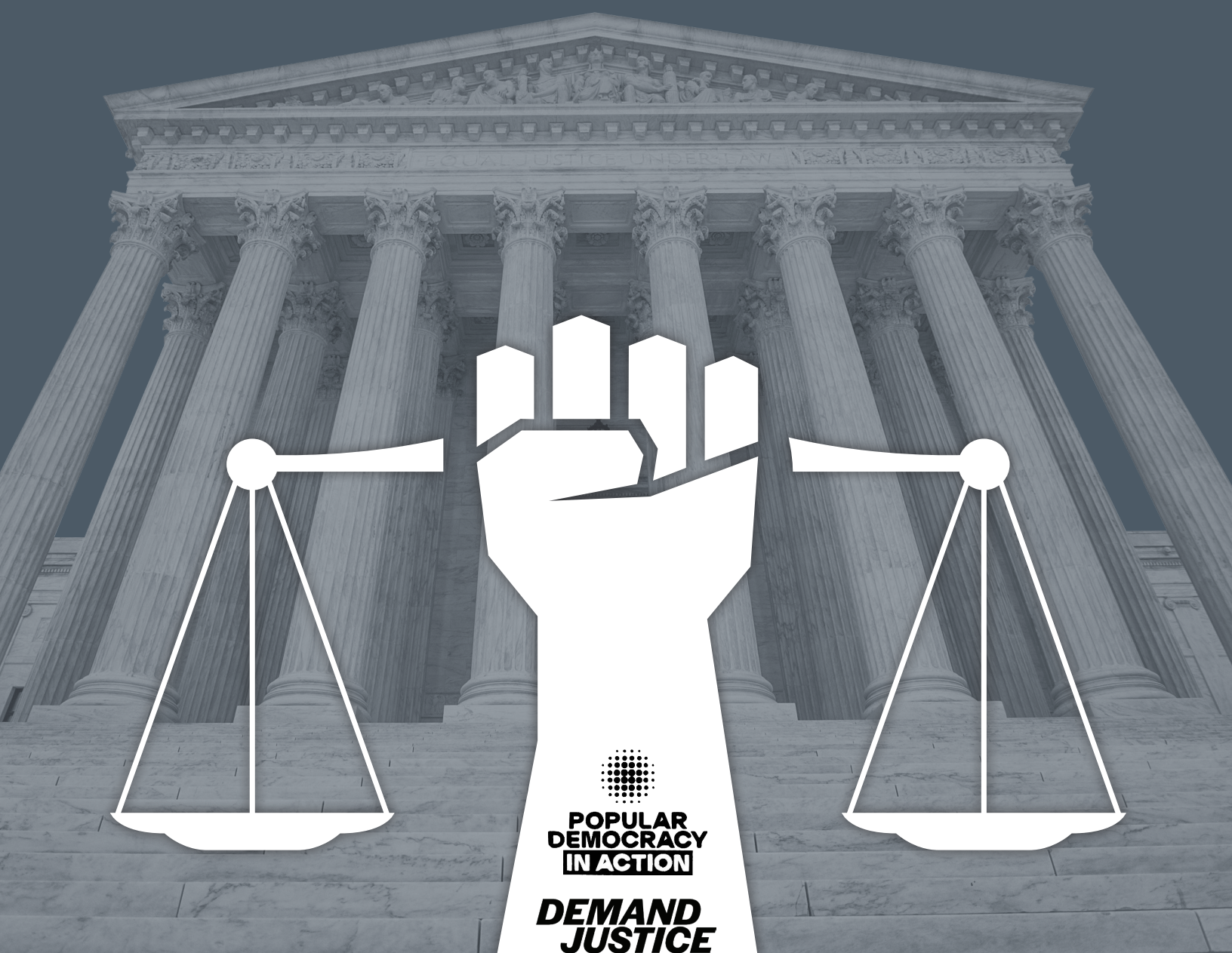


# Justice in the Balance: What's at Stake with This Supreme Court



JUNE 2020

## ACKNOWLEDGMENTS

This report was written by Eli Vitulli (Center for Popular Democracy) . It was edited by Katie O'Connor (Demand Justice) and Julia Peter (Center for Popular Democracy).

## ABOUT THE AUTHORS



**Demand Justice** is a progressive movement fighting to restore the ideological balance and legitimacy of the federal courts by advocating for reform and vigorously opposing extreme nominees. We are empowering citizens to organize around our nation's courts and prevent them from devolving into just another tool of economic and social oppression. We wage fact-based campaigns to defend our rights and to stop our courts from pursuing an agenda that further enriches the wealthy and corporations at the expense of everyday Americans.

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**Popular Democracy in Action** and its affiliates know that everyday people have the power to change the world. We upend politics as usual to forge a representative, multiracial government and society where we all thrive, no exceptions.

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# Justice in the Balance: What's at Stake with This Supreme Court

Every June, the United States Supreme Court issues its final decisions for the term. These decisions have far-reaching impacts on people throughout US society.

The Supreme Court is the highest court in the US, which means that it is the final arbiter of the law. Supreme Court decisions set precedent—or act as the authoritative guide—for law throughout the country. It is the head of the federal judicial branch, whose job is also to act as a check on the executive and legislative branches. Thus, the Court, and the federal court system more generally, plays an incredibly important role in US society and democracy, determining how laws should be interpreted and implemented. Their decisions often have a highly significant impact on communities of color, low-income communities, immigrants, LGBTQ people, and others, as the Court decides important questions regarding civil rights, regulating the economy, immigration, and our election system.

While in theory the judicial system strives to be “fair and impartial,”<sup>1</sup> Supreme Court justices and their decisions—along with all other federal and state judges and their decisions—are deeply influenced by society, culture, and political ideologies and play a powerful role shaping US social structures, economy, and democracy, while also reflecting—indeed perpetuating—broader power dynamics. Throughout its history, Supreme Court decision-making has and continues to perpetuate and legitimize systems of power and oppression, including white supremacy, racial capitalism, ableism, heteropatriarchy, and xenophobia.<sup>2</sup>

Supreme Court justices—as well as judges in the federal court system—are unelected and serve lifetime appointments. As a group, federal judges do not represent the diversity of life experiences and identities of people in the US. For example, a majority of Supreme Court justices and lower federal court judges are white men,<sup>3</sup> and all nine justices attended either Harvard Law School or Yale Law School.<sup>4</sup>

Supreme Court justices are also subject to few transparency and accountability mechanisms. They are not held to a code of ethics, and while it is possible to impeach a justice, that has never been done.<sup>5</sup>

For decades Republicans and their allies on the Right have been organizing to pack our courts with conservative judges. Their efforts have been paying off as the Supreme Court and the federal judiciary generally have become increasingly conservative and partisan. The Court has “sided with the rich and powerful” against poor people, people of color, immigrants, and other marginalized people in “virtually every area of the law” for the past few decades, and it has aided the “massive transfer of wealth to corporations, corporate executives, and share-holders” from “ordinary Americans” that has been the hallmark of the US economy for the past few decades.<sup>6</sup> Trump’s Supreme Court picks have entrenched a conservative and partisan majority.

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But another Supreme Court is possible.

**Countering the rightwing court grab and creating a court that will defend civil rights, our democracy, and the humanity of all people requires a movement pushing to win judicial reforms and putting pressure on elected officials to nominate and confirm justices who will make decisions based on social justice and equity.**

If we don't act, the conservative majority on the Supreme Court—and the increasing conservatism of the federal judiciary more generally—could not only become entrenched for decades but could become even more extreme. It is likely that the Court will have at least two vacancies in the next few years. If Trump is able to appoint those justices, rightwing, partisan justices will hold a supermajority on the Court. Trump will also be able to continue moving the rest of the federal court system further to the right. His judges could serve for decades after he leaves office.

This brief provides important background for understanding the Supreme Court. The first two sections describe how past and present Supreme Court decision-making has perpetuated and legitimized systems of oppression, especially white supremacy, and how the recent rightwing court grab perpetuates these dynamics. The next two sections describe how cases reach the Supreme Court and give background on the Supreme Court justices and the judges in the larger federal court system. The final section of the report summarizes four of the most important cases still under consideration this term: cases addressing the future of the Deferred Action for Childhood Arrivals (DACA) program, whether LGBTQ people are protected from employment discrimination, the constitutionality of a Louisiana law restricting access to abortion, and whether Trump must publically release his tax returns. This term, the Supreme Court has or will rule on many more cases that could have wide reaching consequences. The appendix to this brief includes descriptions of 16 additional cases.



