

**Testimony of Nan Aron**  
**President of Alliance for Justice**  
**Before the Presidential Commission on the Supreme Court of the United States**  
**July 20, 2021**

Chairs Rodriguez and Bauer, and distinguished members of the Commission, thank you for the opportunity to testify today. It is wonderful to be here with so many dear friends and champions of justice whom I have worked with over the years.

My name is Nan Aron. Over forty years ago, I founded an organization, Alliance for Justice (AFJ), that works to ensure that our nation's justice system protects core constitutional rights, unfettered access to the courts, and the evenhanded administration of justice for all Americans, not just the wealthy and the powerful. A central mission in my decades at AFJ has been to educate the American people about how the courts impact their day-to-day lives. The perspectives and lived experiences of these hundreds of millions of Americans, people who do not have law degrees, people who could not tell you what states are encompassed in a particular circuit, or people who could not debate the merits or define the meanings behind theories of jurisprudence in forums like this one, are crucially important to any real discussion of court reform.

Over the years, I have gotten to know firsthand people affected by the law and by judges who all too often twist the law to side against workers and consumers, people like Lilly Ledbetter and Jack Gross, both of whom faced blatant discrimination in the workplace but were denied justice by the Supreme Court.<sup>1</sup> I have seen a growing problem in our judiciary—a continued partisan takeover, a sharp politicization, and the development of a system that increasingly prevents the American people from governing themselves. It is a change that makes me fear for the legitimacy of the Court and the survival of the very principle of equal justice under the law.

Since the 1980's, AFJ has researched the records of judicial nominees of presidents of both parties. Working with a breadth of coalition partners, we have led opposition to judicial nominees who would undermine our rights and critical protections and have supported those that would advance our rights and the rule of law. I have witnessed many of the judges we have supported go on to greatly distinguish themselves on the federal bench, and I have watched many of the nominees we vigorously opposed become lifetime judges and go on to make decisions that have caused real pain to Americans.

This Commission has heard many witnesses speak about the Supreme Court's legitimacy and the importance of the institutional norms governing how the Court operates. Many suggest that these norms are all important, and we should not undermine them to fix the problems with the Court. In my testimony today, I hope to make two key points:

- First, the Court's legitimacy has already been tarnished—after decades of partisan takeover, it has increasingly placed itself above Congress and interfered with the people's

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<sup>1</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167 (2009).

ability to self-govern. Given this reality, it is clear that reform is in fact necessary to *restore* legitimacy to the Court.

- Second, the persistent focus on the abstract norms and traditions surrounding the Court misses the mark entirely and is quite frankly out of touch. It ignores the real-world harm that the Supreme Court in its current state is doing to people across the country. Whatever you think of the norms governing the Court, the reality is that the state of our judiciary is harmful and untenable, and reforms *must* be made.

The fact is, as many witnesses have made clear, there have been few times in our nation's history that we have witnessed an assault on our democracy and our justice system like the one we are currently living through. Unfortunately, the Supreme Court is central to that assault, and unless there are real reforms to the Court, our system of government and our core rights and legal protections will be eroded for generations.

I understand the gravity of the reforms that I am advocating for, and I do so with great reluctance, not zeal. During my 42-year tenure as President of the Alliance for Justice, conservative justices have always commanded a majority on the Supreme Court. Nevertheless, no matter how contentious a nomination fight, we have always opposed expanding the Supreme Court.

In fact, for years, people on the left, dear friends of mine, pushed to reform the Court. I pushed back. I resisted. I have dedicated my entire career to fighting for a fair and independent judiciary, and I have often made the same arguments against court expansion that are so frequently cited today. I had always believed that expanding the Court would damage the institution and further politicize the judiciary. I also feared that such an act would lead to an untenable arms race.

