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THE CASE FOR SUPREME COURT REFORM:

AN ANALYSIS OF THE 2023-2024 TERM

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Introduction

Year after year, the U.S. Supreme Court demonstrates its readiness and power to restrict our most basic rights and freedoms. The Court is the final arbiter over issues of racial justice, worker's rights, consumer protections, reproductive rights, gun safety laws, LGBTQ+ rights, immigrant justice, environmental justice, and more. While the Court maintains that it does not engage in policymaking, it has created some of the most far-reaching policies affecting our daily lives. And yet, the nine Supreme Court justices comprise the least democratic branch of our government. We do not vote for them. We have no say in the cases they hear. We have little to no visibility into their process. The public has no direct way to hold them accountable for their decisions. And they are appointed for life.

Throughout history, the Court has been overwhelmingly antagonistic or indifferent to the rights and well-being of Black and brown communities and those who are disadvantaged and vulnerable. Moreover, in recent times, partisan groups have weaponized the Court to fortify the interests of corporations and the white, wealthy elite. Far-right groups and donors have orchestrated a bold and highly coordinated strategy to push their policy agenda forward. They have packed federal courts with judges that will support their positions, fabricated lawsuits to challenge specific policies, and ensured that those lawsuits end up before their preferred judges—including at the Supreme Court level. Furthermore, three Republican presidents (two of whom lost the popular vote) appointed six of the nine sitting Supreme Court justices. The result is an ideological supermajority that often acts in lockstep and has wasted no time rolling back reproductive rights, gun control, and environmental rights, to name a few.

The structure and the functioning of the Supreme Court, exacerbated by our increasingly polarized two-party system, have enabled this far-right political capture. The Roberts Court has overstepped its role and concentrated power in its own hands. Through its decisions, the Supreme Court has whittled the powers of the legislative and executive branches, styling itself as the all-powerful decider of our country's laws. The Court can wield this power in large part because of the severe lack of oversight it currently enjoys. The Court has no term limits, binding code of ethics, or other mechanisms for accountability. The Court also engineers its docket, cherry-picking the cases it will hear and the issues it gets to decide. When convenient, the Court disregards its own precedent or invents new legal standards to reach its desired outcome. And because the justices are appointed for life, the Court has the luxury of playing the long game to achieve desired legal outcomes, gradually chipping away at the foundation of long-held principles over many years to justify their eventual whole-scale overhauling of settled law.

But Congress is far from powerless here. It must reclaim its role as a check on the judiciary and stop the Supreme Court's path of destruction. Congress has constitutional authority to regulate the Supreme Court, including by changing the size of the Court, implementing term limits, strengthening the Court's financial disclosure and

recusal rules, and imposing an enforceable code of ethics on the justices, among other reforms. If Congress doesn't intervene, the ultraconservative justices will continue to dismantle our rights and seize power for themselves for decades to come. It is difficult to fathom what the Supreme Court won't do if it remains completely unaccountable. Indeed, the Biden administration recently uplifted the urgency of reining in the Supreme Court, pushing for a court reform package that includes a binding code of ethics and 18-year term limits.

The Supreme Court's 2023-2024 term proves the need to stop the Court's continued rolling back of hard-won rights. The Court decided many high-profile cases and issued devastating opinions covering issues such as agency power, racial gerrymandering, bribery of government officials, immigrant rights, gun safety, and homelessness. Below, we use cases from the Court's 2023-2024 docket to highlight how the Court has stripped our rights and freedoms and to inform burgeoning conversations about court reform. We explore how the far right is weaponizing the judiciary to further its extremist agenda and how the Supreme Court's ultraconservative supermajority is exploiting its positions and lack of oversight to upend legal norms and precedents to enact these destructive policies. Finally, we offer a variety of reforms Congress can take to rein in this out-of-control Court and reinstate the balance between the three branches of government.

The Brazen, Unfettered Power of the Supreme Court

The Court has become a tool to advance the wealthy, conservative agenda.