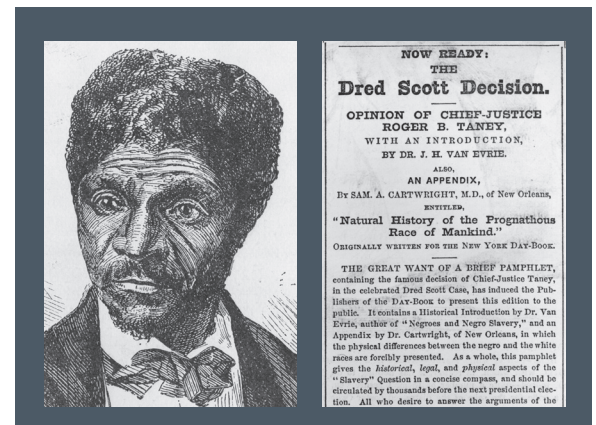
# Power, Oppression, and the Supreme Court

Throughout the history of the US, the Supreme Court has been a key institution maintaining and legitimizing a power structure rooted in white supremacy, racial capitalism, heteropatriarchy, ableism, and other systems of oppression.<sup>7</sup> The current Court with its majority of conservative justices continues this tradition as it props up partisan (GOP) politics, conservative movement priorities, and corporate interests.

The Court's role in maintaining systems of oppression is manifested in its rulings on a wide range of issues throughout its history. For example, in *Dred Scott v. Sanford* (1857), the Court held that Black people could not be US citizens and that enslaved Black people were property under the Fifth Amendment and thus any law emancipating them (i.e. depriving an "owner" of that property) was unconstitutional. The Court in *Dred Scott* not only continued to legitimize US systems of slavery and white supremacy but also helped create a legal and social understanding of blackness as property and legitimately subject to violence and oppression.<sup>8</sup> *Dred Scott* was effectively overturned after the Civil War by the Thirteenth and Fourteenth Amendments.<sup>9</sup>

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In their 1927 *Buck v. Bell* decision, the Court upheld the forced sterilization of a woman who was imprisoned in a state mental hospital in Virginia and deemed "feeble-minded," determining that "three generations of imbeciles are enough."<sup>10</sup> This case not only legitimized the practice of forced sterilization of certain disabled people, thus taking away their reproductive rights, but also helped root into law the ableist understanding of disabled people as less than human or less valuable than able-bodied people. *Buck v. Bell* was never overturned and thus technically remains the law.<sup>11</sup>



In 1944, in *Korematsu v. US*, the Court upheld the internment of Japanese Americans during World War II, legitimizing racist understandings of Japanese American people as inherently foreign and enemies.<sup>12</sup> The Court did not overturn this decision until 2018, ironically in the ruling that upheld Trump's anti-Muslim travel ban.<sup>13</sup>

In their 1986 *McCleskey v. Kemp* decision, the Court ruled that statistical evidence showing that Black defendants convicted of killing white victims were more likely to receive the death penalty in Georgia could not be used to challenge McCleskey's death sentence; only evidence of racially discriminatory behavior by a person specifically influencing McCleskey's sentencing would be admissible.<sup>14</sup> This decision perpetuated a legal understanding of racial discrimination as only overt individual acts, not as part of systems and institutions,<sup>15</sup>

Photos: Century Company, P. (1887) Dred Scott. Harriet, wife of Dred Scott. 1887. [New York: Century Co., June] [Photograph] Retrieved from the Library of Congress, [www.loc.gov/item/2014645331/](http://www.loc.gov/item/2014645331/). (1859) Now ready: the Dred Scott decision—Opinion of Chief-Justice Roger B. Taney. 1859. [Photograph] Retrieved from the Library of Congress, [www.loc.gov/item/2002735894/](http://www.loc.gov/item/2002735894/).

and created a substantial burden for addressing the systemically racist criminal legal system. It is a standard that continues today.

In its 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, which was decided 5-4 along ideological lines, the Court struck down a Seattle school district plan that maintained desegregated schools.<sup>16</sup> Here, the Court reasoned in the plurality opinion that the “way to stop discrimination on the basis of race is to stop discriminating on the basis of race”—that nearly any consideration of race, even to address racial inequities, is discriminatory.<sup>17</sup> This is a standard that makes it difficult, if not impossible, to address systemic racism and racial inequalities in education.

The Supreme Court’s practice of perpetuating systems of oppression is also deeply connected to how it has shaped our elections. For example, in *Shelby County v. Holder* (2013), the Supreme Court, in another 5-4 vote along ideological lines, gutted a key section of the Voting Rights Act that required jurisdictions with a history of race-based voter discrimination to submit any changes to voting procedures to the federal government for preclearance.<sup>18</sup> This ruling decimated one of the most potent enforcement tools of the Voting Rights Act. Within 24 hours of the ruling, previously covered states, such as Texas, began to implement strict voter ID laws, and over the following years, more jurisdictions have passed laws or other measures restricting the vote.<sup>19</sup>

On April 6, 2020, in *Republican National Committee v. Democratic National Committee*, again in a 5-4 decision along ideological lines, the Court blocked Wisconsin from extending the deadline for absentee ballots, granting a request made by the Republican National Committee and the Republican Party of Wisconsin.<sup>20</sup> This order was the final determination in a dispute between Wisconsin Democrats and Republicans about how to hold their election—both the Democratic presidential primary and state races—during the coronavirus pandemic and forced Wisconsin residents to decide between being disenfranchised and risking their health to vote.<sup>21</sup> Thousands received their requested mail-in ballots too late due to a dramatic increase in requests because of the pandemic.<sup>22</sup> In Milwaukee, whose population is majority people of color and where most Black people in Wisconsin live,<sup>23</sup> polling locations were cut by 97%, from 180 locations to just five.<sup>24</sup> Thus, the Supreme Court’s order effectively put Wisconsin residents of color at greater health risk than their rural and suburban white counterparts, who saw far fewer polling stations in their areas closed.<sup>25</sup>

# The Increasing Conservatism of the Current Court

The current Court is highly partisan and conservative, giving many wins to Republican and corporate interests.<sup>26</sup> The increasing conservatism of the Supreme Court, as well as the rest of the federal court system, is largely a product of a long-term strategy on the Right of packing the courts with conservative judges.<sup>27</sup> These efforts have been increasingly successful under Mitch McConnell's (R-KY) leadership in the Senate and Donald Trump's presidency.

During the final two years of the Obama administration, the Republican Senate majority, led by McConnell, confirmed the fewest judges in the last fifty years, holding open more than 110 judicial seats.<sup>28</sup> The best known and perhaps most egregious example of this is McConnell's unprecedented decision to obstruct President Obama's nomination of Merrick Garland to the Supreme Court,<sup>29</sup> paving the way for Trump to appoint Neil Gorsuch, who is among the most conservative justices on the Court and has reliably sided with the Trump administration.<sup>30</sup>

After Trump assumed office, the Republican-led Senate changed the confirmation process rules to make it easier and quicker for them to appoint conservative judges, including allowing the Republican Party to end debate by a majority vote instead of 60-member vote and ending the long-held practice of allowing senators from a nominee's home state to have a say in the appointment.<sup>31</sup> Conservative organizations, such as the Federalist Society and the Judicial Crisis Network, have substantially supported these efforts by identifying judges to nominate and spending thousands and even millions of dollars running political ads in support of conservative judges.<sup>32</sup>

In other words, Senate Republicans have effectively cut Democrats out of the confirmation process, allowing them to confirm extremely conservative, partisan, and even controversial judges. Some of those judges were even deemed unqualified by the American Bar Association.<sup>33</sup>

In the first two years of his presidency, Trump was able to appoint more than 90 judges, totaling more than 10% of the federal judiciary.<sup>34</sup> By March of this year, he had appointed over a quarter of all judges on the US Courts of Appeals.<sup>35</sup> In the midst of the COVID-19 pandemic, Trump nominated two conservative judges with records opposing the Affordable Care Act to the US Courts of Appeals.<sup>36</sup> The Trump administration has called this a "historic transformation" of the federal judiciary.<sup>37</sup>



In other words, Senate Republicans have effectively cut Democrats out of the confirmation process, allowing them to confirm extremely conservative, partisan, and even controversial judges. Some of those judges were even deemed unqualified by the American Bar Association.



