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OT 2022 SCOTUS Round Up

Blaine H. Evanson
Lauren M. Blas
Elizabeth A. Dooley

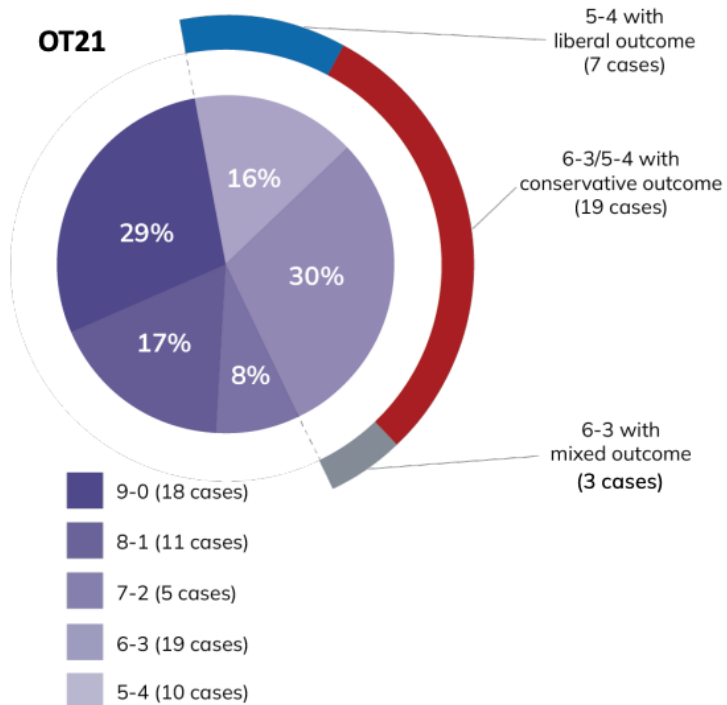
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October 2021 Term:
Statistics and Overview

Breakdown of the Vote

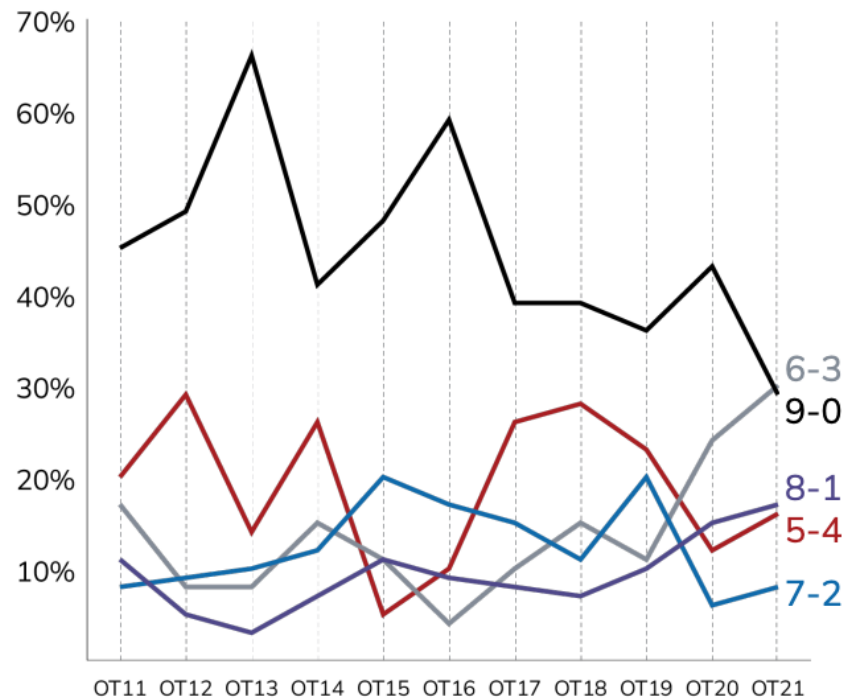
VOTING ALIGNMENTS

Frequency of different vote alignments, in OT21 and over time.



