



The Supreme Court's 2020-21 Term Shows the Damage Caused by Trump-Appointed Justices

In recent years, political overreach by elected Republicans and judicial overreach by the far-right justices they have gotten onto the Supreme Court have made more and more Americans aware of the critical importance the Court plays in our lives. Among other things, the ultraconservative justices have:

- opened our elections to unlimited spending by corporate interests;
- dismantled the central mechanism of the Voting Rights Act that prevented discriminatory voter suppression laws from going into effect;
- given the green light to hyper-partisan gerrymandering schemes that subvert democracy;
- made it easier for companies to violate the rights of working people and to exercise abusive monopoly power;
- authorized the Trump administration's discriminatory Muslim ban;
- redefined religious liberty from a shield to protect religious exercise into a sword to harm others;
- undermined precedents upholding the ability of federal agencies to adopt vital health and safety regulations; and
- threatened to eliminate the constitutional right to abortion.

Not surprisingly, most Americans don't like this.

As Republican-appointed justices and judges do more and more harm to people and to the country, the long-term movement to improve our courts is getting stronger. While the courts have long been an issue that motivates conservative voters more than others, that is changing. For instance, the Trump campaign's own "[autopsy](#)" of his 2020 election defeat showed that in 10 key battleground states, the issue of the Supreme Court motivated Biden voters more than Trump voters. This is consistent with [other research](#) from the election.

In this term, the Court in some cases bypassed controversial issues and reached surprising compromises. For instance, the justices avoided ruling on the merits of the challenge to the Affordable Care Act, and they issued a narrow ruling in a case that had threatened to let religious liberty be used as a license to discriminate against LGBTQ+ people.

Yet in other cases, the ultraconservatives are clearly taking full advantage of their ill-gained majority. They have continued to abet Republican efforts to make it harder for popular majorities to vote them out of office through free and fair elections; let racial injustice fester in the criminal justice system; continued to give special rights to religious organizations far beyond what the Constitution contemplates; made life harder for undocumented immigrants trying to exercise their legal rights; advanced their agenda to weaken Congress and undo the New Deal; and

reinterpreted the Constitution to give corporations a new weapon to neutralize ordinary health and safety regulations.

The 2020-2021 term that just ended shows that our rights are not safe at the Supreme Court, and that we must work to change the makeup of the Court.

Subverting Our Elections

Brnovich v. Democratic National Committee

Trump justices Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barrett cast deciding votes in a 6-3 decision to reverse a lower court and approve state practices that had the effect of discriminating against minority voters. The ruling also devastates Section 2 of the Voting Rights Act, an important tool to help fight discrimination in voting. The July 2021 decision was in [*Brnovich v. Democratic National Committee*](#).

In 2016, a challenge was filed to two Arizona voting rules on the ground that they “adversely and disparately affect Arizona’s American Indian, Hispanic, and African American citizens” and thus violated Section 2 of the Voting Rights Act. These mandates included throwing out completely a person’s ballot if it was mistakenly cast in the wrong precinct, even with respect to state-wide and national offices where the precinct location makes no difference, and a law making it a crime for anyone other than a person’s caregiver, family member, postal worker, or election official to collect and turn in completed absentee ballots. The lawsuit also contended that the ballot collection restriction was illegal because it was “enacted with discriminatory intent.”

A district court and a three-judge appellate panel rejected these claims, but a decision by the full Ninth Circuit reversed and found against the state. Based on clear statistics, the court found that both requirements “imposed disparate burdens on minority voters” since they were “more likely to be adversely affected” than white voters. Based on Supreme Court precedent, the court also found that these burdens were “in part caused by or linked to social and historical conditions that produce inequality,” and violated Section 2 of the Voting Rights Act. The Ninth Circuit also concluded that the lower court had committed “clear error” in determining that the ballot collection restriction was not enacted with discriminatory intent. The Supreme Court decided to review the case.

In a 6-3 ruling in which Trump justices Barrett, Gorsuch, and Kavanaugh cast the deciding votes, the Supreme Court reversed the Ninth Circuit and upheld both Arizona rules. Although Justice Alito’s decision stated that it was not announcing rules that would govern all Section 2 cases challenging restrictions on the “time, place or manner of casting ballots,” it did set forth what Alito called “guideposts” which, in fact, seriously harm Section 2.

Before considering the Arizona restrictions specifically, Alito discussed a number of “circumstances” that should be considered in deciding whether a practice violates Section 2. These included the “size of the burden imposed,” the extent to which a practice “departs from

what was standard practice” when Section 2 was “amended in 1982,” the “size of any disparities” in impact on minority vs white voters, other “opportunities provided” to voters by a state’s “entire system of voting,” and the “strength of the state interests,” including what Alito called the “strong” interest in “prevention of fraud.” According to Alito, it is “less helpful” to consider other factors that lower courts have taken into account, such as past discrimination and its continuing effects and the “disparate impact” analysis used in fair housing and employment cases, which would require that a state demonstrate that its asserted interests can be accomplished “only” through the voting restrictions in question. Alito maintained that it should be enough for a state to show that challenged practices are “reasonable means” of pursuing “legitimate interests.”

Based on these criteria, Alito had no trouble in concluding that the Arizona restrictions did not violate Section 2. Requiring voters to vote in the correct precinct in order for votes to count, he claimed, was a “modest” and “unremarkable” burden, and the state’s other actions to try to help people find the right precinct “reduce their impact.” The “racial disparity” in effect was “small,” he went on, and the state interests were “important,” including encouraging people to vote in the right precinct and avoiding the “complic[ation of] the process” that would result from counting votes for statewide and national elections cast in the wrong precinct.

Alito similarly upheld the third-party ballot collection restriction, on both effect and intent grounds. Complying with one of the permitted means to turn in an absentee ballot, Alito claimed, was nothing more than one of the “usual burdens” of voting. Testimony that Native Americans rely more heavily on third-part collection and are “disproportionately disadvantaged” by the restriction, Alito went on, was not enough “concrete evidence.” And in any event, he claimed, the state’s interest in “deter[ring] potential fraud” was enough to “avoid” liability under Section 2. As to discriminatory intent, Alito concluded that “we are more than satisfied” that the district court’s “interpretation of the evidence” to find no intent was “permissible.”

On behalf of herself and Justices Stephen Breyer and Sonia Sotomayor, Justice Elena Kagan strongly dissented. She explained that the majority had “rewritten” and “damaged” Section 2, and thus “undermines” the law “and the right it provides” to equal voting without discrimination. Alito’s analysis of the proper factors in a Section 2 claim, she went on, “mostly inhabits a law-free zone.” Most of the “circumstances” Alito talks about, she complained, are “extra-textual restrictions” on the law that “stacks the deck against minority citizens’ voting rights.”