Corporations and far-right power brokers orchestrated several cases this term to ensure conservative priorities were argued before the Court. Megadonors, like the Koch network and Leonard Leo, were behind lawsuits this term seeking to overturn agency deference, attack the Environmental Protection Agency, overturn a ban on bump stocks, and block access to mifepristone.[1] Meanwhile, Starbucks spearheaded a case attacking the National Labor Relations Board, and a trade association representing payday lenders brought a case attacking the Consumer Financial Protection Bureau's (CFPB's) funding structure. The conservative capture of the courts has made the right bolder in their legal strategies. The Koch network specifically cited like-minded judges as a motivating reason for funding lawsuits in the hopes of overturning agency deference.[2]

Conservative legal groups and corporate interests also shape legal outcomes through an aggressive amicus brief strategy. Last year, Politico investigated seven high-profile Supreme Court cases and found that 69% of conservative amicus briefs were connected to Leonard Leo or his network.[3] Politico also found "multiple instances of language used in the amicus briefs appearing in the court's opinions."[4] This term, in the majority opinion overturning a ban on bump stocks in *Garland v. Cargill*, Justice Thomas included several diagrams from an amicus brief submitted by Firearms Policy Coalition, an extremist gun rights group known for its violent rhetoric.[5]

Partisan groups are also succeeding in weaponizing the lower courts to enact their extreme agenda. To ascertain favorable rulings, far-right legal groups engage in judge shopping to ensure their cases are heard before sympathetic judges. Notably, judge shopping in the Northern District of Texas can guarantee a "superhighway" of far-right judges from the district level to the notorious Fifth Circuit to the Supreme Court. In *Food and Drug Administration v. Alliance for Hippocratic Medicine*, Alliance Defending Freedom (an organization labeled a hate group by the Southern Poverty Law Center) filed the case in Amarillo, Texas, most likely because it was a single-judge division.[6] The case was guaranteed to be heard by Judge Matthew Kacsmaryk, a Trump appointee with a noted anti-abortion record, and any appeal would go to the anti-abortion Fifth Circuit.

Certain judges, and markedly those in the far-right "superhighway," are becoming bolder in espousing fringe legal theories that even the Supreme Court found extreme. In *Consumer Financial Protection Bureau v. Community Financial Services Association of America*, the far-right organization CFSA argued that the CFPB's funding structure was unconstitutional, an argument

far outside the bounds of good-faith interpretation. Instead of dismissing this faulty lawsuit, the Fifth Circuit adopted CFSA's absurd legal argument.[7] In *U.S. v. Rahimi*, the Fifth Circuit took the Supreme Court's already extreme "history and tradition" test from *New York State Rifle & Pistol Association v. Bruen* to a further extreme, striking down as unconstitutional a law prohibiting domestic violence abusers from owning guns on the ground that there was no analogous law restricting a domestic abuser's access to arms at our country's founding.[8] While the Supreme Court ultimately reversed the Fifth Circuit's rulings in *Consumer Financial Protection Bureau* and *Rahimi*, the fact that those extreme legal arguments succeeded in circuit courts demonstrates the extent to which private interests are weaponizing the judiciary.

Though the Supreme Court only upheld three of the 11 appeals it heard from the Fifth Circuit, those three cases significantly pushed the jurisprudence of the federal judiciary to the right. In *Garland v. Cargill*, the Supreme Court upheld the Fifth Circuit's ruling overturning a ban on bump stocks,[9] while in *Campos Chavez v. Garland*, it upheld a ruling that made it easier to deport migrants without providing sufficient notice of their hearing.[10] The ruling upheld in *SEC v. Jarkesy*, along with other rulings this term attacking federal agencies, makes it harder for agencies to enforce civil penalties.[11] Over time, even the Fifth Circuit's rulings that were overturned might become law. In many cases, one or more of the ultraconservative Supreme Court justices agreed with the Fifth Circuit's ruling in their dissents, portending an ominous sign for the Court's long game and its role in advancing an extremist agenda.

The justices were handpicked to deliver conservative wins.

For decades, far-right megadonors and the conservative legal movement have conspired with Republican lawmakers to pack federal courts. After the liberal legal victories of the Warren Court, the conservative movement identified the need to transform their strategy around the courts. The strategy was multi-pronged and included packing the federal judiciary with like-minded idealogues to issue favorable, pro-corporate decisions in the litany of anti-environmental and anti-labor lawsuits they hoped to bring, as well as overturn the reproductive freedoms secured in *Roe v. Wade*. And thus, the Federalist Society was born.