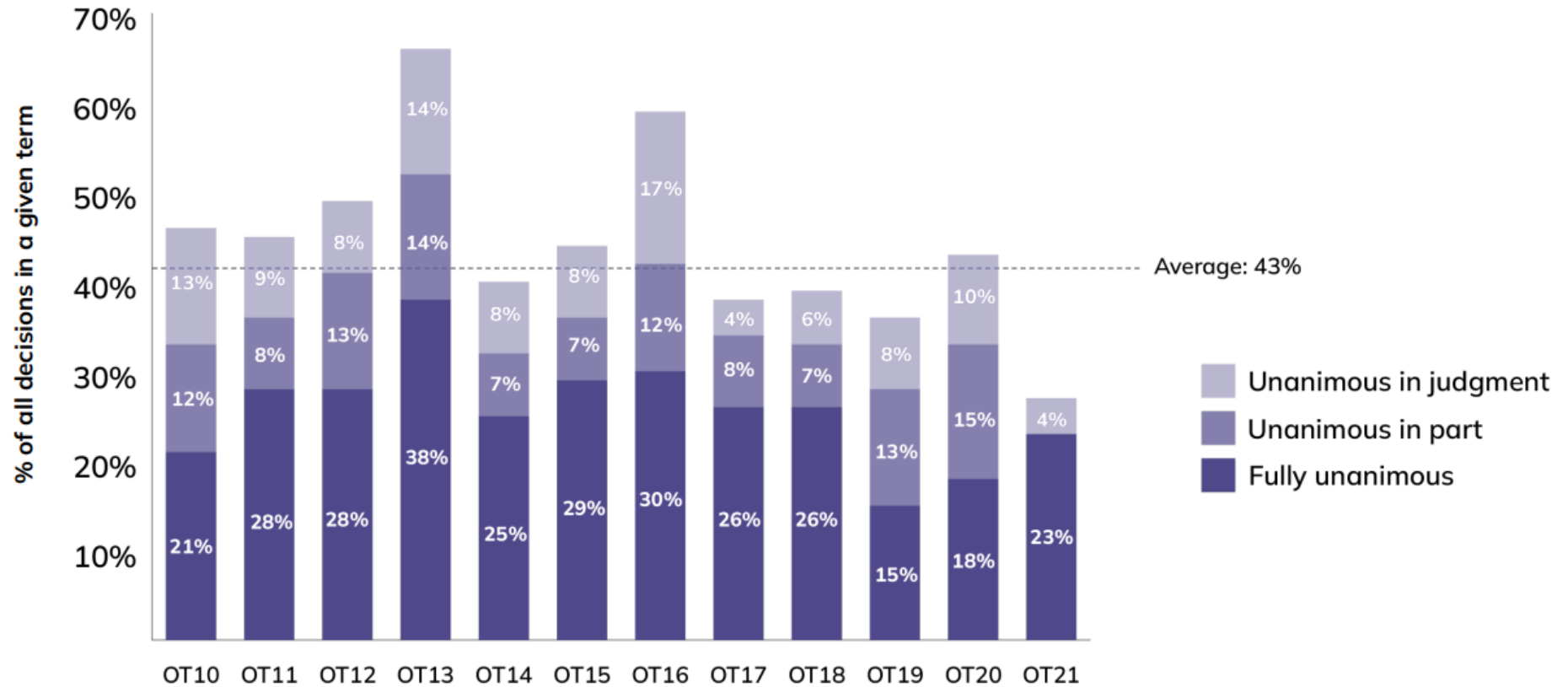
On this slide and the following slide, we assume that a recused justice would have joined the majority (thereby counting 8-0 decisions as 9-0) and exclude cases that were dismissed as improvidently granted.