For example, Kagan wrote, the notion that because something is one of the “usual burdens” of voting it is an “exception” to Section 2 ignores the fact that this is “nowhere in the provision’s text,” which instead makes clear that any such burden is illegal if it disproportionately harms minorities. The same is true of whether “other opportunities” exist. What was standard practice in 1982, she went on, is “no part of the Section 2 test,” which makes clear that if a practice at the time makes voting harder for minority citizens, then “section 2 covers” it. The majority’s discussion of state interests, Kagan noted, contradicts the Court’s own previous precedent that an election law or practice with discriminatory effects “must fall” if a less discriminatory alternative would not “significantly impair” those interests. Allowing a state to justify a discriminatory practice if it “reasonably pursues” an important interest, Kagan noted, “gives election officials too easy an escape from Section 2.”

Based on the correct analysis, Kagan explained, both Arizona restrictions violate Section 2. The record shows that the precinct limitation, she wrote, results in minority voters' ballots being "thrown out at a statistically higher rate" than whites, and Arizona is a "national aberration" in throwing out more ballots completely because they were cast at the wrong precinct. More than 20 states partly count such out-of-precinct ballots, Kagan went on, and even the district court found that it would be "administratively feasible" for Arizona to do the same.

The majority's conclusion about the ballot collection law, Kagan wrote, was possible "only by ignoring the local conditions" which the record shows create a disproportionate burden on Native Americans. Because these voters live in rural areas and "lack access to mail service" to a very large extent, Kagan continued, they are particularly dependent on "third parties" to turn in absentee ballots. In addition, she pointed out, the state already has laws that "deter fraudulent collection practices." Based on the record, Kagan concluded, the majority opinion "flouts what Section 2 commands" – the "eradication" of the ballot collection restriction because it clearly results in "unequal opportunities" for minority (in this case Native American) voters. Because Kagan concluded that the collection law violated Section 2 and the results test, she did not review the majority's conclusion on intent.

As a result of the deciding votes of Trump justices Barrett, Gorsuch, and Kavanaugh, however, the Arizona practices that disproportionately harm minorities have now been upheld. Perhaps even more important, as Justice Kagan wrote, the majority opinion "cuts Section 2 down to its own preferred size" and proceeds to "sap the Act's strength," just as it did almost a decade ago with respect to the Act's preclearance provisions in Section 5. It is now more crucial than ever that Congress pass the For the People Act and the John Lewis Voting Rights Act to restore the protections of the landmark Voting Rights Act. And for the sake of our fight for our courts, it is similarly critical for the Senate to promptly confirm Biden judicial nominees to all levels of the federal courts who will truly respect the right to vote and Congress' laws to help protect it.

Pre-Election Shadow Docket

It is important to remember the precipice we were on in the fall of 2020. Donald Trump was behind in the polls and declaring in advance that he would consider any defeat illegitimate, his fellow Republicans were blocking efforts to make it safer for people to vote during the COVID-19 pandemic, and his administration was sabotaging the postal system, creating the possibility that absentee ballots—which Democratic voters were expected to use more than Republicans—would not be received by election officials in time to be counted.

After the unexpected death of Justice Ginsburg on September 18, less than seven weeks before Election Day, [Trump made clear](#) he would nominate someone quickly so that they could illegitimately hand him a second term even if Biden won the election:

It's better if you go before the election, because I think this scam that the Democrats are pulling — it's a scam — the scam will be before the United States Supreme Court. And I think having a 4-4 situation is not a good situation.

Trump soon selected Amy Barrett, who accepted the nomination despite the ethical cloud Trump had created.

Four years earlier, Senate Republicans had blocked President Obama from filling a vacancy that had opened in February 2016 because it was too close to the presidential election (nearly nine months). But in 2020, with an opportunity to seize power with a 6-3 far-right supermajority on the Supreme Court, they abandoned their previous position and raced to confirm Barrett mere weeks before Election Day.

In *Scarnati v. Boockvar* and *Republican Party of Pennsylvania v. Boockvar*, decided on October 19 (before Justice Barrett was confirmed), an evenly divided Court was only one vote away from shortening the deadline for Pennsylvanians to mail in their absentee ballots. In the fall of 2020, in the midst of a worsening pandemic that made in-person voting potentially fatal, far more people than usual were counting on absentee ballots to exercise their right to vote. But the Trump administration was sabotaging the postal system, creating anxiety that voters' returned absentee ballots would be unduly delayed in the mail and not received by election officials by the statutory deadline of Election Day, in time to be counted. The Pennsylvania Supreme Court ruled that in order for voters' rights to a fair election under the state constitution to be protected during the COVID-19 health crisis, officials must count timely mailed absentee ballots received up to three days after the election. This would protect people from having to choose between voting and their lives.

Thinking that these ballots would more likely favor Biden, state Republicans appealed to the Supreme Court. They asked the justices to act immediately to prevent the state court's ruling from going into effect pending the filing and disposition of their petition for the Court to hear the case on its merits. (Conveniently, any such consideration would likely not occur until weeks after the election). Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted their request not to count lawfully cast votes, resulting in a 4-4 tie that kept the lower court order in effect.

A few days later, after Barrett's confirmation, the Republican Party of Pennsylvania tried again, submitting their formal appeal and asking the Court to expedite its consideration of it. But Barrett did not participate. According to the Supreme Court public information office, she had not had time to fully review the filings in the case. On October 28, the Court rejected the Pennsylvania Republicans' request to expedite consideration, but Justice Alito—joined by Thomas and Gorsuch—issued a statement “reluctantly” agreeing that there was insufficient time before the election for the Court to act, but sharply condemning its previous decision not to prevent counting of absentee ballots received within three days of the election. They claimed that the U.S. Constitution gives state legislatures, not state courts, the authority to set the rules for federal elections. Foreshadowing the “Big Lie” that has poisoned our democracy since Trump lost the election, the three justices declared that the presidential election in Pennsylvania would be “conducted under a cloud.”

Ultimately, Biden’s victory in Pennsylvania and nationwide was by a substantial margin, so that the absentee ballots at issue in the case did not make a difference. As a result, a month after President Biden was inaugurated, the Supreme Court formally declined to hear the case. Yet even then, when the case was moot, Justices Thomas, Alito, and Gorsuch dissented from that decision and declared that the Court should have taken the case anyway, with Thomas writing that the Court’s decision invited “further confusion and erosion of voter confidence.”

Another election-related case arose in Alabama. Several counties in that state sought to offer curbside voting to help voters with disabilities, who were at even greater risk of contracting COVID and dying from it than the general population. But the Republican secretary of state banned the practice. After a lengthy trial and based on an extensive record, a federal district court found that the ban violated the Americans with Disabilities Act. But in a 5-3 order (Justice Barrett had not yet been confirmed) in *Merrill v. People First of Alabama*, the Supreme Court’s conservatives upheld their fellow Republican’s ban on curbside voting. They provided no explanation for their action, making this part of their widely condemned “shadow docket,” orders generated under time pressure without benefit of oral arguments and often without a detailed majority opinion explaining the legal reasoning to guide lower court judges.