Trump's other Supreme Court nominee, Brett Kavanaugh, was confirmed by the Senate in an exceptionally partisan confirmation process and in spite of serious sexual assault allegations and his own ill-tempered sworn testimony. Kavanaugh is also himself a partisan professional, having worked inside Republican electoral politics), and has replaced the less conservative Anthony Kennedy, who often acted as a swing vote.<sup>38</sup> The addition of Kavanaugh has pushed the Court even more to the right and given the conservative justices much more control over not only decisions but also which cases to hear. This term's cases may have reflected Kavanaugh's influence as it includes a large number of blockbuster cases, including an abortion rights case that sets up the Court to overturn a four-year-old precedent (see *June Medical Services LLC v. Russo* below). Overturning precedent, especially such a recent one, is very rare. By agreeing to hear this case, the Court's conservative majority may be indicating that they are set to overturn other precedents that protect not only abortion rights but other important rights.<sup>39</sup>

Thus, who sits on the Supreme Court matters, and the decisions that they make impact US democracy and the lives of people throughout the US. Supreme Court decisions can wreak long lasting harm, especially to people of color, poor people, people with disabilities, and other marginalized people, who rarely have a voice on the Supreme Court or the rest of the federal court system.



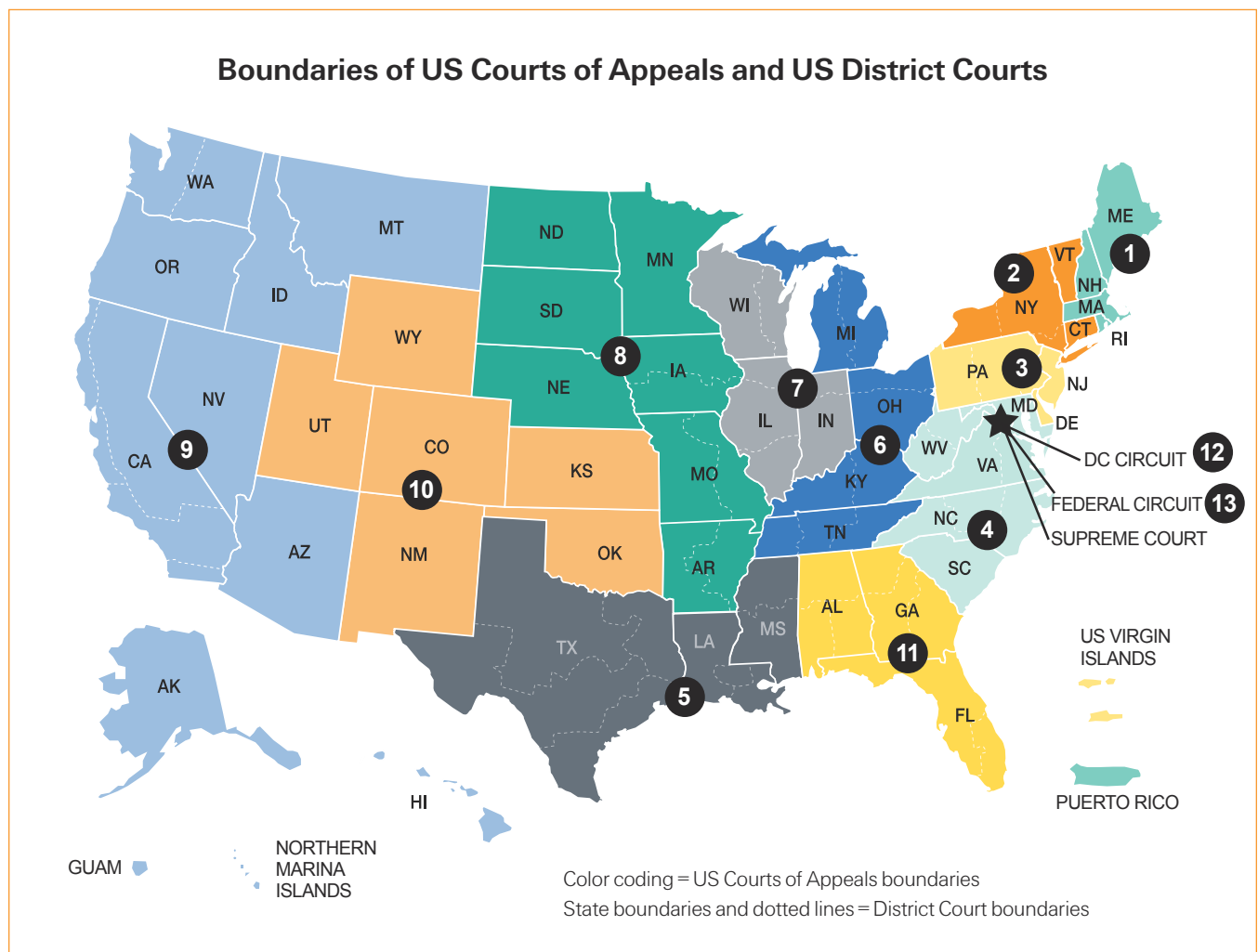


# How a Case Reaches the Supreme Court

Cases primarily come to the Supreme Court through an appeals process within the federal court system.

The federal court system is distinct from state court systems, which is where most cases are heard. The federal court system primarily hears cases involving the US government and federal laws, the constitutionality of laws according to the US Constitution, or controversies between states or the US and foreign governments.<sup>40</sup> State court systems hear cases involving state laws and constitutions and hear most criminal, personal injury, family law, probate, contractual, and traffic cases. However, a case can move from state to federal systems, and thus eventually reach the Supreme Court, if a party challenges a decision based on the US Constitution.<sup>41</sup>

The federal court system is divided into three layers. At the bottom are district courts, which are organized into 94 regions (every state and DC has at least one district court). District courts hold trials in criminal and civil cases. If you lose at the district court level, you can appeal to the US Courts of Appeals, which can also hear appeals to decisions by federal administrative agencies. The US Courts of Appeals is divided into 13 circuits, including 12 regional and a federal circuit. Appeals to a circuit court are heard by a panel of three judges and not juries. Each side submits briefs arguing why the circuit court should uphold or reverse the district court's



ruling. The court then holds oral arguments before the panel of judges. Lawyers for each side make their arguments and answer the judges' questions. Occasionally, the entire circuit court will hear arguments, but usually only after a panel of judges has first heard them. If you lose at the circuit court level, you can appeal to the Supreme Court. There are other avenues for a case to appear before the Supreme Court, but the one outlined here is the most common and how all the cases described below arrived before the Court.<sup>42</sup>

To appeal to the Supreme Court, you must submit a written petition, called a *writ of certiorari*. It is up to the discretion of the justices whether or not to grant the petition, and thus it is not guaranteed that the Supreme Court will hear a case. In fact, it is extremely unlikely. The Court receives about 7,000 to 8,000 petitions each year, while only hearing about 80 cases.<sup>43</sup> Four of the nine justices must vote to accept a petition to hear the case.

The Supreme Court is most likely to take cases that clarify legal issues and set precedent, involve a large constitutional impact or important legal questions that affect the entire US, are socially or politically important, clarify a conflict in lower courts over interpreting laws, disregard Supreme Court precedent, and/or are of particular interest to a justice.<sup>44</sup>

The Supreme Court hears oral arguments from October through April, with the final opinions of the term released in June. Each case is allotted an hour for arguments with lawyers from each side having half an hour to argue their case. Their allotted time is mostly spent answering the justices' questions. Witnesses are not part of oral arguments.<sup>45</sup>

Following oral arguments, the justices confer and vote about cases in the Justices' Conference. The Chief Justice or the most senior Associate Justice voting in the majority then assigns who will write the opinion of the Court. A justice may also write a concurring opinion if they agree with the majority vote but came to that conclusion for different reasons. Justices who disagree with the majority decision may write dissenting opinions. Thus, there may be a number of opinions written for a case, but there is only one opinion of the Court.<sup>46</sup>

# The Justices and Judges of the Federal Court System

Federal judges, including Supreme Court justices, are nominated by the President and confirmed by the Senate. Once confirmed, they serve life terms.<sup>47</sup> There are currently nine justices on the Supreme Court. However, that number is not required by the Constitution, which allows Congress to make that determination. The first Supreme Court had six justices, and the amount changed a number of times before being set at nine in 1869.<sup>48</sup>

## Current Supreme Court Justices<sup>49</sup>



Life term appointments mean that judges can potentially stay in their position for decades. The average length of time that a Supreme Court justice served is 16 years, and the longest term any justice has served was nearly 37 years.<sup>50</sup> Justice Clarence Thomas is the longest serving justice still on the bench, having been on the Supreme Court for nearly 29 years.<sup>51</sup>

While the original intention of the life term was to insulate federal judges from political pressure,<sup>52</sup> the nomination and confirmation process is political and has become increasingly partisan, and judges themselves are influenced by their own politics, identities, and life experiences.<sup>53</sup>



Moreover, while lower federal court as well as state court judges are bound by codes of ethics, Supreme Court justices are not. Instead, the Constitution establishes that they can serve as long as they exhibit “good Behavior.”<sup>54</sup> While it is possible to impeach a justice, it is extremely unlikely. Since the Court was established, only one justice even faced an impeachment trial (Samuel Chase in 1805), and he was acquitted.<sup>55</sup> This means that justices can—and often have—engage in conduct prohibited for all other judges, such as accept gifts or participate in partisan fundraisers.<sup>56</sup>

While federal law requires a Supreme Court justice to recuse themselves from cases in which they or their family members have a conflict of interest,<sup>57</sup> justices themselves make the ultimate decision on recusal and that decision is not reviewable, so there is no real enforcement mechanism to the law.