OT10-OT21



Source: <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf>

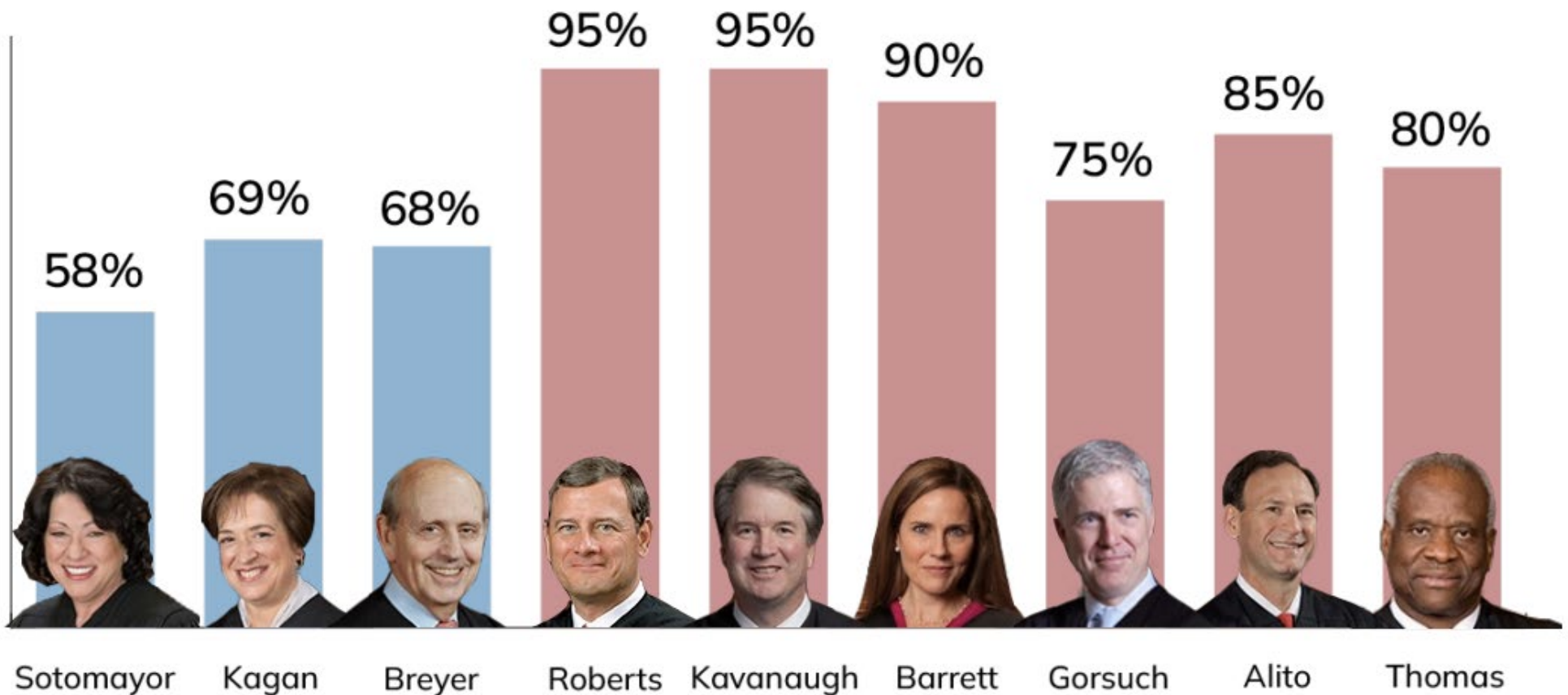
Declining Unanimity



"Unanimous in judgment" means that all justices voted for the same judgment – whether to affirm or reverse the decision below – but at least one justice did not join the opinion of the court and wrote separately.
 "Unanimous in part" means that all justices joined at least part of the court's opinion, but at least one justice wrote separately as well.
 "Fully unanimous" means that all justices joined the court's opinion in full, and none wrote separately.

Source: <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf>

Frequency in the Majority



Source: <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf>

The (Mostly *Liberal*) 5-4 Majority



Case name	Issue	Sotomayor	Kagan	Roberts	Alito	Gorsuch	Kavanaugh	Breyer	Sotomayor	Kavanaugh
Biden v. Missouri	COVID-19 vaccine mandate for health workers	✓	✓	✓	✓	✓	✓	✓	✓	✓
Ysleta del Sur Pueblo	Regulation of gambling on tribal lands	✓	✓	✓	✓	✓	✓	✓	✓	✓
Nance	Procedural vehicle for method-of-execution claim	✓	✓	✓	✓	✓	✓	✓	✓	✓
Empire Health	Medicare reimbursement dispute	✓	✓	✓	✓	✓	✓	✓	✓	✓
Concepcion	Sentencing reduction by district courts	✓	✓	✓	✓	✓	✓	✓	✓	✓
Torres	Veteran's ability to sue state for federal violation	✓	✓	✓	✓	✓	✓	✓	✓	✓
Biden v. Texas	Rescission of the Migrant Protection Protocols	✓	✓	✓	✓	✓	✓	✓	✓	✓
Patel	Discretionary relief in immigration proceedings	✓	✓	✓	✓	✓	✓	✓	✓	✓
Twyford	Transportation order for death-row prisoner	✓	✓	✓	✓	✓	✓	✓	✓	✓
Castro-Huerta	Authority to prosecute crimes on tribal lands	✓	✓	✓	✓	✓	✓	✓	✓	✓