Justice Sotomayor wrote a dissent, joined by Justices Breyer and Kagan, putting the case in the largest context of the ongoing fight for the right to vote:

Plaintiff Howard Porter, Jr., a Black man in his seventies with asthma and Parkinson’s Disease, told the District Court: “ [S]o many of my [ancestors] even died to vote. And while I don’t mind dying to vote, I think we’re past that – we’re past that time.’ ” Election officials in at least Montgomery and Jefferson Counties agree. They are ready and willing to help vulnerable voters like Mr. Porter cast their ballots without unnecessarily risking infection from a deadly virus. This Court should not stand in their way.

Americans For Prosperity Foundation v. Bonta

On the last day of the term, in a 6-3 decision made possible by the three Trump justices, the Supreme Court struck down a California law requiring nonprofits to report (but not publicly disclose) their major donors to state authorities. But rather than addressing the specific facts before them in [*Americans For Prosperity Foundation v. Bonta*](#), the conservatives issued a sweeping ruling that threatens to undermine traditional campaign contribution disclosure requirements.

To help prevent fraud, California requires charities to file with the state attorney general a copy of their federal tax return, which lists their major donors. The law prevents the public from having access to the information, but there have been significant data breaches in the past. Two conservative organizations challenged the law as violating their First Amendment political association rights. They claimed that potential contributors were intimidated from giving because

they feared repercussions if their donations were to be made public. To support their position, the organizations cited a 1950s Supreme Court decision striking down an Alabama law requiring disclosure of all members of the NAACP, a law that was clearly intended to intimidate racial justice advocates in an environment where opponents of segregation were brutally targeted with state-sanctioned violence.

In an opinion written by Chief Justice Roberts, the conservative justices gave the organizations what they wanted, and more. They did not just rule that the law as applied to these groups under these circumstances violates their First Amendment associational rights, which groups such as the ACLU and NAACP Legal Defense and Educational Fund had argued in an *amicus* brief. Instead, the chief justice (joined by Justices Alito, Gorsuch, Kavanaugh, and Barrett) issued a far broader ruling, declaring that the California law is “facially unconstitutional,” meaning it violates the First Amendment under any and all circumstances. In their reading of the Constitution, confidential reporting requirements automatically impose burdens on the right to associate even if there is no risk of public disclosure, and even if public disclosure would not be harmful. (Justice Thomas agreed that the law is unconstitutional, but only “as applied.”)

Justice Sotomayor wrote the dissent, joined by Justices Breyer and Kagan. She pointed out that the majority was discarding a requirement going back decades that in order to show a burden on one’s rights to associate under the First Amendment, one must demonstrate that disclosure will likely lead to threats, harassment, reprisals, or other objective harms. She also criticized the majority for adopting a “new rule” that every reporting or disclosure requirement be “narrowly tailored,” a test that has in the past been reserved for the “strict scrutiny” applicable to direct burdens on First Amendment rights.

She stated that the majority’s “analysis marks reporting and disclosure requirements with a bull’s-eye.” She elaborated:

Regulated entities who wish to avoid their obligations can do so by vaguely waving toward First Amendment “privacy concerns.” ... It does not matter if not a single individual risks experiencing a single reprisal from disclosure, or if the vast majority of those affected would happily comply. That is all irrelevant to the Court’s determination that California’s Schedule B requirement is facially unconstitutional. Neither precedent nor common sense supports such a result.

As the dissent points out, the Court in 2010 rejected a facial challenge to a law requiring public disclosure of who had signed a petition to get an item opposing domestic partnerships placed on the ballot for a public referendum. That was an 8-1 decision called *Reed v. Doe* citing the fact that since the typical referendum petition deals with much lower-profile issues where the burdens of disclosure feared by the anti-equality parties in that case are unlikely to materialize. That case cited another 8-1 decision issued earlier that same year: the part of *Citizens United* upholding campaign contribution disclosure requirements. Only Justice Thomas had dissented from those holdings.

Justice Sotomayor’s dissent stated:

That disclosure requirements directly burden associational rights has been the view of Justice Thomas, but it has never been the view of this Court.

Until now. As Rick Hasen stated in his [Election Law Blog](#), “it will be much harder to sustain campaign finance disclosure laws going forward.”

Racial Justice and the Criminal Justice System

Edwards v. Vannoy

In May 2021, the far-right justices made it easier for states to keep people in prison even when the procedures used to convict them are later deemed unconstitutional. [Edwards v. Vannoy](#) was decided in the increasingly familiar 6-3 split made possible by the three Trump justices.

In 2007, Thedrick Edwards was on trial in Louisiana for violent crimes including armed robbery, and two of the 12 jurors did not believe he was guilty of armed robbery. While that would have been enough to prevent a conviction on that charge in most of the country, that was not the case in Louisiana. As part of its 1898 Jim Crow constitution, that state adopted non-unanimous guilty verdicts, to allow mostly-white juries to convict someone over the opposition of Black jurors. Edwards unsuccessfully appealed his conviction in state court, and his conviction became final in 2011. Several years later, he filed a *habeas corpus* petition in federal court, arguing that the non-unanimous verdict was unconstitutional. In 2020, while his case was still in the federal courts, the Supreme Court declared in an unrelated case (*Ramos v. Louisiana*) that state convictions by non-unanimous juries indeed violate the U.S. Constitution.

But even though Edwards’s federal petition raised the exact same issue, Justice Kavanaugh (joined by Roberts, Thomas, Alito, Gorsuch, and Barrett) ruled that *Ramos* can’t be applied to his case because his conviction had already become final in state court. But as Justice Kagan (joined by Breyer and Sotomayor) pointed out in dissent, that refusal goes against clear Supreme Court precedent from a 1989 case called *Teague*: When the Court issues a “watershed” ruling striking down a flawed criminal justice procedure as fundamentally inconsistent with justice, then the Constitution requires that ruling to be applied retroactively, even if their convictions have been deemed final.

Kagan pointed out that *Ramos* had vindicated core principles of racial justice in response to state laws originating in white supremacy and continuing to this day to have racially discriminatory effects. “If you were scanning a thesaurus for a single word to describe the [*Ramos*] decision, you would stop when you came to ‘watershed.’” To escape applying it retroactively, the majority effectively overruled *Teague* without admitting that was what it was doing: Kavanaugh asserted that no previous procedural decision had ever met the *Teague* “watershed” test, so the test is “moribund,” and therefore there is no reason to decide if *Ramos*—or any case in the future—is such a watershed decision.

So the six ultraconservatives overruled precedent even though no party had asked them to do that. As Kagan wrote in her dissent, the majority “discards precedent without a party requesting the action” and “does so with hardly a reason given, much less the ‘special justification’ our law demands.” They have made it much harder for people who are convicted under procedures later found to be unconstitutional to vindicate their rights. And more generally, their casual disregard for precedent could have ominous implications for how they will rule in next term’s major abortion rights decision from Mississippi challenging *Roe v. Wade*.