Since he took office, Trump has appointed over a quarter of the federal judiciary, and many of his judges are comparatively younger than his predecessors’ appointments.<sup>58</sup> Boasting of their youth, the Trump administration claims that his judges combined will serve for more than 2,600 years.<sup>59</sup>

Trump’s picks have also been overwhelmingly white men. He has appointed the least racially diverse and least qualified group of federal judges of any president in the last few decades, further perpetuating the existing inadequate diversity among federal judges.<sup>60</sup> Only 20% of all sitting judges in the lower federal courts (District Courts and US Courts of Appeals) are people of color, and only 27% are women. Women of color are particularly severely underrepresented. They make up only 7% of sitting judges in lower federal courts. Less than 1% of sitting judges identify openly as LGBTQ.<sup>61</sup>

Thus, cases impacting people of color, women, LGBTQ people, and others—as many do—are unlikely to be heard by judges from those communities. Because judges are influenced by their life experiences, perspectives, and political and social beliefs, they may have a hard time understanding the experiences and concerns of groups of people whose identities and life experiences are outside their own.<sup>62</sup>

The US Courts of Appeals hears tens of thousands of cases every year, and US District Courts hear hundreds of thousands.<sup>63</sup> In fact, nearly all cases end at the district or circuit court level. **These federal judges could potentially hold their positions for decades and will have a major impact on US society, including potentially expanding the power of police, prosecutors, and immigration authorities; restricting the rights of people of color, LGBTQ people, disabled people, immigrants, and others; restricting access to abortion; expanding the power of corporations; and severely harming voting rights.**

# Highlights From This Term

The current Supreme Court term is packed with significant cases that could have wide reaching implications. The following are brief descriptions of four of the cases that the Supreme Court has heard or will hear this term. The appendix to this brief includes 16 other case descriptions.

## IMMIGRATION

***Department of Homeland Security v. Regents of the University of California* (no. 18-587), *Trump v. NAACP* (no. 18-588), and *McAleenan v. Vidal* (no. 18-589)**

In 2017, the Trump administration announced that it would end the Deferred Action for Childhood Arrivals (DACA) program. Three nationwide injunctions halted the termination of the program, which have allowed people who previously had DACA to renew it. In these consolidated cases, the Supreme Court will determine, first, whether courts can review Trump's decision to end DACA, and, if so, whether the decision to end the program was legal.<sup>64</sup>



While the decision in this case will have an enormous impact on the nearly 800,000 people who have obtained protections under DACA, the decision actually hinges on tiny legal and administrative distinctions. At issue is not whether Trump can end DACA, because there is no question that he can, but whether he did so properly.<sup>65</sup> The decision may come down to whether a pair of memos explaining the decision were adequate.<sup>66</sup> In other words, does the President have to fully and truthfully justify his actions, especially for a decision that, as Justice Sotomayor said during oral arguments, is not about the law but about "our choice to destroy lives"?<sup>67</sup>

If the Court rules against the Trump administration, he could still end DACA by releasing a memo that adequately explains the decision. In the worst case scenario, the Court could declare DACA illegal, which would bar future presidents from reintroducing the program.<sup>68</sup>

This case will be decided by a court that has issued a string of victories to the Trump administration on his anti-immigrant policies in the last few years, including upholding Trump's Muslim travel ban,<sup>69</sup> allowing the administration to begin using military money to build Trump's border wall,<sup>70</sup> allowing immigration authorities to detain immigrants without bond hearings based on convictions from decades ago,<sup>71</sup> and allowing the indefinite detention of immigrants.<sup>72</sup> Many of these decisions have been 5-4 votes along ideological lines.<sup>73</sup> However, the Court has also handed Trump a few defeats, such as blocking a citizenship question from being added to the 2020 Census.<sup>74</sup>

Immigration is this term's key issue, with numerous immigration cases on the docket, in addition to the DACA case. The cases this term will help shape how far Trump can go with his anti-immigrant policies, especially his attempts to expand the deportation regime.

On June 18, the Court ruled that the Trump administration's decision to end DACA was "arbitrary and capricious" and, thus, improperly terminated the program. This decision means that DACA will remain in place both for existing recipients and to accept new applications (which it could not under the nationwide injunctions). However, the Trump administration could still end the program at any time as long as they provide adequate justification.<sup>75</sup>

## EMPLOYMENT DISCRIMINATION AGAINST LGBTQ PEOPLE

***R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* (no. 18-107), *Bostock v. Clayton County, Georgia* (no. 17-1618), and *Altitude Express Inc. v. Zarda* (no. 17-123)**



These cases ask the Supreme Court to decide whether Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination “because of sex,” covers LGBT employees who have been discriminated against because of their sexual orientation or gender identity.

Aimee Stephens, who was a transgender woman, was fired from her job at a funeral home after she told the owner, who is a devout Christian, that she is a woman and wanted to wear women’s clothing to work. The owner claimed that allowing her to wear women’s clothing violated the funeral home’s dress code and “God’s commands,” and he fired her.<sup>76</sup> Gerald Bostock, who is gay, was fired from his job as a child welfare service coordinator in Clayton County, Georgia, because, according to the county, he mismanaged public money. Bostock claims that this was a false accusation and that he was actually fired because he is gay. Donald Zarda was fired from his job as a sky diving instructor because he was gay. All three separately sued their former employers, arguing that they were discriminated against because of their gender identity or sexual orientation.<sup>77</sup>

Approximately 42% of LGBTQ people live in states that do not prohibit employment discrimination based on sexual orientation or gender identity. Another 2% live in a state that does not prohibit employment discrimination based on gender identity (but does cover sexual orientation).<sup>78</sup> LGBTQ workers in these states rely exclusively on the federal Civil Rights Act to protect them.

Under the Obama administration, the federal Equal Employment Opportunity Commission (EEOC) began to interpret Title VII’s prohibition on employment discrimination based on sex as barring discrimination based on sexual orientation and gender identity.<sup>79</sup> In fact, the EEOC originally filed the suit against the funeral home on behalf of Aimee Stephens. However, under the Trump administration, the Department of Justice began to argue the opposite,<sup>80</sup> and the EEOC filed a brief with the Supreme Court for Stephens’ case that argues that discrimination based on gender identity is not covered by Title VII—the opposite of their argument at the lower court level.<sup>81</sup> The EEOC and the Trump administration also sided with the employers in Bostock and Zarda’s cases, arguing that Title VII does not prohibit discrimination based on sexual orientation.<sup>82</sup>

A Supreme Court ruling in favor of the employers in these cases, and thus an interpretation of Title VII as not barring discrimination based on sexual orientation and gender identity, would strip millions of LGBTQ people of protections against employment discrimination.

On June 15, 2020, the Court handed down its ruling in favor of Stevens, Bostock, and Zarda. The Court found that Title VII’s ban on sex discrimination protects LGBT employees because “sex plays a necessary and undistinguishable role” in discrimination based on sexual orientation or gender identity.<sup>83</sup>



## REPRODUCTIVE RIGHTS

### ***June Medical Services LLC v. Russo* (no. 18-1323) and *Russo v. June Medical Services LLC* (no. 18-1460)**

The Court will decide whether a Louisiana law, the Unsafe Abortion Protection Act, is unconstitutional. The law requires doctors who perform abortions to have admitting privileges to a hospital within thirty miles of where the abortion is performed.<sup>84</sup> If this law went into effect, it is likely that there would be only one doctor in the entire state who could perform abortions in the early stages of pregnancy and no doctors who could perform abortions between 17 and 21 weeks of pregnancy.<sup>85</sup>

Advocates of the law argue that it will make abortion safer for a pregnant person. However, there is no evidence that this is accurate. Medical experts oppose such requirements because they are medically unnecessary (abortion is a very safe procedure) and burdensome (it can be extremely difficult for an abortion provider to be granted admitting privileges).<sup>86</sup> In fact, what counts as legitimate evidence in this type of case is also at stake. Courts have recently upheld similar laws by finding that anti-abortion claims about the health of the pregnant person and the fetus, which are often not based on evidence, are equal to medical expertise.<sup>87</sup>

This law is part of a recent wave of anti-abortion laws, often referred to as TRAP (targeted regulation of abortion providers) laws. A current strategy of anti-abortion advocates, TRAP laws often aim both to make abortion extremely difficult, if not impossible, to access and to set up a case for the Supreme Court to overturn *Roe v. Wade*.<sup>88</sup> These laws tend to be especially burdensome on low-income women of color.<sup>89</sup>

In 2016, the Court struck down a substantively identical Texas law (*Whole Women's Health v. Hellerstedt*). If they rule that the Louisiana law is constitutional, they would have to overturn the precedent they set in *Whole Women's Health* just four years ago.<sup>90</sup> It is extremely rare for the Court to overturn a precedent so quickly, and thus it is concerning that they would even agree to hear this case. Since 2016, Trump has appointed two new conservative justices (Gorsuch and Kavanaugh), shifting the ideological balance of the Court further right.