Source: <https://www.scotusblog.com/2022/07/as-unanimity-declines-conservative-majoritys-power-runs-deeper-than-the-blockbuster-cases/>

The 6-3 Conservative Majority



Polarized cases	Issue								
NFIB v. Dept. of Labor	Vaccine-or-test policy for large workplaces								
Tsarnaev	Capital sentence of Boston Marathon bomber								
Davenport	Test for federal courts to grant habeas relief								
Cummings	Emotional-distress damages under federal laws								
Cruz	Campaign-finance limits on candidate loans								
Shinn	Ineffective-counsel claims in habeas proceedings								
Egbert	Ability to sue federal officials for money damages								
Gonzalez	Availability of classwide relief in immigration law								
Carson	Tuition assistance to religious schools								
New York Rifle	Concealed firearm licensing								
Vega	Ability to sue police for <i>Miranda</i> violations								
Dobbs	Constitutional right to abortion overturned								
Kennedy	First Amendment rights of praying football coach								
West Virginia v. EPA	Agency regulation of carbon emissions								

Source: <https://www.scotusblog.com/2022/07/as-unanimity-declines-conservative-majoritys-power-runs-deeper-than-the-blockbuster-cases/>



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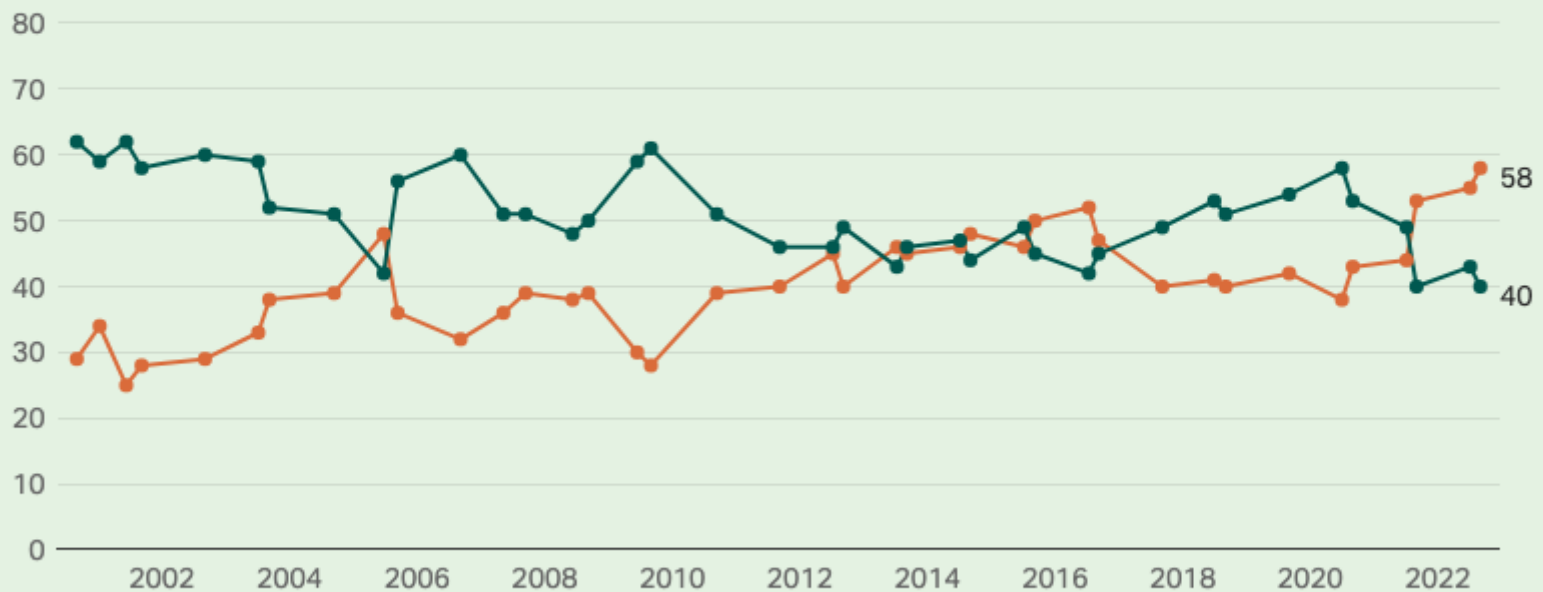
Approval Rating

Supreme Court's Job Approval

Job Approval Rating of the U.S. Supreme Court

Do you approve or disapprove of the way the Supreme Court is handling its job?