Jones v. Mississippi

In [*Jones v. Mississippi*](#), the 6-3 conservative majority abandoned two recent precedents that protected minors from unconstitutionally excessive prison sentences. In *Miller v. Alabama* (2012), the Court had struck down mandatory sentences of life without parole (LWOP) when applied to juveniles as violating the Eighth Amendment’s prohibition against cruel and unusual punishment. The Court explained that such a penalty cannot be mandatory because a lifetime in prison is a disproportionate sentence for all but the rarest children, whose crimes represent “irreparable corruption.” And in *Montgomery v. Louisiana* (2016), the justices ruled that people who had been sentenced to LWOP in the era before *Miller* had a right to a new hearing, in which a judge must determine if the defendant had been one of those rare juveniles with “irreparable corruption.”

But the replacement of Justices Kennedy and Ginsburg with Kavanaugh and Barrett put those precedents at risk. In *Jones v. Mississippi*, Justice Kavanaugh (joined by the other five arch-conservatives) held that a judge does not need to actually address whether the defendant had been in that rare category where mandatory LWOP was appropriate. Instead, they declared that as long as the sentencing judge simply considers the defendant’s youth, they can sentence them to LWOP without addressing whether the juvenile is actually irredeemable.

Kavanaugh claimed he was being consistent with the two recent precedents. However, the three dissenters knew better, since they had been part of the majorities in those cases and were well aware of what they had held. Sotomayor commented that Kavanaugh’s interpretation came as a “shock,” noting that the new majority was circumventing *stare decisis* by completely reinterpreting the two precedents. “The Court is fooling no one,” she wrote. Even Justice Thomas, who voted with the majority, criticized his fellow conservatives for not admitting what they were doing.

The abandonment of *Miller* and *Montgomery* will help perpetuate racial injustice in the juvenile justice system, where Black youth are treated more harshly than their white counterparts with similar charges and prior records.

Torres v. Madrid

In the March 2021 case of [Torres v. Madrid](#), Justice Gorsuch tried to open a new avenue for law enforcement to escape liability when they wrongfully shoot someone. Gorsuch wrote a dissent arguing that a police shooting is not a “seizure” covered by the Fourth Amendment’s protections if the victim is not killed or subdued as a result. However, the Supreme Court disagreed with his dissent in a 5-3 decision authored by Chief Justice Roberts and joined by Justices Kavanaugh, Breyer, Sotomayor, and Kagan. (Justice Barrett did not participate in the case because it was argued before she joined the Court.)

Roxanne Torres alleged that she was sitting in her car when two individuals with guns approached and tried to open her door. Thinking she was being carjacked, she started to drive away. Unknown to her, the individuals were actually police officers, and they shot at her while she was trying to get away. She was hit twice, but continued to drive, and she eventually got away. She filed a civil rights complaint against the officers for using unconstitutionally excessive force against her, saying they committed an unconstitutional seizure under the Fourth Amendment.

The lower courts dismissed her case because they were bound by a 2010 Tenth Circuit precedent that had been joined by then-Judge Gorsuch. Under that case, if someone wrongfully shot by police continues to flee, they have not been “seized” and they therefore cannot pursue an excessive-force claim under the Fourth Amendment.

A decade later, that was the position of the officers who shot Torres, as well as now-Justice Gorsuch. In a dissent joined by Justices Thomas and Alito, he argued that there was no “seizure” to be considered unconstitutional because Torres got away after being shot.

But the Supreme Court rejected that cramped reading of our Fourth Amendment protections in an opinion authored by the Chief Justice. The majority opinion opened with a reminder that the Bill of Rights prohibits unreasonable “seizures” in order to safeguard “the right of the people to be secure in their persons.” As the majority explained, the “seizure” of a person has always been understood to mean any use of force intended to restrain movement, regardless of whether it is successful. As an example, Roberts wrote that “the ordinary user of the English language” could say that someone “seized the purse-snatcher, but he broke out of her grasp.”

The majority and dissent argued over American and English precedents dating back centuries. Gorsuch found it relevant that the ancient cases involved officials who actually touched the individuals they were trying to subdue, while the case before the Court involved gunfire rather than physical touch. The majority found no basis for drawing “an artificial line between grasping with a hand and other means of applying physical force to effect an arrest.” Roberts wrote that Gorsuch’s focus on physical touching “calls to mind the unavailing defense of the person who ‘persistently denied that he had laid hands upon a priest, for he had only cudged and kicked him.’”

Commentators have rightly described this case as [closing a “police shooting loophole.”](#) But this [“nonsensical exemption from the Fourth Amendment”](#) was not part of the Constitution. Instead, it was a creation of far-right judges like Neil Gorsuch. Under their interpretation, whether an unjustified police shooting is unconstitutionally excessive depends on what happens *after* the gun is fired, based on what the *victim* does.

It is disturbing that Gorsuch found two justices in agreement once he reached the Supreme Court. It shows the importance of nominating qualified judges to the Supreme Court, ones with a demonstrated commitment to civil rights. A Court on which this commitment prevailed would have rejected the Gorsuch approach unanimously.

Importantly, this still does not guarantee that Torres will have her day in court. She still faces the hurdle of overcoming the police officers’ argument that they have qualified immunity from being sued.

Health Care

California v. Texas

Republicans at various levels of government across the country advanced this [meritless](#) lawsuit to eliminate every health benefit provided by the Affordable Care Act, including guaranteed health insurance regardless of preexisting conditions. Ultimately, the Supreme Court avoided a decision on the merits, instead ruling 7-2 in [California v. Texas](#) that the case should be dismissed because the parties did not have standing to file the lawsuit in the first place. Justice Breyer wrote for the majority, while Alito and Gorsuch angrily dissented in a polemic railing against the ACA and the two previous Court cases upholding it.

It would be hard to exaggerate how bad the plaintiffs’ legal case was. It was ginned up by more than two dozen Republican state attorneys general after Republican majorities in the House and Senate reduced the ACA’s tax penalty for not having health insurance to zero. Congress made that change in 2017 while leaving the rest of the law mostly unchanged. The mandate that Republicans claimed for years made the law unconstitutional came to an end. But then Republicans claimed that the *absence* of an enforceable requirement to buy health insurance made the ACA unconstitutional.

In 2012, the Supreme Court upheld the individual mandate as a constitutional exercise of Congress’s taxing authority (while also ruling that it was not an authorized exercise of Congress’s constitutional authority to regulate interstate commerce). In the current case, the Republican AGs argued that reducing the tax penalty to zero meant the mandate is no longer a tax and therefore has no constitutional basis. Even more bizarrely, they urged the Court to strike down the entire ACA because Congress would not have wanted the ACA to exist without the

mandate—even though Congress showed exactly the opposite in 2017 when it eliminated the mandate but kept the rest of the law.