The Trump administration argued in support of Louisiana.<sup>91</sup>



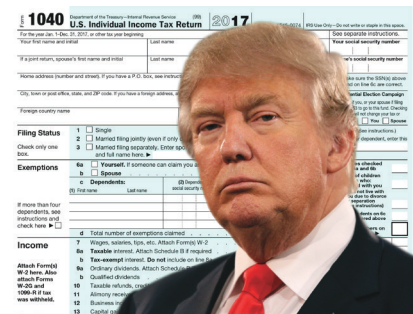
## TRUMP'S TAX RETURNS

***Trump v. Vance* (no. 19-635), *Trump v. Mazars USA, LLP* (no. 19-715), and *Trump v. Deutsche Bank AG* (no. 19-760)**

Since the 2016 presidential campaign, Trump has refused to release copies of his tax returns. These three cases, which were argued together, are from three separate investigations that are seeking financial information from Trump. Two of the cases involve separate investigations by House oversight, financial services, and intelligence committees and the third case involves investigations by the New York District Attorney's office. All seek years of Trump and his businesses' financial records as part of investigations into alleged illegal activities and/or ethics violations.<sup>92</sup>

Trump claims that Congress and the New York Attorney General do not have the power to issue these subpoenas for his financial records because the President cannot be indicted or prosecuted while in office, and, thus, he is immune from all criminal proceedings and investigations as well.<sup>93</sup>

If the Court rules against Trump, it is likely that his tax returns will be released because the subpoenas being challenged in these cases were served to Trump's accountants or bankers, not Trump himself, and these firms have said that they will comply with the Court's ruling.<sup>94</sup> However, the potential significance of the Court's decision reaches much further than whether or not Trump will be forced to release his tax returns. A ruling in Trump's favor would harm democratic accountability and transparency, greatly expand presidential immunity and executive power, and curtail congressional oversight authority of the President.<sup>95</sup>



### ***Citizens United v. Federal Election Commission* (2010)**

In a 5-4 vote along ideological lines, the Court ruled that corporations had a First Amendment right to independent political spending as protected “speech,” striking down legal restrictions on independent expenditures by corporations, unions, and other outside groups.<sup>96</sup> The result of this case has been a massive increase in political spending from wealthy corporations, people, and groups as well as the creation of super PACs—which allow unlimited contributions and can spend unlimited money to influence elections, just not to contribute directly to politicians. There has also been a rise of dark money groups that spend money in elections without disclosing their donors. These changes have allowed wealthy people and corporations with already outsized influence to have an even greater impact on elections and influence over elected officials.<sup>97</sup>

# A Call to Action

Countering the overly partisan Court and creating a new Supreme Court is possible, but it requires us to organize to win judicial reform and to put pressure on elected officials to nominate and confirm judges who both reflect the broad diversity of US society and will defend civil rights, our democracy, and the humanity of all people.

These reforms could include:

**INSTITUTING TERM LIMITS.** Uniform term limits would keep justices from serving for decades and provide checks and balances to the system.

**ESTABLISHING A CODE OF ETHICS.** Supreme Court justices are not bound by any code of ethics. Establishing one will provide a much needed mechanism for transparency and accountability and prevent abuses of power.

**IMPEACHMENT.** Congress should also use its existing power to impeach justices who have engaged in misconduct.

**ROTATING JUDGES.** Instead of instituting term limits, justices could be rotated off the Supreme Court after a set number of years and onto lower federal courts.

**EXPANDING THE NUMBER OF SEATS ON THE SUPREME COURT.** The US Constitution does not mandate how many justices must make up the Court. The number of justices changed a number of times until reaching the current nine. Adding seats could restore balance to a Court that has become overly partisan.

**NOMINATING PROGRESSIVE JUSTICES AND JUDGES TO FEDERAL COURTS.**

For years, both Republican and Democratic Presidents have nominated judges who were corporate lawyers or prosecutors. We need more judges with backgrounds as public defenders, public interest lawyers, and progressive legal scholars.

If we want to see change, we need to organize to both counter the rightwing court grab and to create a new Court. We do not need a “return to normal.” The Supreme Court’s “normal” has been to legitimize white supremacy and other systems of oppression. Instead, we are calling for a transformed Court. We need a Court that protects democracy, social justice, equity, and the dignity and humanity of all people.



# Appendix

What follows are descriptions of 16 additional cases on the Supreme Court docket this term. These descriptions include brief summaries of any decisions the Court released through May 18, 2020.

## IMMIGRATION

### ***Barton v. Barr* (no. 18-725)**

*Barton v. Barr* is a case about how to interpret language in immigration law determining which legal permanent residents (also known as green card holders) who have certain criminal convictions are eligible to apply for relief from deportation and keep their legal permanent residency. Immigration law allows a person facing deportation to seek this type of relief from deportation if they are a lawful permanent resident and have resided in the US continuously for seven years after being admitted in any legal status. However, if that person is convicted of certain crimes while in the US, the clock on the seven years of residency stops. This is called “the stop-time rule” and is the provision of immigration law that the justices must interpret to determine the fate of Andre Martello Barton and potentially thousands of other immigrants.<sup>98</sup>

Barton, a 41 year old father of four, is a legal permanent resident of the US who immigrated from Jamaica in 1989 and was convicted of felonies just before he had been in the US for seven years. Those convictions do not trigger deportation, but they would make him inadmissible (i.e. not eligible to be admitted into the US). Immigration law lays out different rules for which convictions make someone deportable or inadmissible. The justices must determine whether crimes that make an immigrant inadmissible but not deportable would trigger the time-stop rule for a legal permanent resident (i.e. someone who had already been admitted into the US). Barton’s lawyers say that the rules for inadmissibility should not apply to him since he was already admitted; the government says they should. At stake in this complicated minutiae of immigration law is not only Barton’s fate—whether or not he will be given the opportunity to argue against his deportation in front of an immigration judge—but potentially the fate of thousands of other immigrants who are in a similar situation as Barton. Ruling against Barton would make it easier to deport immigrants who have been convicted of certain crimes because the rules for inadmissibility are stricter than for deportation.<sup>99</sup>

On April 23, the Court ruled against Barton in a 5-4 decision along ideological lines. The Court found that an immigrant can become inadmissible at any time if they commit certain crimes, regardless of whether or not they had been lawfully admitted into the US. Thus, the Court both takes away Barton’s best means of fighting his deportation through immigration law and also limits which immigrants are eligible to get relief from deportation. To explain its ruling, the majority opinion, written by Justice Kavanaugh, focused, in part, on detailing Barton’s criminal history, thus mimicking Trump’s anti-immigrant rhetoric that frames immigrants as dangerous. In contrast, the dissenting opinion, written by Justice Sotomayor, describes Barton’s support of his family, employment history, and achievements in education.<sup>100</sup>

### ***Pereida v. Barr* (no. 19-438)**

Similar to *Barton v. Barr*, this case focuses on how to interpret a law barring immigrants with certain convictions to apply for relief from deportation.

The Department of Homeland Security initiated deportation proceedings for Clemente Avelino Pereida, an immigrant from Mexico who entered the US without documentation about 25 years ago. Citing his criminal conviction for a misdemeanor, an immigration judge rejected Pereida's application to stop his deportation because he could not prove that his conviction was not a crime that barred him from relief from deportation under immigration law. Thus, at issue for the Supreme Court is how to apply a law that bars immigrants with certain convictions from applying for relief from deportation when it is unclear if the immigrant's conviction is a crime included in that law.<sup>101</sup>

### ***U.S. v. Sineneng-Smith* (no. 19-67)**

This case focuses on a part of the Immigration and Nationality Act that criminalizes "encourag[ing] or induc[ing]" an undocumented person to enter or reside in the US.<sup>102</sup> The question the Court must first answer is how narrowly or broadly to interpret this law.