— % Approve — % Disapprove



Get the data • Download image

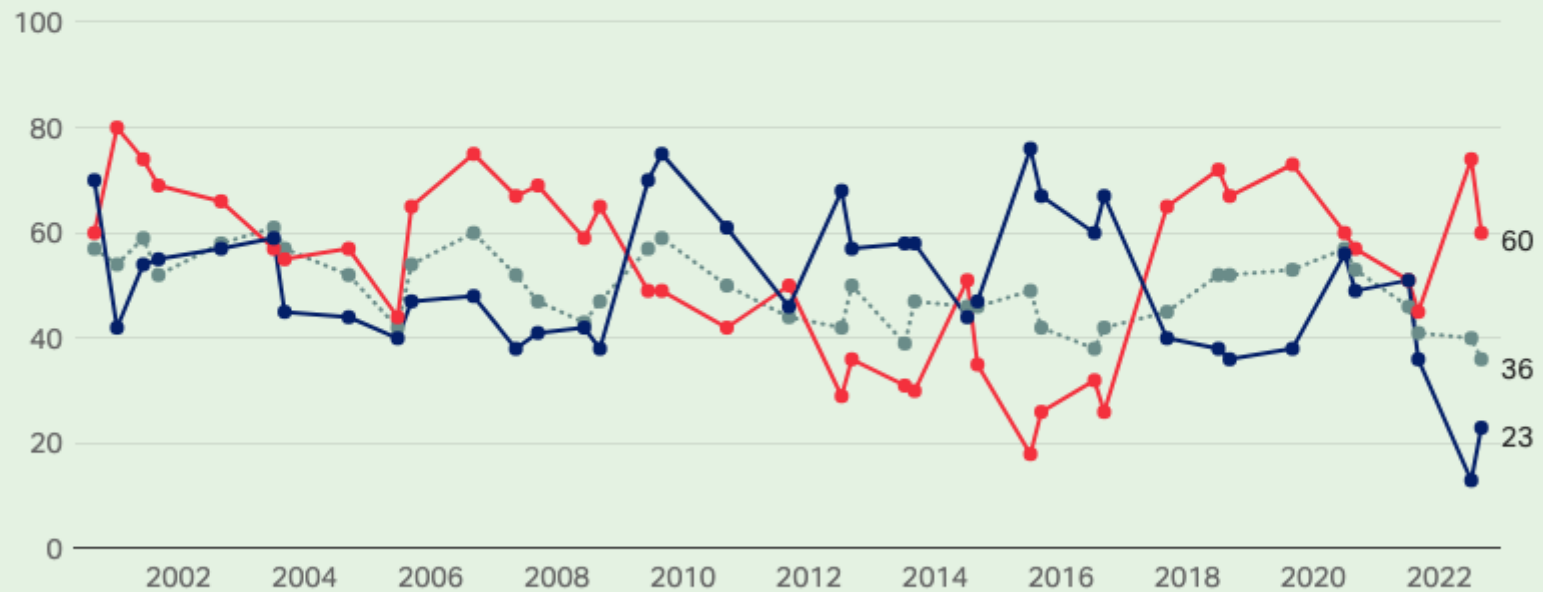
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Job Approval by Political Party

Supreme Court Job Approval, by Political Party

Figures are the percentage who approve of the job the Supreme Court is doing

— Republicans ··· Independents — Democrats



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Justice Ketanji Brown Jackson