That the outcome was ever in doubt shows how extensively Republican-nominated justices have diminished the Supreme Court’s integrity. Donald Trump deepened the problem by explicitly promising to nominate justices who would strike down the ACA. While the seven-justice majority did not strike down the ACA, they also did not reject the state Republicans’ argument on the merits. Instead, they bypassed the issue altogether by ruling that the plaintiffs lacked standing to sue. Individual plaintiffs can’t be harmed by the former “mandate” because there is no penalty for nonpayment. And the state plaintiffs’ claims of standing are based on expenses they incur by other parts of the law, not the former individual mandate. Even some conservative opponents of the ACA who recognized how weak this case was expressed [surprise and disappointment](#) that the Court chose to rule on standing and thereby avoid ruling on the merits. But either way, millions of people can continue to count on the health care protections that Republicans tried to take away.

Redefining Religious Liberty

COVID-19 shadow docket cases

The COVID-19 pandemic gave the newly installed Justice Barrett an immediate chance to effect a sharp lurch rightward for the Court. When Justice Ginsburg was still alive, she was part of the slim 5-4 majority (the moderates joined by Roberts) that rejected efforts by some churches to exempt themselves from temporary emergency restrictions on public and private gatherings adopted to limit the spread of the deadly pandemic. But Barrett shifted the balance. In November 2020, the Court issued a 5-4 order in [Roman Catholic Diocese of Brooklyn v. Cuomo](#) stopping New York from enforcing public health restrictions with respect to religious institutions in New York City.

Officials had imposed different sets of restrictions on various types of activities based on the risk of disease transmission. After extensive hearings, a district court judge refused to issue an injunction against the regulations as likely violating religious exercise rights, noting that they actually treated religious institutions more, not less, favorably than secular activities with comparable risks like concerts or plays. Nevertheless, the Supreme Court’s unsigned opinion claimed that the health regulations “single out houses of worship for especially harsh treatment.” In a concurrence, Gorsuch angrily complained that houses of worship faced more restrictions than places like bicycle repair shops and liquor stores. But as Sotomayor (joined by Kagan) pointed out in dissent, such places have a much lower risk of virus transmission because they “generally do not feature customers gathering inside to sing and speak together for an hour or more at a time.”

In February 2021, the three Trump justices made possible a 6-3 emergency order barring enforcement of a temporary ban on indoor worship services in California in [South Bay United Pentecostal Church v. Newsom](#). Acting on the advice of public health experts, and applicable only to the worst-hit parts of the state, California temporarily barred indoor activities of extended duration if they involved people from different households doing activities involving substantial talking and singing. These included concerts, plays, political meetings, restaurants, bars, and indoor worship services. For indoor activities like shopping where people were in less proximity for less time, officials allowed them but with capacity restrictions. And in parts of the state not subject to the strictest restrictions, indoor worship services were permitted, but with capacity restrictions and without singing and chanting.

In response to a petition by a church in one of the worst-hit areas, the 6-3 far-right majority granted an emergency petition to bar enforcement of the ban on indoor worship services. As Justice Kagan wrote in a dissent (joined by Breyer and Sotomayor), the majority was forcing California to “treat worship services like secular activities that pose a much lesser danger. That mandate defies our caselaw, exceeds our judicial role, and risks worsening the pandemic.” In a concurring opinion, Justice Gorsuch (joined by Justices Thomas and Alito) condemned the majority for not going even further and striking down the capacity and singing restrictions as applied to religious services outside the worst-hit parts of the state.

The Court issued similar orders later in the term in cases like *Gateway City Church v. Newsom* and [Tandon v. Newsom](#). In all of these cases, the ultraconservatives voted to give special exemptions to churches from temporary public health emergency restrictions. They were all part of the Court’s so-called “shadow docket.”

Fulton v. Philadelphia

In perhaps the highest-profile religious liberty case of the term, [Fulton v. Philadelphia](#), the Supreme Court ruled for Catholic Social Services (CSS) in a highly anticipated foster adoption discrimination case. However, the narrow nature of the ruling means that, at least for now, federal, state, and local governments remain free to pass and enforce neutral laws prohibiting anti-LGBTQ+ discrimination.

CSS had a contract with the city to recommend foster families, but the group refused to engage with same-sex couples in violation of the contract and city rules. So the city stopped contracting with CSS, which then claimed that the city had violated its rights under the First Amendment’s Free Exercise Clause. All nine justices agreed, but Justices Thomas, Alito, and Gorsuch argued for a far more sweeping attack on nondiscrimination laws.

Chief Justice Roberts’s narrow majority opinion was joined by the more progressive justices (Breyer, Sotomayor, and Kagan), as well as by conservatives Kavanaugh and Barrett. Although it was a loss for those opposing anti-LGBTQ+ discrimination and for those favoring religious free exercise as it has traditionally been understood, it may have been as narrow a loss as

possible given the current membership of the Court, leaving most anti-discrimination protections unscathed.

The majority avoided the devastating attack on LGBTQ+ equality that many had feared. Instead, as in *Masterpiece Cakeshop*, they took a narrow approach specific to the facts of this case and did not undermine the government's general ability to prohibit anti-LGBTQ+ discrimination.

Under the Court's *Employment Division v. Smith* precedent, religiously neutral generally applicable laws that incidentally burden religious exercise are not subject to strict scrutiny and are generally upheld. In contrast, a non-neutral law that effectively targets and burdens religious exercise is subject to strict scrutiny—it must advance a compelling interest and be narrowly tailored to achieve those interests—and is more likely to be struck down.

Had the Supreme Court decided to characterize all prohibitions against anti-LGBTQ+ discrimination as targeting religious exercise, it would have triggered strict scrutiny of such laws across the country, putting them at risk of being overturned. The impact could have been devastating.

Instead, while the majority did use strict scrutiny, the trigger for that was something specific to the contracts at issue in this case. The standard foster care contract used by Philadelphia prohibits organizations from discriminating against same-sex couples, but it grants the public service commissioner “sole discretion” to make exemptions. For the majority, that contractual provision automatically means that this is not a case about a generally applicable law, so *Smith*'s relaxed standards do not apply. So while the majority applied strict scrutiny and ruled in favor of CSS, the analysis does not have a larger impact on anti-discrimination laws.

Justice Alito wrote a concurrence that ran 77 pages, joined by Thomas and Gorsuch. He railed against the majority for not addressing and overruling the *Smith* precedent and restoring heightened scrutiny to all laws that burden religious exercise. While that was his main focus, he also made clear that he would rule for CSS in this case under any form of scrutiny. Specifically, he wrote that “Philadelphia's ouster of CSS from foster care work simply does not further any interest that can properly be protected in this case,” at least in part because there are other organizations in Philadelphia that do not discriminate.