Nevertheless, I have come to the conclusion that reform is the only option, and I have come to this conclusion because the risks that I have feared and contemplated for so long are simply outweighed by the reality of our current crisis. What sense does it make to fear damaging an institution that is already so skewed by partisan considerations and anti-democratic tendencies that it no longer serves as the protector of the Constitution that the Framers designed it to be? What sense does it make to feign regret over further politicizing a judiciary that is simply not concerned with advancing the rule of law, but is instead interested in solidifying power for an anti-majoritarian movement through undemocratic means? What could possibly outweigh the systematic erosion of our critical rights and protections, and most serious of all, undermining our electoral system itself? I genuinely believe that these reforms are necessary, that there is no other choice if we wish to preserve our democracy and the ability of the American people, through their elected officials, to collectively address issues of public policy.

### **Republicans have Engaged in a Partisan Takeover of our Court**

To see the anti-democratic nature of the Court as it is today, look no further than its composition: since 1992, a Republican candidate for president has only won the popular vote once, yet two-thirds of the bench is composed of Republican-appointed Justices. It cannot be lost on this Commission that of this conservative majority, only one – Clarence Thomas – was appointed by a president who received a majority of the popular vote. Consider the other Justices:

- John Roberts and Samuel Alito, who were appointed by George W. Bush, a president who had lost the popular vote and who had been handed the presidency by Republican-appointed Justices on the Supreme Court, which voted to shut down a recount in a state governed by George Bush’s own brother.<sup>2</sup>
- Neil Gorsuch, who sits on the Court because Senate Republicans refused to even consider President Barack Obama’s nomination of Merrick Garland, an eminently qualified jurist to whom they had no substantive objection. Senate Republicans instead chose to defy their Constitutional duty and hold a Supreme Court seat open for over a year. Because of this obstruction, the newly-elected President Trump—another Republican president who lost the popular vote—was able to select Gorsuch from a Federalist Society list, and subsequently have Senate Republicans change the Senate’s rules to confirm him.<sup>3</sup>
- Brett Kavanaugh spent much of his career as a hyper-partisan operative prior to joining the court, working on *Bush v. Gore* and working with Ken Starr to investigate President Clinton and dignify unhinged conspiracy theories alleging the murder of Vince Foster. Nevertheless, he was confirmed after Senate Republicans hid relevant documents from other senators and from the public and hamstrung the FBI’s ability to properly investigate credible allegations of sexual assault.<sup>4</sup>
- And Amy Coney Barrett, whom Senate Republicans, breaking from their own principle applied to Merrick Garland in 2016, rushed to confirm on the eve of a presidential election.

In addition to the circumstances of their confirmations, these Justices are also openly partisan figures. After the confirmations of Gorsuch and Kavanaugh, each traveled to Kentucky to hold campaign-style “victory lap” events with Mitch McConnell; Kavanaugh’s trip took place just months before McConnell’s reelection and at the height of the pandemic.<sup>5</sup> Gorsuch spoke at the Trump Hotel (at the same time litigation was ongoing regarding emoluments) and dined with Republican leaders (but not Democratic leaders) to discuss “important issues facing our country.”<sup>6</sup> Or look to Amy Coney Barrett attending a White House rally days before the 2020 elections.<sup>7</sup> Or look to Justices’ frequent partisan speeches at Federalist Society events, including an incendiary speech just last year where Justice Alito decried COVID-19 regulations, claimed

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<sup>2</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>3</sup> Susan Davis, *Senate Pulls ‘Nuclear’ Trigger to Ease Gorsuch Nomination*, NPR (Apr. 6, 2017),

<https://www.npr.org/2017/04/06/522847700/senate-pulls-nuclear-trigger-to-ease-gorsuch-confirmation>.

<sup>4</sup> Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, THE N.Y. TIMES (Oct. 6, 2018),

<https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html>.