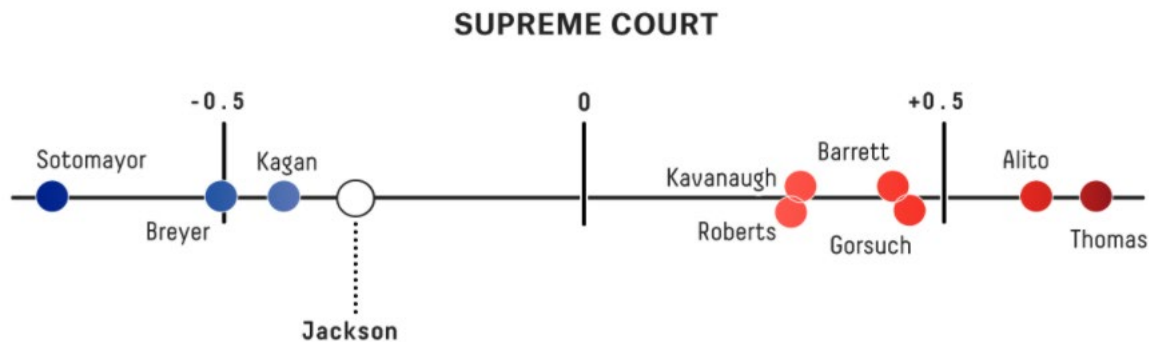
Justice Ketanji B. Jackson Joins the Court



Justice Jackson's Ideology

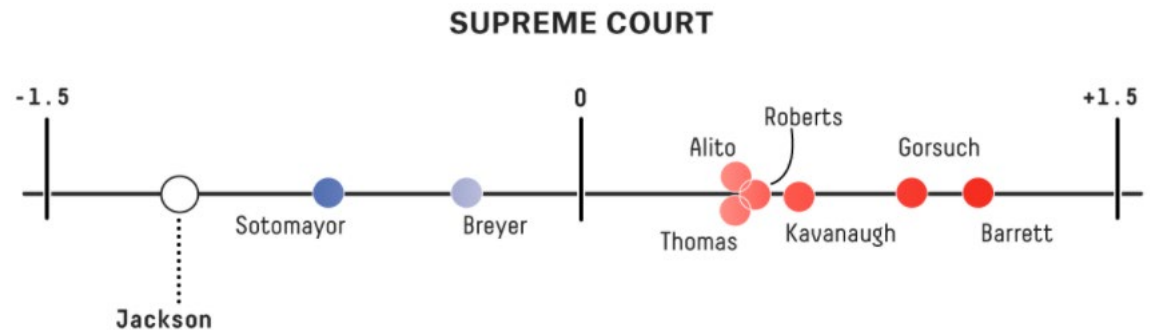
Jackson could be a moderate liberal

Judicial Common Space scores for current Supreme Court judges and judges on the Court of Appeals for the D.C. Circuit



Jackson could pull the liberal bloc to the left

Database of Ideology, Money in Politics, and Elections (DIME) scores for current Supreme Court judges and judges on the Court of Appeals for the D.C. Circuit



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2022 Term

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IP & Technology

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 21-869

Argument Held: 10.12.2022

Issue: Whether a work of art is “transformative” when it conveys a different meaning or message from its source material (as the Supreme Court, U.S. Court of Appeals for the 9th Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it “recognizably deriv[es] from” its source material (as the U.S. Court of Appeals for the 2nd Circuit has held).



Abitron Austria GmbH v. Hetronic International, Inc., 21-1043

Argument Set: 03.01.2023

Issue: Whether the U.S. Court of Appeals for the 10th Circuit erred in applying the Lanham Act, which provides civil remedies for infringement of U.S. trademarks, extraterritorially to Abitron Austria GmbH's foreign sales, including purely foreign sales that never reached the United States or confused U.S. consumers.



Amgen Inc. v. Sanofi, 21-757

Argument not yet set

Issue: (1) Whether enablement is governed by the statutory requirement that the specification teach those skilled in the art to “make and use” the claimed invention, or whether it must instead enable those skilled in the art “to reach the full scope of claimed embodiments” without undue experimentation—i.e., to cumulatively identify and make all or nearly all embodiments of the invention without substantial “time and effort.”

Jack Daniel's Properties, Inc. v. VIP Products LLC, *22-148*

Argument not yet set

Issues: (1) Whether humorous use of another's trademark as one's own on a commercial product is subject to the Lanham Act's traditional likelihood-of-confusion analysis, 15 U.S.C. § 1125(a)(1), or instead receives heightened First Amendment protection from trademark-infringement claims; and (2) whether humorous use of another's mark as one's own on a commercial product is "noncommercial" and thus bars as a matter of law a claim of dilution by tarnishment under the Trademark Dilution Revision Act, 15 U.S.C. § 1125(c)(3)(C).