This case had the potential of being another step in the Far Right's effort to transform religious liberty provisions from a shield protecting the free exercise of religion into a sword to deprive other people of their legal rights. The Supreme Court's far-right majority signed on to this project with 2014's notorious *Hobby Lobby* opinion, which Justice Alito authored. He also wrote the majority opinion in 2020's *Our Lady of Guadalupe School v. Morrissey-Berru*, which made it easier for religiously affiliated schools to discriminate in hiring by claiming that the employees are really ministers, making their hiring (or firing) a choice protected by the First Amendment. And since Justice Barrett joined the Court, it has favored churches through orders empowering

them to exempt themselves from health and safety protections imposed during the COVID-19 pandemic.

But *Fulton* does not do the damage that those cases did. It does not announce a new constitutional right to use religion as an excuse to discriminate. It does not undermine existing or proposed laws prohibiting LGBTQ+ discrimination. The legal issues avoided by the majority in *Fulton* will continue to arise in future cases, so the religious right's campaign to redefine religious liberty remains a threat while the Court has an ultraconservative majority.

Tanzin v. Tanvir

In a positive move for religious liberty, the Court unanimously held that the Religious Freedom Restoration Act (RFRA) allows lawsuits seeking monetary damages against individual federal employees who violate someone's religious liberty rights under that law. [*Tanzin v. Tanvir*](#) (decided 8-0 because Barrett's nomination was still pending when it was argued) involved three American Muslims who were improperly included on the federal government's "No Fly List." They will be able to sue the FBI agents who allegedly would only remove them from the list if they spied on their fellow American Muslims. People For the American Way Foundation had joined an amicus brief authored by Americans United for Separation of Church and State in support of the victims.

Immigrants' Rights

Pereida v. Wilkinson

Trump Justices Gorsuch and Kavanaugh cast the deciding votes in this 5-3 decision with Roberts, Thomas, and Alito. (Justice Barrett did not participate in the case because it was argued while her nomination was still pending before the Senate.) Under the Immigration and Nationality Act (INA), an undocumented non-citizen who is ordered to leave the country is generally eligible to have the order cancelled on the grounds that it would harm their U.S. citizen spouse, children, or parents. But someone convicted of a crime of "moral turpitude" is not eligible for that relief. The far-right majority in [*Pereida v. Wilkinson*](#) made it much easier for officials to assume without sufficient evidence that the immigrant has committed such a crime.

Clemente Pereida has lived in the United States since the 1990s. He is married with three children, one of whom is a U.S. citizen. In 2010, he was charged with using a fake Social Security card to get a job. He eventually pled "no contest" and paid a \$100 fine for violating a Nebraska law prohibiting attempts to commit criminal impersonation. The state court document (which federal immigration officials had) did not specify the exact criminal act he was convicted of. Instead, it recited the entirety of the relevant criminal statute, which covers a broad range of actions, some of which would not be considered crimes of moral turpitude. Nor were there any surviving plea negotiation documents that might provide that information. Nevertheless, despite

the vagueness of the state documentation, federal immigration officials determined that Pereida had indeed been convicted of a crime of moral turpitude, and they deemed him ineligible for cancellation of the order to leave the country.

Justice Gorsuch (joined by Roberts, Thomas, Alito, and Kavanaugh) wrote that the INS puts the burden on immigrants such as Pereida to prove the crime they were convicted of was not one of moral turpitude. In dissent, Justice Breyer (joined by Sotomayor and Kagan) wrote that since the Nebraska documents did not show that the previous conviction necessarily was for a crime involving moral turpitude, they should not be treated as if they did.

Niz-Chavez v. Garland

In an ideologically mixed 6-3 lineup, the Court protected immigrants who receive notice that the government will hold a hearing to make them leave the country, but where the government fails to put all the information the immigrant needs into a single notice. Justice Gorsuch wrote the majority opinion in [Niz-Chavez v. Garland](#) and was joined by the three moderate justices as well as two of his fellow conservatives (Thomas and Barrett).

When the federal government targets an immigrant for forced removal from the country, the immigrant can be eligible for relief if they prove several things, including that they have been continuously present in the U.S. for at least ten years. Under a “stop time rule” created by Congress in 1996, the time of continuous residence stops accruing as soon as the immigrant receives “a notice to appear.” The Immigration and Nationality Act requires that the federal government give the targeted individual ten particular pieces of information before it can count as a sufficient notice. For administrative convenience, the federal government often sends out the required information in multiple mailings and triggers the “stop time rule” when the final information is provided. When they did that to Augusto Niz-Chavez, he argued that the text of the 1996 statute (“a notice to appear”) requires all the information to be in a single mailing before the stop-time rule is triggered. The Court agreed.

Johnson v. Guzman Chavez

Trump justices Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barrett cast deciding votes in a 6-3 decision to reverse a lower court and ruled that the government can indefinitely detain refugees, who are seeking through sometimes lengthy proceedings to avoid being returned to their home countries because of a reasonable fear of torture or persecution, without even a bond hearing. The June 2021 decision was in [Johnson v Guzman Chavez](#).

As explained in an [earlier decision](#) in the case when it was in the lower courts, Maria Angelica Guzman Chavez and eight other individuals were deported from the U.S. to their home countries in South and Central America, where they contended that they faced “death threats” and other actual or threatened “persecution or torture” endangering them. “Fearing for their safety,” they returned to the U.S. without legal authorization, and the orders of removal were reinstated

against them. Government asylum officers interviewed them and found that “in every case,” they had a “reasonable fear” of “persecution or torture,” so they were placed into proceedings before immigration judges to apply for “withholding of removal.”

Such proceedings can take months or more to complete, but the federal government insisted that they remain imprisoned while the cases continued, and refused to grant any of them a hearing so that they could apply for temporary release, even so they could gather information to help “make their case” for withholding of removal. The individuals then filed suit in Virginia, on behalf of themselves and a class of all such people being detained in Virginia, seeking such bond hearings so they could ask for temporary release.

A district judge granted summary judgment in their favor, ruling that they were being held pursuant to a federal law (“section 1226”) that expressly allows “discretionary release on bond” of individuals being detained “pending a decision” on whether they would be “removed from the United States.” The court rejected the federal government’s claim that the individuals were in fact being held under a different federal law (“section 1231”) that requires that a person who has been “ordered removed” must be detained without bond for a period of no more than 90 days, after which the person “shall” be removed. The Fourth Circuit agreed with the district court and ruled for the individuals being held, in a 2-1 decision in which Trump judge Julius Richardson dissented, and the Supreme Court decided to review the case.

In a 6-3 decision joined or concurred in by Trump justices Barrett, Gorsuch, and Kavanaugh, Justice Alito reversed the Fourth Circuit and ruled that the individuals could be indefinitely imprisoned according to section 1231. He claimed that the “statutory text makes clear” that section 1231 applied because the individuals had previously been “ordered removed.” Justice Alito maintained that according to his interpretation of the statutory language, the individuals could be detained beyond 90 days if removal is not “practicable” within that time period, as long as the detention is only for a period “reasonably necessary” to “bring about” such removal.