Over time, the Federalist Society became the premier conservative legal organization. Through lavish events and networks across the conservative movement, the Federalist Society builds ideological cohesion among conservative lawyers, and membership in the organization is a pipeline to obtaining federal judgeships. Due to its wide-ranging influence, it has been a favored organization of many rightwing megadonors like the Koch brothers and corporate interest groups like the Chamber of Commerce.[12] Republican lawmakers depend on the Federalist Society to provide names of potential judicial appointees who are aligned with Republican priorities. All six of the ultraconservative justices on the Supreme Court are affiliated with the Federalist Society.[13]

The federal judiciary's rightward turn in recent years underscores the unmitigated success of conservative court packing, which was fully realized during the Trump administration. Trump's judicial appointments were handpicked by the Federalist Society and ushered through by far-right power brokers like Leonard Leo, underlying the coordination between rightwing megadonors, the conservative brain trust, and Republican elected officials. In all, Trump nominated more than a quarter of all active federal judges, including 54 federal appellate judges and three Supreme Court justices, resulting in the capture of three Circuit courts and solidifying the Supreme Court's ultraconservative supermajority.[14]

These efforts led directly to conservative wins this term. For example, questions during judicial confirmation processes under the Trump administration specifically focused on appointees' views on federal agency authority and deregulation.[15] In three cases with the broadest impacts on federal agency authority this term, the ultraconservative justices ruled 6-3 against federal agencies, making it harder for the Executive branch to create and enforce regulations that protect the public. The crown jewel of these decisions was *Loper Bright v. Raimondo*, in which the Roberts Court overturned the doctrine of agency deference laid out in *Chevron v. Natural Resources Defense Council*, to the delight of the

conservative legal movement. For decades, corporations have been campaigning to end *Chevron* deference—largely due to the power it gave federal agencies to quell pollution[16] and other corporate activities that damage the public good. Justice Gorsuch's repudiation of *Chevron* deference as an appeals court judge was one reason Trump nominated him to the Supreme Court.[17]

The Court is not bound by an enforceable code of ethics.

Currently, the only people who can hold Supreme Court justices accountable are themselves. The Supreme Court has never had an enforceable ethics code—and until recently, it did not even have an aspirational one.

While most acute at the Supreme Court level, the lack of a strong, enforceable code of ethics tarnishes the entire federal judiciary. The Constitution states that judges on the Supreme Court and lower federal courts "shall hold their Offices during good Behaviour," which has generally been understood to mean simply that Congress cannot remove judges based on the content of their decisions.[18] Since 1973, lower federal court judges have been expected to follow the Code of Conduct for United States Judges,[19] which is written and revised by the Judicial Conference.[20] This code lacks teeth,[21] and judges are rarely disciplined in practice.[22] Moreover, the code does not apply at all to the Supreme Court justices.[23]

On November 13, 2023, the Supreme Court released a Code of Conduct for Justices of the Supreme Court of the United States for the first time.[24] This code contains no enforcement language. It merely notes what the justices "should" do, not what they "shall" or "must" do. Nor does it mention the possibility of disciplinary action or other consequences for ethical breaches.

The expectation that the justices will adhere to an ethics code is particularly disturbing because some of them have deep and undeniable ties to the ultrawealthy and far-right and have clearly demonstrated their inability to follow ethical standards. This new Supreme Court code of ethics was released in the wake of reporting about Justice Thomas's and Justice Alito's failures to disclose lavish gifts from right-wing billionaires. Justice Thomas has for decades been accepting—and failing to report[25]—gifts, including luxury vacations with Republican billionaire donor Harlan Crow, who "has spent millions on ideological efforts to shape the law and the judiciary."[26] Justice Alito, in turn, accepted a gift of a luxury trip in 2008 with Republican billionaire Paul Singer, who has been involved in litigation before the Supreme Court at least ten times.[27] Justice Alito failed to disclose the trip and did not recuse himself from the cases involving Singer.[28]

This term, Justice Alito and Justice Thomas further demonstrated their inability to appropriately self-regulate by refusing reasonable demands from lawmakers to recuse themselves from cases in which they are likely to have personal connections. Justice Alito refused to recuse himself from *Trump v. United States*, involving Trump's claim of immunity from criminal prosecution, and *Fischer v. United States*, involving the January 6, 2021, Capitol riots, despite revelations that his wife, Martha-Ann Alito, recently flew two flags associated with Trump supporters outside their home, signaling support.[29] Justice Thomas refused to recuse himself from *Trump v. United States* despite his wife Virginia Thomas's support of efforts to overturn the outcome of the 2020 election.[30] Justice Thomas also refused to recuse himself from *Loper Bright v. Relentless*, concerning the power of federal agencies, despite his ties to the Koch brothers, who orchestrated and funded that litigation.[31]

The Supreme Court stated that it adopted this new code of ethics to dispel the "misunderstanding that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules."[32] But there is hardly a misunderstanding. Other federal employees have strict legal obligations concerning their ethics, including limitations on their ability to accept even small gifts.[33] Moreover, federal employees are advised that it is "prudent" to decline a gift "if acceptance would cause a reasonable person to question the employee's integrity or impartiality."[34] Justice Thomas and Justice Alito's actions demonstrate their complete disregard for the ethical obligations they claim to be able to self-enforce.