This law was challenged by a woman who ran an immigration consulting firm in the 1990s and 2000s that, in part, helped undocumented people apply for lawful permanent residency under a federal program. After that program expired, she continued to offer clients services under it even though she knew it would not lead to her clients obtaining lawful status. She was eventually convicted of encouraging or inducing unauthorized migrants to stay in the US (the law in question) and of mail fraud. She later appealed her conviction, arguing that the former law was unconstitutional because it violated the First Amendment's freedom of speech.<sup>103</sup>

The biggest danger of this case is that under certain interpretations of the law it could criminalize immigrant rights advocacy, social service provision to undocumented immigrants, legal services for undocumented immigrants, the creation of sanctuary cities and other governmental and nongovernmental policies supporting undocumented immigrants, and even hosting "know your rights" trainings for undocumented immigrants. All of which could be considered encouraging or inducing undocumented people to enter or stay in the US.<sup>104</sup> This is especially concerning as the Trump administration has repeatedly attacked immigrants and advocates. The administration argued that the law is constitutional. While the Department of Justice argued that the law should be narrowly interpreted and thus not applicable to immigration advocacy,<sup>105</sup> it is not beholden to that interpretation.

On May 7, the Court issued an opinion that focused on procedural issues at the lower court level without addressing the substance of the law in question. The court sent the case back to the 9th Circuit for reconsideration.<sup>106</sup>

### ***Nasrallah v. Barr* (no. 18-1432)**

After pleading guilty to two felony charges and beginning his sentence, an immigration judge ordered the deportation of Nidal Khalid Nasrallah, a Lebanese lawful permanent resident. However, the judge also ordered his deportation order not be executed because he established a high likelihood of being tortured if he returned to Lebanon. This type of immigration relief is referred to as deferral of removal under the Convention Against Torture, an international treaty that prohibits governments from deporting a person who is likely to be tortured, regardless of any criminal record. Both Nasrallah and the government appealed this decision to the Board of Immigration Appeals. Nasrallah argued he shouldn't have been ordered deported based on his criminal convictions, while the government argued the immigration judge shouldn't have ordered his deportation not be executed because of likelihood of torture in Lebanon.<sup>107</sup>

The Board of Immigration Appeals sided with the government, saying the deportation order should be executed. Nasrallah appealed that decision to the US Court of Appeals. This put Nasrallah in a strange

intersection in immigration law, which both strips federal courts of jurisdiction over questions of fact (i.e. what happened in the case, instead of how the law applies to those facts) in final orders of removal and also allows federal courts to review any claim under the Convention Against Torture.<sup>108</sup>

The central question that the Court must decide is whether or not federal courts are barred from reviewing Nasrallah's claim that he will be tortured. Like many of the other immigration cases under Supreme Court review, this case involves tiny, complicated aspects of immigration law that have literal life or death consequences for potentially thousands of people. As a brief to the Court from legal service providers argued, it is vital to have further checks on the immigration court system, which is designed to expedite and which is "gravely overburdened" by "crushing workloads and onerous case-completion deadlines."<sup>109</sup>

The Trump administration argued that the federal courts are barred from reviewing Nasrallah's claim and others like it.<sup>110</sup>

### ***Department of Homeland Security v. Thuraissigiam (no. 19-161)***

Vijayakumar Thuraissigiam, who is Tamil, an ethnic minority in Sri Lanka that has been subject to well-documented human rights violations by the government, fled his home in Sri Lanka for the US. After entering the US over the Mexican border, he was taken into custody by Customs and Border Protection and subjected to an expedited removal process. Because Thuraissigiam sought asylum, he met with an asylum officer and described his experience in Sri Lanka, including being kidnapped and severely beaten. The asylum officer determined that he did not have a "significant possibility" of establishing an asylum claim because he had not identified the names or motives of his attackers and, thus, could be deported. Thuraissigiam asked for a review of the denial. In accordance with the expedited process, an immigration judge quickly reviewed his case—without an attorney or evidence—and affirmed the officer's decision. Thuraissigiam then filed an appeal in federal court, claiming multiple problems with the process, such as the interpreter not accurately communicating questions and answers.<sup>111</sup>

The expedited removal process is a quick, bare-bones procedure with few safeguards or oversight mechanisms for immigrants, such as access to an attorney or a meaningful appeals process. It applies to any immigrant that is arrested within 100 miles of the border and who cannot prove they have lived in the US for more than two weeks. Under this process, an immigration official can issue a removal order without a hearing, witnesses, or evidence. If the immigrant requests asylum, an asylum officer must determine that there is a "significant possibility" that they will be granted asylum at a hearing. Immigration law also bars federal courts from reviewing most aspects of this process.<sup>112</sup>

The question before the Supreme Court in this case is whether a person seeking asylum may challenge mistakes made during the expedited removal process in federal court.<sup>113</sup> In other words, can immigration officials make what might be life and death decisions with almost no oversight?

This case has significant implications for migrants seeking asylum and oversight of immigration enforcement and asylum decisions. Since before Trump assumed office, most deportations were done through the expedited removal process.<sup>114</sup> Trump has ordered that expedited removals be used as a central tool in his deportation policy and has attempted to expand the scope of the program, including permitting ICE to use the process anywhere in the US and requiring detained people to prove they had been living in the US for more than two years, instead of two weeks.<sup>115</sup>

## ENVIRONMENT

### ***County of Maui, Hawaii v. Hawaii Wildlife Fund* (no. 18-26)**

This case centers on how to interpret a specific regulatory power of the Clean Water Act. The County of Maui runs a wastewater treatment plant, which every day adds millions of gallons of sewage to underground wells, then runs into the groundwater, and finally travels to the Pacific Ocean. According to the Clean Water Act, a facility needs a permit if it discharges any pollutant into “navigable waters, from any point source.”<sup>116</sup> Despite the fact that the plant has run for decades and has caused pollution in the Pacific Ocean (i.e. navigable waters) that is linked to algae blooms that kill coral reefs and damage the marine ecosystem,<sup>117</sup> it had never had a permit. At question in front of the Supreme Court is the meaning of “point source,” and specifically the legal relevance of the sewage’s passage through the groundwater.

Notably, the federal government initially stated that a permit is required and thus the county acted illegally, but under the Trump administration, it sided with the county to argue that a permit is not required and the Environmental Protection Agency released a statement supporting this position, which reversed four decades of guidance.<sup>118</sup> Numerous energy, oil, and gas companies, including Energy Transfer Partners, the company behind the Dakota Access Pipeline, have submitted briefs to the Court supporting the county.

At stake is the strength of the Clean Water Act, which is vital to keeping water throughout the US clean and safe. Environmental groups argue that a ruling in the county’s favor could open “a massive loophole” in the law to allow companies to avoid regulation.<sup>119</sup>

On April 23, the Court announced its decision in the case, siding with environmental groups that the County needed a permit for the facility and that a pollutant’s travel through groundwater to navigable waters did not negate permit requirement under the Clean Water Act, as the Trump administration and the county argued.<sup>120</sup>

### ***Atlantic Richfield Co. v. Christian* (no. 17-1498)**

For nearly a century, the Anaconda Smelter facility, which refined copper, emitted tons of arsenic, lead, and other pollutants into a large area of southwestern Montana, contaminating soil, groundwater, and surface water. After the refinery was shut down in 1980, the EPA designated the area as a Superfund site—an area so contaminated with pollution that it requires long-term clean up—and created a plan with the owner, Atlantic Richfield Co (Arco), which is a subsidiary of BP, to clean up the area. Arco spent nearly \$500 million to clean up the area in accordance with an EPA plan. The area remains the largest Superfund complex in the US. In 2008, residents of the small towns in the area whose land was contaminated by the pollution sued Arco, arguing that the company should restore their land to its original condition.<sup>121</sup>

The case in front of the Supreme Court represents decades of legal battles by residents severely affected by the toxic pollution. One resident, who has been a leader in the movement that led to the lawsuit, estimates that about a dozen of the nearly 100 residents who were part of the suit have died since it started. He told *The Washington Post*, “We only have one lifetime, and the corporations have forever. We just want our yard to be clean and healthy for our kids.”<sup>122</sup>

The question the Supreme Court will address is if the residents can even state a legal claim to get Arco to further clean up their land. The Montana Supreme Court says they can, finding that they had a claim under the state constitution which guarantees a right to a “clean and healthful environment.”<sup>123</sup> Arco argues that this claim conflicts with federal law and the EPA plan, which they followed, and, thus, the residents have no legal claim.