Justice Breyer dissented, joined by Justices Sotomayor and Kagan. Justice Breyer referred to studies indicating that the process for determining whether removal should be withheld because of likely persecution or torture “often takes a year” and sometimes “well over two years.” There was thus “no good reason,” he explained, why Congress would want to imprison and deny a bond hearing to people “who reasonably fear persecution or torture, and who, as a result, face proceedings that may last for many months or years” to determine if those individuals should be removed. Read properly, Breyer continued, section 1231 (the provision cited by the majority) “does not apply” in the context of the withholding of removal proceedings. Instead, and section 1226 “applies, and grants” bond hearings to the individuals seeking such withholding of removal.

As a result of the deciding votes of Trump justices Barrett, Gorsuch, and Kavanaugh, however, individuals like Maria Angelica Guzman Chavez, who are seeking withholding of removal due to reasonable fear of torture or persecution, can be imprisoned indefinitely for a year or more while

such proceedings are pending, without even receiving a bond hearing on whether they can be temporarily released. The Biden Administration can take steps to prevent this from happening at least for now. But the dangerous misinterpretation of the immigration statute in this case makes clear the importance of confirming Biden justices and judges as part of our fight for our courts.

Limiting Congressional Power

U.S. v. Arthrex

Trump justices Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barrett cast deciding votes to invalidate part of a Congressional law that provides for the appointment of independent patent judges in cases concerning the reconsideration of patents. The 5-4 decision in [United States v. Arthrex](#) was a continuation of the ultraconservatives' agenda over the last several years to weaken Congress' authority.

Under a 2011 law Congress passed to avoid political influence on patent decisions, challenges to a patent are decided by panels of three Department of Commerce employees whose decisions cannot be reversed by other executive branch officials. (They can, like other executive branch decisions, be challenged in court.) A panel of Administrative Patent Judges (APJs) ruled that a patent held by a company called Arthrex was invalid. In response, the company sued. It claimed that giving the APJs final decisionmaking authority unconstitutionally limited the authority of the president.

The Supreme Court agreed, in an opinion written by Chief Justice Roberts and joined by Justices Alito, Gorsuch, Kavanaugh, and Barrett. They ruled that final executive authority in patent decisions must be held by a senior officer, i.e., a presidential appointee subject to Senate confirmation. As a remedy, the conservatives altered the 2011 statute to fit their ideology: The presidentially-appointed director of the Patent and Trademark Office (which is part of the Commerce Department) now has the authority to change the decisions of the APJ panels. This severely undermines Congress's effort to protect patent decisions from undue political influence.

This decision came over the dissents of not only the Court's three remaining moderates, but also Justice Thomas. Justice Breyer (joined by Justices Sotomayor and Kagan) wrote that the Constitution gives Congress "considerable freedom to determine the nature of an inferior officer's job, and that courts ought to respect that judgment." In addition, Breyer wrote, the majority makes it impossible for Congress to design a system in which important patent issues are decided free of political influence. More generally, Breyer observed that the majority's ruling was "part of a larger shift in our separation-of-powers jurisprudence."

That shift is weakening Congress's ability to create independent entities to perform important tasks without undue political influence, as with last term's *Seila Law* decision striking down the structure of the Consumer Financial Protection Bureau because the president could not fire its director without cause. This is part of the conservative project to [undermine](#) the social safety net and roll back the New Deal.

Collins v. Yellen

Just two days after *U.S. v. Arthrex*, this shift in the Court’s separation-of-powers jurisprudence continued, with the six-justice majority made possible by the three Trump justices removing the limitations on the new doctrine established only a year ago in *Seila Law*. In [Collins v Yellen](#), the Court invalidated part of a Congressional law that prevented the director of the Federal Housing Finance Agency (FHFA) from being fired at-will by the president. The six justices did this in a way that further weakened congressional authority to insulate agency officials from political pressure.

In 2008, during the mortgage and financial crisis, Congress created the FHFA as an independent agency headed by a director whom the president could not fire except for cause. Insulated from political pressure, the FHFA was designed to help stabilize the housing market. The director arranged for substantial loans to lenders Fannie Mae and Freddie Mac in return for agreements to pay back the loans quickly by delaying the payment of dividends to their shareholders. Shareholders sued, arguing the director’s action was illegal because his insulation from being fired was unconstitutional.

Justice Alito wrote the opinion. The three moderates—who all had dissented in *Seila Law*—all dissented from some part of the constitutional analysis. Justice Kagan stated that she agreed with the conclusion, but only because of *stare decisis*. In fact, her concurrence cited Roberts’ concurrence in the *June Medical* abortion case, where he voted to strike down a Louisiana anti-abortion law that was identical to a Texas law the Court had struck down earlier, even though he had dissented in the Texas case. She sharply criticized the six conservatives for going much further than *Seila Law* had. The prior case by its own terms was strictly limited to agencies (and directors) that wield “significant executive power.” Kagan’s concurrence stated that FHFA fits that description, so, she agreed, *Seila Law* governs the case. She condemned the majority, however, for “careen[ing] right past” the boundary set by *Seila Law* and ruling needlessly (and wrongly) that the president has the power to fire the head of an agency regardless of the extent of its executive authority. She wrote that the majority’s “account of how our government should work” was “deeply flawed” and not shared by the Framers, who adopted a Constitution that did not so unduly limit congressional authority.

Justice Sotomayor also wrote a dissent, joined by Justice Breyer. Unlike Kagan, they did not believe FHFA exercises “significant executive authority.” In fact, they pointed out that when the *Seila Law* majority struck down the structure of the Consumer Financial Protection Bureau as unconstitutional, they limited their holding to agencies with “significant executive authority” and specifically distinguished it from the FHFA in that regard. Yet now, she wrote, the majority claimed that the Court was not well suited to weigh the relative amounts of executive authority different agencies possess and, even more, that the constitutionality of removal restrictions does not depend on such an analysis anyway. As such, Justice Sotomayor concluded, the majority decision “cannot be squared” with its *Seila Law* decision from just a year ago, let alone the decades of precedent before that which *Seila Law* departed from.

Using the Constitution to Protect Business

Cedar Point Nursery v. Hassid

The Fifth Amendment states that private property shall not be “taken for public use without just compensation.” In [*Cedar Point v. Hassid*](#), the far-right majority made possible by the Trump justices expanded the meaning of the Takings Clause in a way that limits organized labor in this particular case, and that threatens any number of government protections that affect monied interests.

At issue was a California effort to protect farm workers from the type of widespread and notorious exploitation that Cesar Chavez and Dolores Huerta worked hard to oppose. Because many of these workers are migrants, they can be uniquely hard to reach in traditional ways. To make sure they are aware of their right to organize, a state regulation requires growers to give union organizers limited access to their property for temporary periods: only three hours a day (one hour before work, one hour during lunch, and one hour after work) during four 30-day periods annually. The labor organizers cannot disrupt work or the landowner’s property, and they can only access parts of the property where the workers congregate before and after work or during lunch.