Technology Cases

Gonzalez v. Google LLC, 21-1333

Argument Set: 02.21.2023

Issue: Whether Section 230(c)(1) of the Communications Decency Act immunizes interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limits the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information.

Twitter, Inc. v. Taamneh, 21-1469

Argument Set: 02.22.2023

Issue: (1) Whether a defendant that provides generic, widely available services to all its numerous users and “regularly” works to detect and prevent terrorists from using those services “knowingly” provided substantial assistance under 18 U.S.C. § 2333 merely because it allegedly could have taken more “meaningful” or “aggressive” action to prevent such use; and (2) whether a defendant whose generic, widely available services were not used in connection with the specific “act of international terrorism” that injured the plaintiff may be liable for aiding and abetting under Section 2333.

Shadow Docket – IP & Technology

Texas:

No. 21A720 - The Supreme Court sided with the technology industry and blocked a controversial Texas law that bars large social media platforms like Facebook and Twitter from removing posts based on the viewpoints they express.

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Constitutional Law &
Civil Rights

Students for Fair Admissions Inc. v. University of North Carolina; President & Fellows of Harvard College, 21-707 & 21-1199

Argument Held: 10.31.2022



Issue: (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; (2) whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity; and (3) whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.

303 Creative LLC v. Elenis, 21-476

Argument Held: 12.5.2022

Issue: Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.



National Pork Producers Council v. Ross, 21-468

Argument Held: 10.11.2022

Issue: (1) Whether allegations that a state law has dramatic economic effects largely outside of the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant commerce clause, or whether the extraterritoriality principle described in the Supreme Court's decisions is now a dead letter; and (2) whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, state a claim under *Pike v. Bruce Church, Inc.*



Shadow Docket – Constitutional Cases

New York:

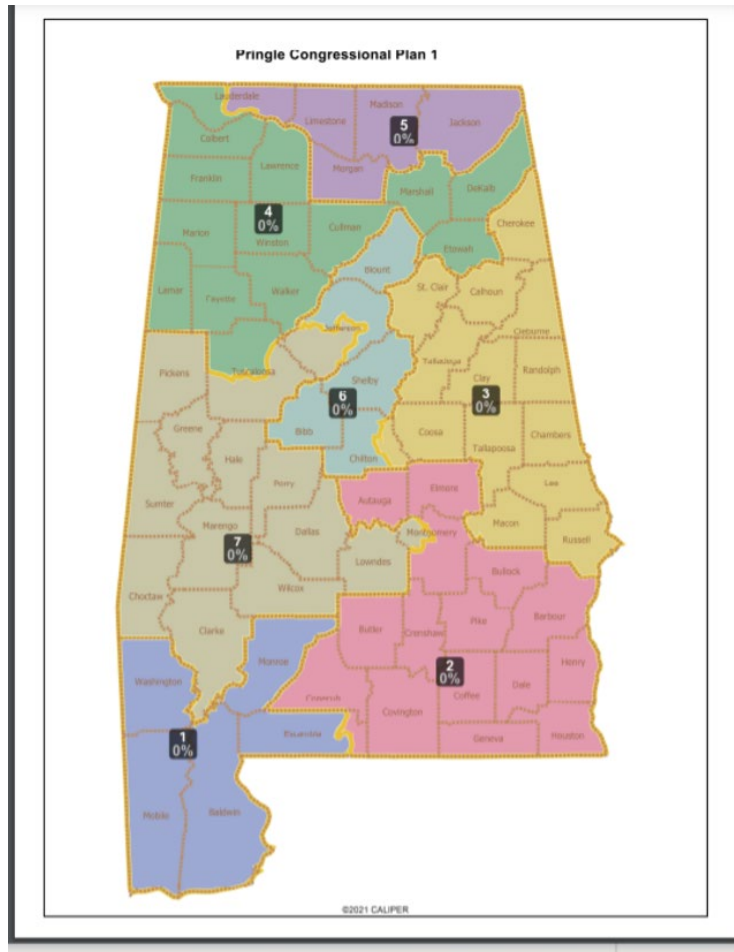
No. 22A184 - After a New York state court decision requiring a university to approve an LGBTQ group on campus, the full Supreme Court directed the university to go back to the state courts to try to obtain relief.