<sup>5</sup> Associated Press, *Supreme Court’s Neil Gorsuch, of Boulder County, Touts Conservative Role for Judges*, BOULDER DAILY CAMERA, (Sept. 21, 2017),

<https://www.dailycamera.com/2017/09/21/supreme-courts-neil-gorsuch-of-boulder-county-touts-conservative-role-for-judges/>;

WDRB, *Mitch McConnell, Brett Kavanaugh attend federal judge’s swearing-in ceremony in Louisville*, WDRB NEWS (MAR. 13, 2020),

[https://www.wdrb.com/news/mitch-mcconnell-brett-kavanaugh-attend-federal-judge-s-swearing-in/article\\_1611593e-657c-11ea-abbf-7b4a682a00e0.html](https://www.wdrb.com/news/mitch-mcconnell-brett-kavanaugh-attend-federal-judge-s-swearing-in/article_1611593e-657c-11ea-abbf-7b4a682a00e0.html).

<sup>6</sup> Jackie Northam, *Supreme Court Justice Neil Gorsuch Criticized for Speech at Trump’s D.C. Hotel*, NPR, (Sept. 28, 2017),

<https://www.npr.org/2017/09/28/554157407/supreme-court-justice-neil-gorsuch-criticized-for-speech-at-trumps-d-c-hotel>;

Brett Samuels, *Gorsuch has Dinner at GOP Senator’s Home*, THE HILL (Jan. 23, 2018),

<https://thehill.com/homenews/senate/370232-gorsuch-has-dinner-at-gop-senators-home>.

<sup>7</sup> Ann Gerhart and Lucio Villa, *Rose Garden ceremony attendees who tested positive for coronavirus*, THE

WASHINGTON POST (Oct. 3, 2020), <https://www.washingtonpost.com/graphics/2020/politics/coronavirus-attendees-barrett-nomination-ceremony/>.

the Second Amendment was under attack, and suggested that expanding LGBTQ rights and protections amounts to religious censorship.<sup>8</sup>

Never forget, in his confirmation hearing, when Kavanaugh cited unsubstantiated conspiracy theories about a former Democratic President and former Democratic presidential candidate, accusing Democrats of opposing him as part of “revenge on behalf of the Clintons” and as part of a “calculated and orchestrated political hit.”<sup>9</sup> He attacked the integrity of Democratic Senators. He condemned progressive groups that opposed his nomination, many of which now litigate in his courtroom. And a sitting Supreme Court Justice—Kavanaugh—openly threatened revenge against Democrats and those who had opposed him, emphasizing that “what goes around comes around.”<sup>10</sup>

Justin Walker, a former Kavanaugh clerk, and now a D.C. Circuit Court judge, celebrated Kavanaugh for being a “warrior” who will “not surrender” in the “war” he sees being fought.<sup>11</sup> Rather than celebrating impartiality and nonpartisanship, Walker, in his own investiture speech, was hostile towards progressives and concluded, referring to conservatives: “we are winning, but we have not won.”<sup>12</sup>

Jurists who literally hold the power of life or death over their fellow Americans have made clear by their very words that they are “warriors” who will “not surrender” in a war they see being fought; who have threatened revenge against those whose political ideology is contrary to their own. Should we be surprised that Kavanaugh has consistently ruled in democracy cases on the side of the Republican Party?

And, just weeks ago Mitch McConnell pledged that, if Republicans win control of the Senate, he will not allow President Biden to fill a vacancy on the Supreme Court.<sup>13</sup>

In the face of changing demographics that make it increasingly difficult for Republicans to obtain the support of a majority of voters, Republicans are using this undemocratic and partisan majority on the Court to cement their own power and enact an unpopular agenda that they cannot achieve legislatively. They are using the Republican-controlled Court to rig the system to keep themselves in charge long after a majority has repudiated them. As David Frum, a former George

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<sup>8</sup> Kalvis Golde, *At Federalist Society Convention, Alito Says Religious Liberty, Gun Ownership Are Under Attack*, SCOTUSBLOG, (Nov. 13, 2020), <https://www.scotusblog.com/2020/11/at-federalist-society-convention-alito-says-religious-liberty-gun-ownership-are-under-attack/>.