Moreover, the Supreme Court's decision this term in *Snyder v. United States* reveals an

unwillingness to confront the influence of money in politics. Justice Kavanaugh wrote the opinion on behalf of all six conservative justices. In it, he interprets a federal anti-corruption statute that prohibits bribes to state and local officials not to cover "gratuities"—gifts or payments from interested parties that are made "as a token of appreciation after the official act."[35] It is no coincidence that Justice Thomas and Justice Alito sided with Justice Kavanaugh here. The artificiality of the distinction the majority draws between bribes and gratuities is evident from the facts of the case: James Snyder, then-mayor of Portage, Indiana, awarded a contract of over $1 million to a trucking company and accepted a check for $13,000 from that company several weeks later.[36] Snyder argued that the federal statute did not cover his acceptance of this check because he did not agree to accept the payment upfront. But the statute prohibits officials from "corruptly" soliciting, *accepting*, or agreeing to accept "anything of value from any person, intending to be influenced or *rewarded*."[37] As Justice Jackson's dissent notes, "Snyder's absurd and atextual reading of the statute is one only today's Court could love."[38]

The Court engineers its own docket.

The Supreme Court has the power to engineer its docket any way it wants. When exercising its appellate jurisdiction (its power to decide cases on appeal), the Court has near total discretion to decide what cases it will hear—and it makes these decisions entirely behind closed doors with less than a majority of the justices. Each year, the Supreme Court receives approximately 5,000 to 6,000 petitions to review lower court decisions and summarily rejects roughly 97% of them without any discussion among the justices.[39] For the three percent of cases that do make the Court's "discuss list," only four of the nine justices need to be in favor of accepting the case for it to be docketed.[40] And for the thousands of cases the justices decline to review each year, the Court offers no explanation or justification for its denial. The discretion afforded the Supreme Court in choosing its docket, coupled with the opaqueness of this process, enables the Court to determine its own sphere of influence—deciding for itself the policy issues it will define and the rights it will shrink or expand—with little to no public scrutiny.

This term exemplified how the Court can pick and choose a docket that fits its political ends. The Court not only chooses the cases it wants to hear but also cherry-picks issues within cases. In *Loper Bright v. Raimondo*, the Court was asked to weigh in on a challenge to a federal fishery law that required fishing boats to pay for compliance monitors as well as the broader issue of whether it was necessary to overrule *Chevron v. Natural Resources Defense Council*—a foundational case concerning agency power that the far-right has been trying to undo for years.[41] The Court decided only to take up the second question.[42] Additionally, in *Moyle v. United States*, the Court agreed to take up the case on the merits even though it had not yet completed the appeals process (more on this in later sections).[43] The Court did not necessarily have to take up these questions, yet chose to do so to pursue its own agenda.

The ultra-conservative majority is flouting legal norms to consolidate power and advance partisan ideology.

The Roberts Court—specifically, the ultraconservative majority—continues to go out of its way to deliver right-wing policy wins, flouting the Court's own precedent and usurping power from trial courts and other branches of government to reach politically conservative outcomes. This term, the Court's decisions on several critical issues—including racial gerrymandering, agency power, political bribery, the rights of unhoused people, and immigrant rights—came down to a 6-3 split along ideological lines.

A prime example of the Roberts Court's overreach to deliver a partisan advantage to Republicans is the majority opinion in *Alexander v. South Carolina State Conference of the NAACP*. In *Alexander*, Justice Alito's opinion on behalf of all six conservative justices validated a congressional map that the trial court had unanimously struck down for unconstitutional racial gerrymandering.[44] In other words, the Court upheld a congressional map that had been proven to intentionally dilute the power of Black voters. To arrive at this outcome, the Court egregiously overstepped its role. Instead of deferring to the trial court's factual findings absent clear error—as it has long been

required to do—it re-evaluated all the evidence to its own liking, dismissing blatant evidence that the mapmakers examined racial data and imposing upon plaintiffs the additional evidentiary burden of producing an alternative map that would achieve greater racial balance.[45] As the dissent warns, this new evidentiary rule will ultimately "pack[] a wallop" by placing "uncommon burdens on gerrymandered plaintiffs" and helping states avoid accountability for racial gerrymanders.[46] In upholding South Carolina's racially gerrymandered map, the conservative majority also expressed their general reluctance to call a spade a spade when it comes to racial discrimination by lawmakers. Specifically, Justice Alito's opinion stated that claims of racial gerrymandering accuse legislatures of engaging in "offensive and demeaning conduct" and that "[w]e should not be quick to hurl such accusations at the political branches."[47] But such accusations are at the heart of racial gerrymandering claims—that is entirely the point. As Justice Kagan noted in her dissent, "[t]his Court is not supposed to be so fearful of telling discriminators, including States, to stop discriminating."[48]