Under Supreme Court precedent, a regulation providing such limited and temporary access to a landowner’s property would not automatically be a taking (or to use the term used by the Court, a “per se taking”). Instead, it would be treated like any other ordinary regulation unless a court determined that it went “too far,” which would then make it a “regulatory taking” requiring some level of compensation. But the growers in this case, emboldened by the conservative willingness to adopt their agenda as constitutional doctrine, denied the unions access and insisted that this was a “per se” taking. They made this claim even though it is a category reserved for encroachments on property rights so extreme that they are automatically eligible for compensation, such as when the government either directly appropriates private property for its own use or causes a permanent physical occupation of private property.

Nevertheless, in an opinion by the chief justice and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, the Court declared this a “per se” taking that is impermissible without compensation. Calling the right to exclude people a central element of ownership, they ruled that even the temporary limitation on that right automatically made this a taking.

Justice Breyer wrote the dissent for the three moderates. He wrote that for the majority, “virtually every government-authorized invasion is an ‘appropriation.’ But this regulation does not ‘appropriate’ anything; it regulates the employers’ right to exclude others.” Like most government actions that affect property rights without completely appropriating or occupying it, Breyer wrote that it should be subject to a fact-specific analysis to determine if it is a regulatory taking.

Breyer expressed concern over the ruling’s impact on “the large numbers of ordinary regulations” that permit temporary entry onto a property owner’s land – what the conservative majority calls an “invasion” of their property. These include inspections for food safety,

preschool licensing verification, the welfare of children in foster homes, environmental protections, safety for people living in assisted living facilities, and more.

[Mark Stern](#) put it more directly, writing in *Slate* that “the Supreme Court has handed business owners a loaded gun to aim at every regulation they oppose.”

TransUnion LLC v. Ramirez

In a 5-4 decision that Trump’s three justices made possible – and which even Justice Thomas dissented from – the Supreme Court made it much harder for victims of corporate malfeasance to use class action lawsuits to hold companies accountable when they violate the rights of vast numbers of people. In the June 2021 case [TransUnion LLC v. Ramirez](#), the Court ruled that although people’s rights under a law enacted by Congress were violated—but where the conservative majority in their own view did not believe real “harm” was caused—those people were not allowed to sue in a federal class action against the company that violated their rights.

In the Fair Credit Reporting Act, Congress determined that consumers have a right to accuracy in the procedures that companies use to report their credit, to receive certain specified information in their credit files, and to receive a summary of their rights from the credit reporting companies. In this case, the credit reporting company TransUnion falsely labelled 8,185 people as potential terrorists or drug traffickers. The company compiled this information based on matching first and last names with those on a federal government list, but without doing rudimentary checks with information in its possession such as middle initials, birth dates, or Social Security numbers. The company included this damaging and misleading information in the credit reports it sold.

When Sergio Ramirez was denied credit, he wrote to TransUnion, which sent him a credit report that included his legal rights, but which did not include the incorrect terrorist list information. The company sent him a second letter separately with only the incorrect terrorist information and, conveniently, without a statement of his rights. Ramirez sued in a class action on behalf of all the other people who had also received incorrect terrorist list information about themselves from TransUnion that didn’t include a statement of their rights under federal law.

In a 5-4 opinion by Justice Kavanaugh (and joined by the other ultraconservatives except for Thomas), the Court ruled that the class could only include those people who had their misleading credit reports provided to third parties. Kavanaugh wrote that the others had not suffered a concrete harm, and therefore do not have standing under the Constitution to have their cases heard by federal courts.

Justice Kagan wrote a dissent (joined by Justices Breyer and Sotomayor) sharply criticizing the majority for letting the credit reporting company so easily get away with violating the rights of thousands of people under the Fair Credit Reporting Act:

TransUnion willfully violated that statute’s provisions by preparing credit files that falsely called the plaintiffs potential terrorists, and by obscuring that fact when the

plaintiffs requested copies of their files. To say, as the majority does, that the resulting injuries did not “‘exist’ in the real world” is to inhabit a world I don’t know.

The three moderates also joined a dissent written by Justice Thomas noting that the majority seemed to be posing a rhetorical question:

Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is not sent anything informing him of how to remove this inaccurate red flag? The answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court.

While this case was about the fair credit reporting statute, the majority’s reasoning is not limited to that particular law. Notably, since this was a 5-4 decision with Barrett in the majority and Thomas in the unusual position of ruling for consumers, it is likely that it would have come out differently had Justice Ginsburg not passed away. Decisions like this are why corporate interests spent so many millions of dollars to put Trump’s nominees on the federal bench. The ruling also highlights the importance of every seat on the Supreme Court as we continue our fight for our courts.

The Threats Next Term

Among the cases the Court has agreed to hear next term are several that will affect the rights and lives of millions of people. These include:

Abortion Rights: If there had been any doubt that the far-right justices are “feeling their oats,” it was dispelled by the ominous decision to hear a case involving Mississippi’s law prohibiting abortions after 15 weeks “except in a medical emergency or in the case of a severe fetal abnormality.” Fifteen weeks is before fetal viability and as even the extremely conservative Fifth Circuit recognized when it struck the law down, the Court has affirmed and repeatedly reaffirmed the constitutional right to abortion before viability. So it is alarming that the Court has chosen to consider the state’s appeal in *Dobbs v. Jackson Women’s Health*. There is simply no way to uphold Mississippi’s law without dismantling the core holding of *Roe v. Wade* recognizing the constitutional right to decide for oneself whether to continue a pregnancy.

Gun Violence: The conservatives who transformed the Second Amendment into a personal right to own a gun more than a decade ago are poised to increase the damage next term. In *New York State Rifle & Pistol Association Inc. v. Corlett*, the Court will consider a New York law that requires an individual to show good cause in order to get a license to carry a concealed firearm. When she was on the Seventh Circuit, then-Judge [Amy Barrett tried in dissent](#) to bar the application of a law banning people convicted of felonies from possessing firearms. Like many

other far-right judges, [including Justice Alito](#), she complained that the Second Amendment was being treated as a “second class right.”

Constitutional Rights for Puerto Ricans: Under the Social Security Act, disability payments are available to residents of any of the 50 states, the District of Columbia, and the Northern Mariana Islands—but not to people living in Puerto Rico, a U.S. territory which for the purposes of the law is regarded as outside the United States. The First Circuit ruled that despite the government’s constitutional authority to treat Puerto Rico differently from the states, there was no rational basis for this exclusion and it therefore violates the Equal Protection Clause. The Supreme Court agreed to hear the federal government’s appeal of this decision, and the case may affect the extent to which Puerto Ricans can be treated differently from other U.S. citizens. It may also provide an opportunity for the rest of the nation to focus on our historical and modern treatment of Puerto Rico.