<sup>9</sup> Dahlia Lithwick, *What Goes Around Comes to a Halt*, SLATE MAGAZINE (Dec. 21, 2018), <https://slate.com/news-and-politics/2018/12/brett-kavanaugh-ethics-complaints-dismissed.html>.

<sup>10</sup> *Id.*

<sup>11</sup> Lawrence Hurley, *Comments by former clerks may backfire on Trump’s high court pick*, REUTERS (Jul. 16, 2018), <https://www.reuters.com/article/us-usa-court-kavanaugh-clerks/comments-by-former-clerks-may-backfire-on-trumps-high-court-pick-idUSKBN1K614N>; Gary Gately, *Kavanaugh nomination draws swift praise, condemnation*, BALTIMORE POST-EXAMINER (Jul. 10, 2018), <https://baltimorepostexaminer.com/kavanaugh-nomination-draws-swift-praise-condemnation/2018/07/10>; Walker Investiture, *Judge Justin Walker Investiture Part Four – Judge Walker Speech*, YOUTUBE (Mar. 13, 2020), <https://www.youtube.com/watch?v=k5iUfudxuM8>.

<sup>12</sup> *Id.*

<sup>13</sup> Alison Durkee, *McConnell: Biden Won’t Get Supreme Court Pick in 2024 if GOP Wins Back Senate*, FORBES, (June 14, 2021), <https://www.forbes.com/sites/alisondurkee/2021/06/14/mcconnell-biden-wont-get-supreme-court-pick-in-2024-if-gop-wins-back-senate/?sh=1b3e3b4910fd>.

W. Bush advisor, wrote, “if conservatives become convinced that they cannot win democratically, they will not abandon conservatism. They will reject democracy.”<sup>14</sup> Through their efforts to entrench their power within the Court, they have done just that.

I recount these circumstances not to relitigate confirmation fights, though AFJ indeed opposed each of these Justices after careful examination of their records and our predictions that they would undermine constitutional rights and legal protections; predictions that have been borne out. Rather, I describe the dubious circumstances of these Justices’ confirmations, and their partisan activities from the bench, to demonstrate that the Court’s legitimacy is *already* at a low point. It is the current state of the Court, and not Court reform, that threatens the legitimacy of the judiciary. A Court that consistently undermines Congress and the will of the American people in order to maintain minority rule can be seen as nothing but illegitimate.

It is certainly true that the framers implemented important checks to temper pure majority rule. There are Constitutional restraints to protect fundamental rights and liberties. And there are structural requirements; for example, to become a law, a bill must pass both chambers of Congress, and is subject to the veto power. But these restraints are meant to protect vulnerable minorities, those without a voice, from abuse and exploitation by the powerful. They are not meant to serve the political interests of a partisan minority, as the Court does today. This is not a group without a voice, or whose rights and legal protections are threatened, but a political faction seeking to force its unpopular ideological agenda onto the majority.

As Alexander Hamilton said of the Constitution, “the fundamental maxim of republican government... requires that the sense of the majority should prevail.”<sup>15</sup> It was never intended that a minority political party could entrench itself in power through the capture of the Supreme Court and consistently strike down efforts by a majority of the public to address issues of public policy that they merely disagree with, from voting rights to the ability to join a union to Medicaid expansion, or gun safety.

But to be sure, the Court’s conservative majority has for decades done just that, preventing self-government by rolling back hard-earned civil rights and protections for workers, consumers, women, people of color, people with disabilities, immigrants, and the environment. Consider just one issue of public policy—health care. Does anyone believe our democracy is functioning as intended when the health (or lives) of millions of Americans came down to the whims of one Justice—John Roberts—appointed by a Republican president who did not receive a majority of votes? Exercising the will of the American people, Congress passed, and President Obama (who received over 69 million votes after campaigning explicitly on a platform of universal health care) signed the Affordable Care Act (ACA), providing healthcare to millions of Americans and expanding rights and protections for all.