The Court also overturned four decades of its own precedent to decimate federal agency power in *Loper Bright v. Raimondo*. For forty years, the doctrine of *Chevron* deference required courts to defer to an agency's interpretation of an ambiguous statute so long as it was reasonable.[49] *Chevron* deference was rooted in the commonsense presumption that Congress would prefer for the federal agency responsible for implementing a law—rather than a court—to resolve any gaps in that law.[50] In undoing *Chevron* deference, the Court consolidated the federal judiciary's power to make "all manner of scientific and technical judgments" and "all manner of policy calls."[51] This blatant power grab will ensure that the federal judiciary—which has been packed with conservative idealogues—can continue to create policy that puts corporate interests above the social and economic well-being of the public. And, as the dissent noted, the conservative majority's disregard of both judicial precedent and executive power in *Loper Bright* is not a "one-off, in either its treatment of agencies or its treatment of precedent."[52]

The conservative majority's decision in *Trump v. United States* is perhaps the most egregious case of the Roberts Court's judicial overreach for partisan gain. In *Trump*, the Court ruled that Presidents are immune from prosecution for any official act carried out as President.[53] This ruling not only enables Trump to skirt any accountability for his role in the attempted January 6 coup; it will also allow future Presidents to commit previously unfathomable acts with impunity. Justice Sotomayor highlighted the gravity of the problem in her dissent: "When [the President] uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune."[54] This placement of the President above the law is neither grounded in the Constitution nor the history of our country. The Court's espousal of an "expansive vision of Presidential immunity . . . never recognized by the Founders, any sitting President, the Executive Branch, or even President Trump's lawyers" exposes how willing the justices are to cast aside even their purported originalist views to achieve their preferred partisan outcome.[55]

These cases amplify the Court's ideological entrenchment and show that the conservative justices are not afraid to disregard legal standards or invent new ones just to reach their desired outcome. As Justice Kagan aptly noted in *Loper-Bright*, "The majority disdains restraint and grasps for power."[56]

The Supreme Court's "moderate" decisions are not wins for our rights.

The Roberts Court's issuance of radical rulings that gut our democracy, roll back fundamental rights, and push a far-right agenda has shifted the entire American jurisprudence to the right. The result is that any time the Court stops short of issuing the most extreme ruling possible, some label the decision as a victory for progressives. During its 2023 term, the Court eviscerated race equity in higher education, crushed President Biden's student loan relief plan, and empowered businesses to engage in anti-LGTBQ discrimination.[57] Despite these

devastating blows to progressive movements, the Court still garnered approval for a supposed shift towards moderation and the delivery of "a fair number of liberal victories."[58] In particular, the Court received positive coverage for electing not to further erode the power of Black and brown voters in the two high-profile redistricting cases, *Moore v. Harper* and *Allen v. Milligan*, on its 2023 docket. However, in both cases, the Court did nothing more than maintain the status quo, declining to expand voter protections in any way.

This past term followed a similar pattern. The Court ended its 2024 term with far-reaching decisions that will have dire consequences for our democracy and economy for years to come. In just one morning, the Court both diminished the power of federal agencies to issue regulations that protect the public[59] and effectively greenlighted the criminalization of homelessness across the country.[60] Only four days later, the Court bestowed on Trump full immunity for his actions while in office, turning the President into, in Justice Sotomayor's words, "a king above the law."[61] Yet in the weeks leading up to these explosive opinions, the Court delivered what was lauded as wins for abortion rights in *Food and Drug Administration v. Alliance for Hippocratic Medicine* and *Moyle v. U.S.* (consolidated with *Idaho v. U.S.*). But even a cursory analysis of the *Alliance for Hippocratic Medicine* and *Moyle* opinions unveils the temporary and narrow contours of these so-called victories.

In *Food and Drug Administration v. Alliance for Hippocratic Medicine*, the Court rejected an attempt by anti-abortion doctors to restrict access to the abortion pill mifepristone—but did so on purely procedural grounds.[62] Specifically, the Court found that the plaintiff doctors lacked standing to file the lawsuit because the challenged Food and Drug Administration (FDA) policies did not sufficiently impact them. The Court's narrow holding in *FDA v. Alliance for Hippocratic Medicine* leaves the door wide open for future legal challenges to mifepristone. Indeed, Justice Kavanaugh expressly stated in his majority opinion that it is "not clear that no one else would have standing to challenge FDA's relaxed regulation of mifepristone."[63] In short, the *Alliance for Hippocratic Medicine* decision merely maintained the status quo—at least for now.