The Trump administration argued on Arco's side.<sup>124</sup>

On April 20, the Court announced its decision in this case. Siding with Arco, the Court ruled that the residents whose land had been polluted needed approval from the EPA before taking any action against Arco to have their land further cleaned up.<sup>125</sup> While siding with business interests in this case, the ruling was fairly narrow in scope and explicitly argued that the ruling did not mean that Arco could not be held responsible for additional clean up and liability either through EPA approval or under state law.<sup>126</sup>

### ***U.S. Forest Service v. Cowpasture River Preservation Association* (no. 18-1584) and *Atlantic Coast Pipeline LLC v. Cowpasture River Preservation Association* (no. 18-1587)**

At stake in these cases is whether the Atlantic Coast Pipeline can be constructed under part of the Appalachian Trail. A joint venture of Dominion Energy and Duke Energy, two of the largest energy companies in the US, who have ties to the climate denial movement,<sup>127</sup> the Atlantic Coast Pipeline is a \$8 billion, 600-mile pipeline intended to carry fracked natural gas from West Virginia to the coast of Virginia and North Carolina. The Court must decide who has jurisdiction over the federally-owned land of the Appalachian Trail: either the Forest Service, which in 2017 approved a permit for the construction, or the National Park Service, whose ownership would mean that the pipeline could not be constructed under the Trail.<sup>128</sup>

If the Court rules that the Forest Service has jurisdiction, thus allowing the pipeline to be built, it will have devastating environmental impacts on the land and waterways it traverses. It could also set a precedent allowing similar projects on other protected federal land.<sup>129</sup> There are also serious health and safety concerns for those living near the path of the pipeline, which are disproportionately low-income communities and/or communities of color, including many Native Americans.<sup>130</sup> If the Court rules that the National Park Service has jurisdiction, then it will not only force the Atlantic Coast Pipeline to reroute, potentially ending the project, but keeps most of the Appalachian Trail and other federal land protected from similar projects.<sup>131</sup>

The Trump administration argued on the side of the Atlantic Coast Pipeline.<sup>132</sup>

## **THE ACA'S BIRTH CONTROL MANDATE**

### ***Trump v. Pennsylvania* (no. 19-454) and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (no. 19-431)**

The Affordable Care Act (ACA) requires health insurance to cover contraception as preventative healthcare, a provision that is often referred to as the birth control mandate. However, the law also provided an exemption to this rule for nonprofit religious employers, who objected to covering contraception. In order to get this exemption, those entities needed to file an accommodations form with the Department of Health and Human Services (HHS). In two 2014 decisions, the Supreme Court expanded this exemption to cover family-owned for-profit corporations, such as Hobby Lobby, whose owners had sincere religious objections to covering contraception, and also ruled that entities seeking an exemption did not need to file the accommodations form and instead just notify HHS.<sup>133</sup>

The Trump administration has sought to further expand the exemption, arguing that the mandate imposes a "substantial burden" on the exercise of religion.<sup>134</sup> In 2018, HHS issued new rules that significantly expanded which employers could be exempt from the mandate and also included an exemption for employers "with sincerely held moral convictions opposed to coverage of some or all contraceptive or sterilization methods."<sup>135</sup>

These rules were issued without going through the “notice and comment” period, standard practice which allows for public input on proposed regulations.<sup>136</sup>

Pennsylvania and New Jersey challenged these new rules, and a lower federal court issued an injunction preventing them from going into effect.<sup>137</sup>

The Supreme Court will determine both whether it was legitimate for HHS to bypass the notice and comment period and whether the broad scope of the rules is legal, particularly the new “moral objection” exemption, which has the potential to have much broader implications than the standard religious-based exemption. A ruling in favor of the Trump administration’s new rules could mean that 70,000 to 126,000 people lose birth control coverage, which will likely disproportionately affect poor women.<sup>138</sup>

## CONSUMER FINANCIAL PROTECTION BUREAU

### ***Seila Law LLC v. Consumer Financial Protection Bureau (no. 19-7)***

When Congress created the Consumer Financial Protection Bureau (CFPB), the federal agency that oversees consumer protection in the financial sector, in the Dodd-Frank Act as a response to the 2008 financial crisis, they outlined that the CFPB’s director would be appointed by the President and confirmed by the Senate to serve a five year term and then could only be removed for cause. In other words, a president could not fire the director without a reason. At issue before the Court is whether this restriction on the President’s ability to remove the director is constitutional.<sup>139</sup>

While this question might not seem that significant, a ruling against the CFPB could have far-reaching consequences. The Court could rule that this specific provision of the law is unconstitutional or could invalidate the entire part of Dodd-Frank that created the CFPB, which could potentially unravel the CFPB’s decisions during its nine years in existence.<sup>140</sup> Even if the decision only affects the CFPB’s leadership, it may not be able to function as an independent agency, which is critically important to its work of regulating the financial services industry, and thus be subject to the interference of the President or other politicians, who might put their own short-term interests over the long-term best interests of the economy, and allow “the partisan and electoral disputes of the day [to drive] financial and monetary policy.”<sup>141</sup> Moreover, a ruling against the CFPB could threaten other independent federal agencies that have similar leadership structures, such as the Federal Housing Finance Agency, which oversees Fannie Mae and Freddie Mac.<sup>142</sup>

## FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO

### ***U.S. v. Aurelius Investment, LLC (no. 18-1514), Aurelius Investment, LLC v. Puerto Rico (no. 18-1475), Official Committee of Debtors v. Aurelius Investment, LLC (no. 19-1496), Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC (no. 18-1334), and UTIER v. Financial Oversight and Management Board for Puerto Rico (no. 18-1521)***

In 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) in order to address Puerto Rico’s significant and unsustainable debt. Among other provisions, PROMESA created the Financial Oversight and Management Board, an unelected seven member board with broad power over Puerto Rico’s executive and legislative branches, including potentially rewriting Puerto Rican laws, in order to restructure \$ 120 billion of the island’s debt.<sup>143</sup>

At issue before the Supreme Court is the constitutionality of how the board members were appointed. The two parties challenging the constitutionality of the board member appointments—a New York-based hedge fund, which holds some of Puerto Rico’s debt, and a labor union representing employees of Puerto Rico’s electric utility—argue how the current members were appointed—by President Obama without Senate confirmation—is unconstitutional because they should have been confirmed by the Senate. Thus, they argue, all of the Board’s actions in the almost four years of its existence are also invalid.<sup>144</sup>

The case has many implications for Puerto Rico, even some beyond the Financial Oversight and Management Board. If the Court rules that the board members were appointed unconstitutionally, they could either rule that the Board’s actions so far remain valid or invalidate them. At stake most immediately are billions of dollars of debt that the Board has already restructured as well as a number of tentative deals that are worth billions more.<sup>145</sup> This could include nullifying the Board’s decision to privatize Puerto Rico’s energy utility.<sup>146</sup> A ruling against the current board appointments could also allow Aurelius and other hedge funds, private equity firms, and corporations holding Puerto Rican debt to sue Puerto Rico.

As an unincorporated territory, Puerto Rico has a colonial relationship with the US. In arguing for the constitutionality of the appointments, the Trump administration is invoking the legal infrastructure of this status, which is based on racist, colonial Supreme Court precedents (known as the Insular Cases), made in the same era as *Plessy v. Ferguson*, which upheld Jim Crow laws, and based on the racist assumption that the people of Puerto Rico and other territories, such as Guam, were racially inferior to the white leaders of the US.<sup>147</sup> The Insular Cases treat Puerto Rico not as part of the US but as “a possession.”<sup>148</sup> Thus, the decision in this case could potentially impact Puerto Rico’s legal status in relation to the US.<sup>149</sup>

Finally, because the case focuses on clarifying the status and appointments of key officials governing a territory, the decision could also jeopardize the democratic election of Puerto Rico’s governor as well as the democratically elected officials of other territories (including DC’s mayor) by requiring that they be nominated by the President and approved by the Senate.<sup>150</sup>

It is important to note that this case is not challenging the existence of the Board itself as unconstitutional, even as many Puerto Ricans oppose the Board as a form of undemocratic, colonial supervision.<sup>151</sup>

## ELECTIONS

### ***Chiafalo v. Washington* (no. 19-465) and *Colorado Department of State v. Baca* (no. 19-518)**

During the 2016 election, a number of Electoral College electors from Colorado and Washington state refused to vote for the candidate that won their state’s popular vote, in both cases Hillary Clinton. Both states sanctioned these electors—fining them, in the case of Washington, or firing them, in the case of Colorado, in accordance with both states’ “faithless elector” laws.<sup>152</sup> The Supreme Court must decide whether state laws that require electors to vote in a particular way or face sanction are unconstitutional.