Despite this law being fairly and democratically enacted, Republicans have worked ceaselessly to weaken or repeal it through the courts—and time and again, they have nearly succeeded. In

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<sup>14</sup> David Frum, *An Exit from Trumpocracy*, THE ATLANTIC (Jan. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/01/frum-trumpocracy/550685/>.

<sup>15</sup> Alexander Hamilton, *The Federalist Papers: No. 22*, THE AVALON PROJECT (December 14, 1787), [https://avalon.law.yale.edu/18th\\_century/fed22.asp](https://avalon.law.yale.edu/18th_century/fed22.asp).

*California v. Texas*, most recently, three Republican-appointed lower court judges, plus two Supreme Court Justices, would have taken away health care from millions based on a theory which Senator Lamar Alexander, former Republican Chairman of the Health Committee, called “as far-fetched as any I’ve ever heard.”<sup>16</sup> And, while Chief Justice John Roberts’ decision in *Sebelius* is today celebrated, let us never forget that millions of Americans do not have access to Medicaid, despite Congress passing legislation to expand it, because of that decision.<sup>17</sup>

This is dysfunctional. The ACA was properly enacted. Republican efforts to repeal it legislatively repeatedly failed. We should not be living through an unending effort to undo it through judicial action—and the fact that Republican judges at every level of the judiciary repeatedly vote to make millions of Americans sicker goes to show the extent to which they have come to rely on the Court to achieve their policy objectives.

The ACA is far from the only example. In case after case, Republican-appointed Justices have brazenly undermined vital protections put in place by the people’s representatives and sided with the powerful over the powerless. Republican-appointed Justices – overturning precedents, creatively reinterpreting statutes, making up principles of constitutional law untethered to text or history – have repeatedly made clear that they are not impartial umpires calling balls and strikes, as John Roberts famously claimed, but rather in the dugout advancing the interests of just one team.

Republican Majority Leader Mitch McConnell has been open about his prioritization of packing the federal bench with ultraconservative jurists with the explicit goal of advancing Republican policy objectives (as opposed to neutral jurists who will simply apply the law). As *The New York Times* noted:<sup>18</sup>

The unprecedented number of conservative-approved judicial nominees McConnell has waved through the Senate—a process for which he laid the groundwork before Trump was elected—stands to shift much of the burden of conservative policymaking away from an increasingly paralyzed Senate. In the coming years, battles over voting rights, health care, abortion, regulation and campaign finance, among other areas, are less likely to be decided in Congress than in the nation’s courthouses. In effect, McConnell has become a master of the Senate by figuring out how to route the Republican agenda around it.

The legal fight over the Affordable Care Act demonstrates that conservatives know they cannot achieve many of their current policy objectives through the democratic process.. Few members of Congress would win reelection pledging to dirty the water, strip health care from people with preexisting conditions, allow corporations to steal workers’ wages, or permit persons with disabilities to be discriminated against. So instead, they have installed judges who will advance their agenda for them, using the courts to eradicate laws and agencies put in place by a

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<sup>16</sup> *California v. Texas*, 141 S. Ct. 2104 (2021); Jessie Hellmann, *GOP Senator: DOJ’s ObamaCare Argument ‘As Far-Fetched as Any I’ve ever Heard’*, THE HILL (Jun. 12, 2018), <https://thehill.com/policy/healthcare/391975-gop-senator-dojs-obamacare-argument-as-far-fetched-as-any-ive-ever-heard>.

<sup>17</sup> *Nat’l Fed’n of Indep.t Bus. v. Sebelius*, 567 U.S. 519 (2012).

<sup>18</sup> Charles Homans, *Mitch McConnell Got Everything He Wanted. But at What Cost?*, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes-com.proxygw.wrlc.org/2019/01/22/magazine/mcconnell-senate-trump.html?searchResultPosition=1>.

democratically elected majority that are designed to protect workers, consumers, the environment, and civil rights.