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Voting Rights

Merrill v. Milligan, 21-1086

Argument Held: 10.4.2022



Issue: Whether the state of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated Section 2 of the Voting Rights Act.

Moore v. Harper, 21-1271

Argument Held: 12.7.2022

Issue: Whether a state’s judicial branch may nullify the regulations governing the “Manner of holding Elections for Senators and Representatives ... prescribed ... by the Legislature thereof,” and replace them with regulations of the state courts’ own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a “fair” or “free” election.



Shadow Docket – Voting Rights Cases

Pennsylvania:

No. 21A772 – The Court allowed a Pennsylvania county to count mail-in ballots that do not comply with a state law requiring voters to write the date on the ballot's envelope. Although the case arose from a single local judicial race, it raised broader issues about how federal voting-rights protections apply when voters fail to meet state clerical requirements.

Louisiana:

No. 21A814 - A divided Court blocked a district court's order that would have required the Louisiana legislature to draw new congressional maps, including a second majority-Black district.

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Administrative Law and Business Cases

Axon Enterprise, Inc. v. Federal Trade Commission, 21-86

Argument Held: 11.7.2022

Issue: Whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the Federal Trade Commission's structure, procedures, and existence by granting the courts of appeals jurisdiction to "affirm, enforce, modify, or set aside" the commission's cease-and-desist orders.



Shadow Docket – Administrative Law Cases

Wisconsin:

No. 22A331 - Justice Amy Coney Barrett denied a Wisconsin taxpayers group's bid to block the Biden administration's student-loan forgiveness program while litigation over the program continues in a lower court. Barrett acted alone, without referring the matter to the full court or asking the government to respond.

Helix Energy Solutions Group, Inc. v. Hewitt, 21-984

Argument Held: 10.12.2022

Issue: Whether a supervisor making over \$200,000 each year is entitled to overtime pay because the standalone regulatory exemption set forth in 29 C.F.R. § 541.601 remains subject to the detailed requirements of 29 C.F.R. § 541.604 when determining whether highly compensated supervisors are exempt from the Fair Labor Standards Act's overtime-pay requirements.



Glacier Northwest, Inc. v. International Brotherhood of Teamsters, 21-1449

Argument Held: 1.10.2023



Issue: Whether the National Labor Relations Act impliedly preempts a state tort claim against a union for intentionally destroying an employer's property in the course of a labor dispute.

Recent Cert. Petitions

Coinbase, Inc. v. Bielski, 22-105



On December 9, the Court granted cert. in a case raising the issue of whether a non-frivolous appeal of the denial of a motion to compel arbitration strips the district court of jurisdiction over a case and automatically puts the district court proceedings on hold. Coinbase appeals the Ninth Circuit's denial of its motion for a stay pending appeal. Two circuits agree with the Ninth Circuit, while six disagree. Coinbase argues that under the Ninth Circuit's rule, "arbitration clauses can be effectively nullified for however long it takes for an appellate court to hear and decide the merits of an arbitrability appeal."

Biden v. Nebraska, 22-506 ***Dep't of Educ. v. Brown, 22-535***



On December 1, the Court granted cert. and fast-tracked a challenge by six states to the Administration's student-loan debt relief program. On December 12, the Court granted cert. in another challenge by two borrowers. The case by the six states was dismissed for lack of standing in district court, the states appealed and the Eighth Circuit blocked the program, then the Court decided to hear the case immediately. The case by the borrowers resulted in a district court ruling on the merits that the government lacked authority to adopt the plan; then, the Fifth Circuit declined to stay that ruling. U.S. SG Elizabeth Prelogar successfully requested that the Court fast-track that case to be heard alongside *Biden v. Nebraska*. The program remains on hold.

GIBSON DUNN

Blaine H. Evanson

Tel: 949.451.3805

bevanson@gibsondunn.com

Orange County

3161 Michelson Drive

Irvine, CA 92612-4412

949.451.3800



Lauren M. Blas

Tel: 213.229.7503

lblas@gibsondunn.com

Los Angeles

333 South Grand Avenue

Los Angeles, CA 90071-3197

213.229.7000



Elizabeth A. Dooley

Tel: 415.393.8342

edooley@gibsondunn.com

San Francisco

555 Mission Street, Suite 3000

San Francisco, CA 94105-0921

415.393.8200