Electors are members of the Electoral College who actually cast their state’s electoral votes. States have authority over how to choose their electors, and all states currently choose them in some way to reflect the popular vote. For example, most states hold elections, then the state appoints electors who are supposed to vote for whichever candidate wins the popular vote. Most states require their electors to vote in accordance with the state’s popular vote. However, the Constitution does not mandate a particular system or even that electors must reflect the popular vote.<sup>153</sup>

This case has incredibly significant implications for US democracy and elections. If the Court rules that these laws are unconstitutional, they will allow electors to vote any way they want regardless of what voters in their states say, essentially putting “the outcome of a presidential election into the hands of a few anonymous individuals.”<sup>154</sup> “Unbinding” electors from a state’s popular vote would dramatically change the way we elect the President, creating legal loopholes that would allow for special interests to spend unlimited amounts of money to influence electors and creating chaos in our electoral system just a few months before the 2020 election.<sup>155</sup>

## NATIVE SOVEREIGNTY

### ***McGirt v. Oklahoma* (no. 18-9526)**

Jimcy McGirt, an enrolled member of the Muscogee (Creek) Nation, was convicted by the state of Oklahoma of crimes committed within the Nation’s historic tribal boundaries (i.e. land that was promised to them by treaties between the Nation and the US in the nineteenth century).<sup>156</sup> McGirt challenged his conviction, arguing that the state did not have the authority to prosecute him, only the federal government did because he is an enrolled member of a federally recognized tribe and was on tribal land.

The Supreme Court must decide whether Oklahoma has jurisdiction to prosecute enrolled tribal members, like McGirt, who commit crimes on tribal lands. To do so, they must determine whether the Muscogee (Creek) Nation’s reservation still exists.<sup>157</sup>

Along with the other “Five Civilized Tribes” (the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation, and the Seminole Nation), the people of the Muscogee (Creek) Nation were forcibly and violently removed from their homeland in what is now southeastern US by the US government in the early nineteenth century. Known as the Trail of Tears, the US army violently marched them from the southeast to Indian Territory (what is now Oklahoma); thousands of Native people died during the march. These five tribes signed treaties with the US in the late nineteenth century that gave them approximately 19 million acres of land—3 million of which were for the Muscogee (Creek) Nation—in what is now eastern Oklahoma. Those 19 million acres constitute about 40% of Oklahoma’s land.<sup>158</sup>

Oklahoma argues that it has the authority to prosecute Muscogee Creek people like McGirt because Congress destroyed the Nation’s authority over the land around the time Oklahoma became a state in 1907.<sup>159</sup>

During the late nineteenth century, Congress placed tribes, including the Muscogee (Creek) Nation under the guardianship of the federal government and began to allot reservation land to individual Native people in units of 40 to 160 acres. Any remaining land was sold to white settlers. This racist and colonial policy allowed the US and white settlers to further erode Native American’s land. Native land holdings went from 138 million acres to 48 million acres during the Allotment Era.<sup>160</sup> In the late nineteenth and early twentieth century, Congress passed a number of laws that severely limited the recognition of the “Five Civilized Tribes” sovereignty as it created, first, the Oklahoma Territory and then the state of Oklahoma. However, it is not clear that these laws terminated the Nation’s authority over its land.<sup>161</sup>

At stake in this case is not only the Muscogee (Creek) Nation’s sovereignty over its land but also that of the other Five Civilized Tribes. If the Court rules that the Nation still has sovereignty over their land, there are implications beyond who is authorized to prosecute Native people who commit crimes on that land. For



example, a similar case argued before but not decided by the Supreme Court last term attracted briefs from the oil, gas, and energy industry arguing on the side of Oklahoma.<sup>162</sup>

## RACIAL DISCRIMINATION

### ***Comcast Corp. v. National Association of African American-Owned Media* (no. 18-1171)**

Entertainment Studios Network (ESN), a Black-owned media company, attempted to secure a contract with Comcast to carry its channels for years. After repeatedly being declined while Comcast instead began to carry many less popular, white-owned channels, ESN—along with the National Association of African American-Owned Media (NAAAM)—sued Comcast, arguing that the company racially discriminated against ESN when it declined to carry the channels it produced.<sup>163</sup>

At issue before the Supreme Court was how significant of a factor race must be in Comcast's decision, according to ESN and NAAAM's allegations, in order for a court to allow their lawsuit to move forward. Is it enough for ESN to argue that racial discrimination was a "motivating factor" in Comcast's decision? Or, must they allege that racial discrimination was the decisive reason for the decision—or that "but for" racial discrimination, Comcast would have made a different decision?

ESN and NAAAM charge that Comcast acted illegally under Section 1981, which prohibits racial discrimination in contracts. This law is a provision of the Civil Rights Act of 1866, which was one of a number of civil rights laws passed during Reconstruction, the era following the Civil War and the end of the US system of slavery, to help African Americans have equal access to and rights in the economy. The prevailing interpretation of this law was that a plaintiff must allege that racial discrimination was a motivating factor.<sup>164</sup> Comcast argued for the tougher "but for" standard (that racial discrimination was the decisive reason). The Trump administration argued on Comcast's side.<sup>165</sup>

On March 23, the Court ruled unanimously that ESN, NAAAM, and similar plaintiffs must allege that racial discrimination was the decisive motivation or cause for an injury.<sup>166</sup> This decision is a significant victory for business and makes it much more difficult for people of color experiencing racial discrimination to win a lawsuit or even make it to the discovery phase of a lawsuit when they will be able to gather more evidence. It is extremely difficult to prove that racial discrimination is the decisive cause of a decision; people rarely explicitly say that they will not enter into a contract with someone because they are Black, for example. Thus, this decision harms civil rights protections and could "prevent potentially thousands of meritorious claims from every being heard by a judge, let alone rectified."<sup>167</sup>

## CRIMINAL LEGAL SYSTEM

### ***McKinney v. Arizona* (no. 18-1109)**

At issue before the Court are a number of procedural questions regarding imposing a death sentence. Similar to the immigration cases discussed above, these complicated questions of law have literal life and death consequences.

In 1993, James McKinney was convicted by a jury then sentenced to death by a judge. During the sentencing hearing, that judge heard evidence of the chronic, horrific abuse that McKinney experienced as a child that caused him to suffer from post-traumatic stress disorder. While that judge found that abuse "beyond the

comprehension of most people,” he considered it not to be directly causally related to McKinney’s crime, and therefore, according to Arizona law, he could not consider it when determining McKinney’s sentence.<sup>168</sup> In 2015, the US Court of Appeals for the 9<sup>th</sup> Circuit threw out his death sentence, arguing that the sentencing judge should have considered the abuse he suffered as a child as mitigating evidence. The Arizona Supreme Court resentenced him in 2018, again imposing the death penalty.<sup>169</sup>

McKinney challenged this resentencing, arguing that he should have been resentenced by a jury. In 2002, the Supreme Court found Arizona’s sentencing procedures—the same procedures under which McKinney was sentenced—to be unconstitutional, determining that defendants in capital cases had the right to have a jury sentence them. However, they decided that this was not required in cases that were no longer under review. McKinney argues that his resentencing reopened his case, and, therefore, he is constitutionally guaranteed the right to be resentenced by a jury. Arizona disagreed.

In a 5-4 decision along ideological lines, the Court ruled that McKinney does not have the right to be resentenced by a jury and upheld the Arizona Supreme Court’s sentencing.<sup>170</sup> In other words, the Court allowed his death sentence to stand even though the process under which he was resentenced is considered unconstitutional by the Court. This decision makes it easier for states to impose death penalties and harder for death sentences to be challenged.

### ***Shular v. United States (no. 18-6662)***

This case focuses on how to interpret a provision of the Armed Career Criminal Act (ACCA) that imposes a 15-year mandatory minimum sentence on people convicted of gun-related crimes and who have three or more prior convictions for “violent felonies” or “serious drug offenses.”<sup>171</sup> At issue is how to interpret the law’s definition of “serious drug offense,” particularly how to determine which state laws qualify as a “serious drug offense” when the state law’s language is different than the language in the ACCA.

Eddie Lee Shular pleaded guilty to a felony firearms offense, which carries a sentence of zero to 10 years. He also had several prior drug convictions. The court that sentenced him interpreted his prior drug convictions to qualify as “serious drug offenses” under ACCA, and thus his conviction was enhanced in accordance with the ACCA. Shular challenged that interpretation, arguing that his prior offenses did not qualify. The Trump administration argued that the sentencing court’s interpretation was correct.<sup>172</sup>

On February 26, the Court ruled unanimously that Shular’s original sentencing was correct.<sup>173</sup> In doing so, they broadened the scope of the ACCA, thus allowing more people to have their sentences subject to the law’s 15-year mandatory minimum. Mandatory minimums and three strike laws like the ACCA have fueled the US system of mass incarceration that has targeted Black people and other people of color for the past few decades.<sup>174</sup> ACCA enhancements in particular have disproportionately impacted Black men.<sup>175</sup>

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