In *Moyle*, the Court likewise sidestepped the crucial abortion question presented: whether federal law—specifically, the Emergency Medical Treatment and Labor Act (EMTALA)—requires hospitals in Idaho to perform emergency abortions, despite the state's ban on all abortions except "unless necessary to prevent a pregnant woman's death."[64] The Court opted instead to dismiss the cases on the ground that it had "improvidently granted" the petitions for review in the first place.[65] Worse still, the Court issued its spineless decision after reversing the district court's injunction blocking Idaho's abortion ban and then let these cases idle on its docket for five months—all while emergency care providers were forced to airlift pregnant women requiring abortion care out of Idaho.[66] The Court's refusal to clarify abortion policy in Idaho will indefinitely prolong chaos and confusion for patients and medical providers alike—chaos and confusion that will result in the denial of abortion care in circumstances where both medical standards and federal law require an abortion. Moreover, the Court's decision to—in Justice Jackson's words—"shirk its duty"[67] to answer the straightforward legal question of whether EMTALA preempts Idaho's conflicting abortion ban will have devastating consequences across the entire country. Since *Dobbs v. Jackson Women's Health Organization*, in which the Roberts Court overturned *Roe v. Wade*, fourteen states have outlawed abortions; many others have banned abortion as early as six weeks of pregnancy.[68] Consequently, pregnant patients in a multitude of states will be paying the high price of the Court's callous squandering of a "chance to bring clarity and certainty to [a] tragic situation."[69]

Thus, while the decisions in *Alliance for Hippocratic Medicine* and *Moyle* did not further restrict access to abortion care, they did nothing to sustain or expand it either. All the Court did was maintain the status quo of the abortion landscape—a status quo that the same conservative Court created by slashing the long-held constitutional right to an abortion two years ago. Even when the Roberts Court issues a "moderate" decision, it carefully avoids any expansion of our civil rights. At best, the Court offers only flimsy and temporary protections of these rights on procedural grounds—sometimes while sprinkling their opinions with advice to right-wing litigants

on how to mount more effective legal challenges in the future.

The Court plays the long game.

The Roberts Court plays the long game, frequently planting the seeds for its blockbuster judicial coups in prior strategic rulings, concurrences, and dissents. As Justice Kagan noted in her *Loper Bright* dissent, the Roberts Court engages in a pattern and practice of reversing precedent by repeatedly "stop[ping] to apply a decision where one should; throw[ing] some gratuitous criticisms into a couple of opinions; issu[ing] a few separate writings question[ing the decision's] premises; giv[ing] the whole process a few years… and voila! . . . [Y]ou have a justification for overruling the decision."[70]

Notably, in *Loper Bright*, the Roberts court overturned the well-established doctrine of *Chevron* deference by drawing upon arguments that several majority justices had invoked in prior rulings. Justice Kagan highlighted in her dissent that the conservative majority's justifications for ending *Chevron* deference had been gestating in the Court's opinions for the last eight years: "The majority's argument is a bootstrap. This Court has 'avoided deferring under Chevron since 2016' because it has been preparing to overrule Chevron since around that time."[71] For example, in *American Hospital Association v. Becerra*, the Supreme Court rejected the Department of Health and Human Service's (HHS's) interpretation of the 2003 Medicare Act without mentioning *Chevron* deference, despite the fact that HHS had based its petition for certiorari arguing for such deference.[72] In still other cases, the justices who joined the majority or concurrence in *Loper Bright* expressed their critiques of *Chevron* deference and its role in jurisprudence concerning administrative decisions.[73] The Court's gradual chipping away at *Chevron* ultimately culminated in the *Loper Bright* ruling, where the Roberts Court "in one fell swoop…[gave] itself exclusive power over every open issue—no matter how expertise-driven or policy-laden-involving the meaning of regulatory law."[74]

This pattern of long-term judicial sabotage is not unique to *Loper Bright*. The Roberts court has similarly played the long game to undermine our voting rights, whittling away at fundamental safeguards protecting the franchise over several years. Take, for example, *Alexander v. South Carolina State Conference of the NAACP*. There, the majority upheld South Carolina's racially gerrymandered map based in part on an "alternative map requirement," a concept that originally surfaced in Justice Alito's partially concurring, partially dissenting opinion in *Cooper v. Harris*, a similar racial gerrymandering case from 2017.[75]

The Roberts Court has also foreshadowed the likely dismantling of other long-established fundamental rights. Notably, in its recent *Department of State v. Muñoz* decision, the Court previewed a possible overturning of *Obergefell v. Hodges*, the landmark decision ruling that the Constitution guarantees same-sex couples the fundamental right to marry.

