done, to hold judges accountable for bad decisions or unconstitutional practices. Groups like the <u>Arizona Courts Project</u> can help people inform themselves about judges and learn how to hold them accountable during performance reviews.

Can workers trust Arizona's courts to deliver if they're dominated by judges who spent their careers fighting for corporations? Arizonans deserve courts with diverse perspectives that give them a fair chance at justice. Reshaping the courts to minimize corporate influence is an essential first step in bringing access to justice for workers in Arizona within reach.

APPENDIX

2013-2019

This appendix lists the cases analyzed for this report. The research doesn't include First Amendment lawsuits against public employers, suits against "political subdivisions" of the state (except employment cases), disputes over substituting parties, property disputes, bankruptcy cases, lawsuits involving public employee pensions or benefits, disputes over Medicaid benefits or payments, cases involving sovereign immunity of the state or tribes, legal malpractice claims, open records lawsuits, or disputes over the ownership of a business.

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2004-2012	Date	Corp. win = 1	Robert Brutinel	Andrew Hurwitz	John Pelander	Scott Bales	Rebecca Berch	Michael Ryan	Ruth McGregor	Charles Jones
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ELIZABETH WALSH et al v ADVANCED CARDIAC	4/13/2012	C	0	0	0	0	C)		
ALFRED ALBANO et al v SHEA HOMES/J F SHEA CO INC	6/30/2011	1	1	1	1	1	1			
JESUS GUTIERREZ v ICA/MASTERSON et al	4/21/2011	1	1	1	1	1	1			
LETTIE PRESTON et al v KINDRED HOSPITALS et al	3/24/2011	C	0	0	0	0	C)		
LUIS BALLESTEROS et al v AMERICAN STANDARD et al	1/20/2011	1	X	1	1	1	1			
FIDELITY NATIONAL FINANCIAL v COLIN FRIEDMAN et al	8/19/2010	(X	0	0	0	C	0)	
JAMES TARRON et ux v BOWEN MACHINE & FABRICATING	8/3/2010	1		1	1	1	1	1		
MONICA LIPS/WALTER LIPS v SCOTTSDALE HEALTHCARE	5/3/2010	1		1	1	1	1	1		
LEONEL GARZA v SWIFT TRANSPORTATION	8/24/2009	1		1	1	1	1	1		
SABINO CARBAJAL v ICA/PHELPS DODGE/GABB ROBBINS	6/15/2009	C)	0		0	C	C	0	
LAURA SEISINGER v SCOTT SIEBEL MD	3/13/2009	1		1		1	1	1	X	
M CULLEN/J CORONADO v AUTO OWNERS	7/28/2008	1		0		1	1	1	1	
JEAN CUNDIFF v STATE FARM MUTUAL AUTO INSURANCE	1/10/2008	C)	0		0	C	C	0	
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DEER VALLEY v HON. ROBERT HOUSER/PAMELA McDONALD	2/26/2007	1		1		1	1	1	1	
GEORGE WINN v PLAZA HEALTHCARE et al	1/23/2007	C)	0		0	C	C	0	
HAYWOOD SECURITIES v HONS EHRLICH/BARKER et al	1/10/2007	C)	0		0	C	0	0	
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CHARLES PHELPS v FIREBIRD RACEWAY INC	5/8/2005	C)	0			C	0	1	1
MORGAN/BROHNER v CARILLON INVESTMENTS et al	4/1/2005	C)	0			C	C	0	0
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SIDNEY LACHTER et al v JAMES M SMITH	12/1/2004	1		1			1	1	1	1
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MADELINE SHOTWELL v HON. GARY DONAHOE et al	2/25/2004	()	0			C	C	0	0
CRAIG W PETERSEN v CITY OF MESA	1/27/2004			0			C	0	0	0