Briefly, *Muñoz* arose from the immigration plight of a married couple: one an American citizen, Sandra Muñoz, and the other an El Salvadoran citizen, Luis Asencio-Cordero.[76] Several years after marrying, the couple sought to obtain a visa for Asencio-Cordero so that they could live together in the United States but were denied without explanation.[77] The couple sued the Department of State, the Secretary of State, and the United States consul in San Salvador, claiming that they had abridged Muñoz's constitutional right to marriage by failing to provide a factual basis for excluding Asencio-Cordero.[78] During litigation, the couple discovered the visa denial was based on the government's belief that Asencio-Cordero was affiliated with the gang MS-13.[79] Troublingly, rather than resolving the case on the narrow procedural grounds that the government had met its burden to provide Muñoz with a "legitimate and bona fide reason" for her husband's visa denial, the Roberts Court seized the opportunity to chip away at the right to marriage in the immigration context, sharply limiting *Obergefell*.[80] Indeed, the majority delivered by Justice Barrett recast Muñoz's invocation of her "fundamental right to marriage" as her "right to bring a noncitizen spouse to the United States," a liberty interest that, according to the Court, lacked a sufficiently deep historic origin to warrant Due Process protections.[81] In doing so, the majority ignored a half-century of precedent that does not require plaintiffs to be fully prevented from exercising their right to marriage before invoking it.[82]

In the dissent, Justice Sotomayor warns that *Muñoz* might be one of the first indications that a majority of the current justices wish to pursue a long-term strategy that will chip away at the fundamental right to marriage. Referencing the majority opinion in *Dobbs v. Jackson Women's Health Organization*, Justice Sotomayor wrote:

> Despite the majority's assurance two Terms ago that its eradication of the right to abortion "does not undermine ... in any way" other entrenched substantive due process rights such as 'the right to marry," "the right to reside with relatives," and "the right to make decisions about the education of one's children," the Court fails at the first pass. . . . Because, to me, there is no question that excluding a citizen's spouse burdens her right to marriage, and that burden requires the Government to provide at least a factual basis for its decision.[83]

It is also worth mentioning that while the majority's opinion in *Dobbs* did claim that the right to marry was not in the Court's crosshairs, Justice Thomas's concurrence specifically cited *Obergefell* as a case that could be reconsidered in light of the Court's ruling.[84] Given the Roberts Court's subsequent actions, perhaps Justice Thomas was more accurately describing the Court's long game.

Transforming the Supreme Court

Every year Congress fails to act is another year the Supreme Court will continue to strip us of our rights. Instead of upholding the separation of powers and ensuring checks and balances, the Roberts Court is concentrating power in its own hands, superseding the legislative and executive branches.

This terrifying trend will not be stopping anytime soon. Under current circumstances, the Supreme Court is likely to be under conservative control until 2065.[85] Next term, the Court is set to hear cases on the constitutionality of state bans on gender-affirming care for minors, additional rollbacks of the EPA and other agencies' power, as well as other critical issues.

It is Congress's duty to address the Supreme Court's blatant misuse of power. The Constitution provides Congress with wide leeway to change the Court's size, structure, jurisdiction, and more. Congress must stop the conservative capture of the courts and transform the deep structural problems that have allowed the least democratic branch of government to wield such immense power.

Court Expansion

The first step to transforming the Supreme Court is to mitigate the damage done through decades of conservative court capture. Changing the number of seats on the Court is one of Congress's simplest and most direct tools for reforming the Supreme Court—and one used many times throughout American history. Congress has formally changed the size of the Court six times.[86] For example, in 1863, Congress expanded the Supreme Court to 10 justices to diminish the power of pro-slavery justices on the Court.[87] In 2016, Senate Republicans effectively reduced the number of justices to eight when they refused to seat President Obama's chosen replacement to Justice Scalia. In addition to mitigating the effects of conservative court capture in the short term, expanding the Court would increase the Court's capacity to hear more cases as federal caseloads grow—a problem also facing the rest of the federal judiciary—and could allow for a more diverse Court that more fully represents the American public.

There is currently proposed legislation to address the Court's makeup. The Judiciary Act of 2023, introduced by Representative Hank Johnson and Senator Ed Markey, would add four new seats to the Supreme Court. This legislation already has 65 cosponsors.

Some critics of court expansion worry that adding seats to the Supreme Court would further politicize the federal judiciary or create a tit-for-tat scenario where Democrats and Republicans alternate in expanding the court when their party comes into power. It is important to remember, however, that the Court is already politicized, and conservatives have already packed the Court with ultraconservative ideologues. Court expansion in this context would be a remedial tactic to

mitigate conservative court-packing or risk facing a Court set on stripping away our rights for decades to come.

Code of Ethics

As described earlier, the Supreme Court is currently the only federal body not subject to a binding ethics code. While the Supreme Court now technically has a "code of conduct," the code relies on the justices to self-report and self-regulate. If any justices break this code, no enforcement mechanisms exist to punish the behavior or prevent repeated abuses. There are no procedures for public complaints, formal reviews, or investigations of rule breaking. In contrast, Congress and executive branch members have strict rules regarding ethics, including limitations on gifts.

A strong code of ethics would be enforceable by Congress, including strict rules around recusals, gifts, and financial disclosures, and a process for investigating complaints of judicial misconduct would be created. There are several bills currently pending that would address this ethics crisis, including the Supreme Court Ethics, Recusal, and Transparency Act, introduced by Representative Hank Johnson and Senator Sheldon Whitehouse, and the No More GIFTS Act, introduced by Representatives Alexandria Ocasio-Cortez and Jamie Raskin.

Term Limits

As it stands, Supreme Court justices serve for life or until retirement. America is the only major democracy that allows for lifetime appointments for its justices.[88] In modern times, justices serve longer on the bench than ever, leading to sporadic appointments. As the political influence of the Court has grown, every Supreme Court vacancy and subsequent confirmation process has become highly politicized, including in 2016 when Republicans refused to hold hearings for President Obama's Supreme Court appointee Merrick Garland.

The sporadic appointment process also means that Supreme Court justices do not necessarily represent the will of the people. Of the last nine presidents, only four were Republicans, and only two of those Republicans won the popular vote. In contrast, Republican presidents have appointed six of the current Supreme Court justices.

By instituting 18-year term limits, Congress would normalize the Supreme Court appointment process and ensure a President would appoint two justices each term (one every two years). By ensuring each President has two appointments, the Supreme Court would more accurately represent the will of the people and provide greater accountability for an out-of-control Court. Normalizing the appointment process would also turn down the temperature on Supreme Court appointments, prevent justices from serving excessively long terms, and reduce strategic retirements.

Several term limits bills have already been proposed, including the Supreme Court TERM Act, which was introduced by Representative Hank Johnson and Senator Sheldon Whitehouse.

Reforms that Limit the Role of the Federal Judiciary

In addition to the reforms mentioned above, Congress has the power to limit the role of the judiciary by limiting the opportunities the Court has to make consequential rulings. Under Article III of the Constitution, "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."[89] Congress has taken advantage of these powers throughout its history and could do so again by passing simple legislation or adding language onto existing bills. By limiting the role of the unelected judiciary, and placing more impetus on our elected branches, we are more likely to achieve a federal government that is responsive to the needs of the people.

Some additional actions Congress could take include:

- **Jurisdiction stripping or channeling:** Congress could pass a law which removes the Supreme Court's and/or federal judiciary's jurisdiction to hear challenges to laws or regulations, or channels that power into a different judicial body. For example, if Congress passed the Freedom to Vote Act, it could include a provision in the text stating the federal judiciary does not have jurisdiction to hear a certain class of cases. Instead, it could determine

that all challenges to this law should be channeled to the D.C. Court of Appeals or a newly created judicial body.

- **Supermajority requirements:** Congress could pass a law imposing a supermajority requirement for the Supreme Court or circuit courts to strike down challenges to a particular law or regulation. For example, Congress could require the Supreme Court to have a 7-2 supermajority to strike down a law codifying Roe v. Wade on constitutional grounds.
- **End judge shopping:** Congress could pass laws outlawing single-judge districts or bar single judges from issuing nationwide injunctions. This would remove incentives to file in certain districts to obtain desired case outcomes.

With complete lack of oversight over everything from the Court's selection of cases to its recusal process, it is no wonder that the current ultraconservative majority on the Supreme Court has been emboldened to flout legal and ethical norms and its own precedents to secure conservative policy wins. Congress has many options, outlined above, to rein in the Court's consolidation of power and restore balance to the government—and must do so immediately.

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