At least since Lewis Powell argued that the “American economic system is under broad attack” and urged the business community to weaponize the courts to serve business interests, the Court has become an instrument to let the wealthy and powerful use our courts as a bludgeon to amplify their power and privilege.<sup>19</sup> In fact, former White House counsel Donald McGahn openly acknowledged the “coherent plan” to install judges who will undo federal laws, dismantle environmental protections, roll back civil rights, and gut worker rights.<sup>20</sup> “These efforts to reform the regulatory state begin with Congress and the executive branch,” McGahn said, “but they ultimately depend on courts.”<sup>21</sup>

One of Trump’s judicial nominees, Damien Schiff, offered perhaps the best articulation of the conservative objective: a “reinvigorated constitutional jurisprudence, emanating from the judiciary,” which “could well be the catalyst to real reform, as opposed to that reform coming from other branches.”<sup>22</sup> He wrote that “the President is hampered by the modern administrative state” and “Congress, as a collective body of 535 persons, cannot act effectively.”<sup>23</sup> But, he wrote, “the Supreme Court, with just five votes, can overturn precedents upon which many of the unconstitutional excrescences of the New Deal and Great Society eras depend.”<sup>24</sup> Although Schiff was not confirmed (among other things, he called Justice Anthony Kennedy a “judicial prostitute”), his philosophy is all too typical of what the nation faces by the current Court.<sup>25</sup>

This plan is working. As Senator Sheldon Whitehouse noted in a recently released study, the five conservative Justices—before Barrett was confirmed—on the Court voted to advance right-wing and corporate interests 92% of the time, including protecting corporations from liability, “letting polluters pollute,” “taking away civil rights” and engaging in “union-busting,”—regardless of the intent of Congress.<sup>26</sup>

The examples are abundant of a partisan Court that ensures a paralyzed federal government that cannot work to promote the general welfare. The Court has repeatedly stepped in to undermine the American people’s efforts to provide for worker and consumer protections, preserve public

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<sup>19</sup> Memorandum from Justice Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Education Comm. U.S. Chamber of Com. (Aug. 1971).

<sup>20</sup> Jeremy W. Peters, *Trump’s New Judicial Litmus Test: Shrinking ‘the Administrative State’*, N.Y. TIMES (Mar. 26, 2018)(quoting Donald F. McGahn II), <https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html>.

<sup>21</sup> *Id.*

<sup>22</sup> Damien Schiff, *Federalism and the Separation of Powers, Day II*, Omnia Omnibus Blog (May 18, 2008), [https://web.archive.org/web/20081018211427/http://omniaomnibus.typepad.com:80/omnia\\_omnia/2008/05/index.html](https://web.archive.org/web/20081018211427/http://omniaomnibus.typepad.com:80/omnia_omnia/2008/05/index.html).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Damien Schiff, *Kennedy as the most powerful justice?*, Omnia Omnibus Blog (Jun. 29, 2007), [https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia\\_omnia/2007/06/index.html](https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia_omnia/2007/06/index.html).

<sup>26</sup> Sen. Sheldon Whitehouse, *The Roberts Five: Advancing Right-Wing and Corporate Interests 92% of the Time*, (Sept. 4, 2018), <https://www.whitehouse.senate.gov/imo/media/doc/Roberts%20Five%205-4%20Cases.pdf>.

safety, and protect civil rights:

- In *U.S. v. Morrison*, five Republican Justices held that Congress’s fact-finding was insufficient to support its conclusion that violence against women affected interstate commerce.<sup>27</sup> In doing so, the majority specifically disagreed with Congress’s “method of reasoning”<sup>28</sup> despite eight separate congressional reports on the subject and reports on gender bias from task forces in 21 states. As Justice David Souter wrote in dissent, “the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned.”<sup>29</sup> As Republican Chairman of the Senate Judiciary Committee Arlen Specter said, *Morrison* was an “encroachment on congressional authority.”<sup>30</sup>
- In *Board of Trustees of the University of Alabama v. Garrett*, Republican-appointed Justices held that Congress did not have the authority to enable workers with disabilities to sue state governments for damages.<sup>31</sup> As Justice Breyer noted in dissent, Congress had “compiled a vast legislative record documenting ‘massive, society-wide discrimination’ against persons with disabilities,” including 13 hearings, a task force that “held hearings in every State, attended by more than 30,000 people, including thousands who had experienced discrimination first hand[,]” and “roughly 300 examples of discrimination by state governments themselves in the legislative record.”<sup>32</sup> Senator Specter also said that *Garrett* was “inexplicable” and “has no grounding in the Constitution, no grounding in the Federalist Papers, no grounding in the history of the country, [and] comes out of thin air.”<sup>33</sup>
- More recently, in *Janus v. AFSCME*, five Republican-appointed Justices—all of whom pledged in their confirmation hearings to respect precedent—overturned a 40-year-old precedent to make it harder for workers to fight for better wages and working conditions as they were legally entitled to do.<sup>34</sup> This came on the heels of five Republican-appointed Justices, making it harder for millions of workers to recover stolen wages under an act of Congress (the Fair Labor Standards Act) in *Epic Systems v. Lewis*.<sup>35</sup> And just a few weeks ago, six Republican-appointed Justices, in *Cedar Point Nursery v. Hassid*, effectively overturned a California state law in order to undermine workers’ rights to organize.<sup>36</sup> To get there, the Court revolutionized a century of property law and potentially opened the door to the anti-democratic rollback of a century’s worth of legal precedent recognizing the federal government’s right to enforce regulations protecting workers, consumers, and the environment.<sup>37</sup>

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<sup>27</sup> *U.S. v. Morrison*, 529 U.S. 598, 601 (2000).

<sup>28</sup> *Id.* at 615.

<sup>29</sup> *Id.* at 634 (Souter, J., dissenting).

<sup>30</sup> The Judicial Nomination and Confirmation Process: Hearing Before the Subcomm. on Admin. Oversight and the Courts, 107 Cong. 463 (2001) (Statement of Sen. Specter).

<sup>31</sup> *Bd. of Trs. v. Garrett*, 531 U.S. 356, 360 (2001).

<sup>32</sup> *Id.* at 377 (Breyer, J., dissenting).

<sup>33</sup> 152 Cong. Rec. S8842 (daily ed. Aug. 3, 2006) (statement of Sen. Specter).

<sup>34</sup> Alliance for Justice, *So Long Stare Decisis*, at <https://www.afj.org/article/so-long-stare-decisis/>; *Janus v. Am. Fed’n of State, Cnty., and Mun. Emp., Council 31*, 138 S. Ct. 2448, 2460 (2018).

<sup>35</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

<sup>36</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

<sup>37</sup> *Id.*

- In *District of Columbia v. Heller*, five Republican-appointed Justices overturned longstanding precedent and relied on strained Constitutional interpretation to undermine the government’s ability to protect individuals from gun violence.<sup>38</sup> Nearly 20 years prior to *Heller*, former Chief Justice Warren Burger noted that the National Rifle Association’s interpretation of the Second Amendment (later adopted by the Republican-appointed majority in *Heller*) was “one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public.”<sup>39</sup>
- In *Burwell v. Hobby Lobby* and *Little Sisters of the Poor v. Pennsylvania*, Republican-appointed Justices prevented Congress from ensuring all employees have access to contraceptive health care.<sup>40</sup>
- Throughout the height of the COVID-19 pandemic, the Court’s Republican-appointed Justices repeatedly struck down commonsense measures put in place by elected officials to stop the spread of the disease.<sup>41</sup>
- Five Republican-appointed Justices halted the EPA’s Clean Power Plan, issuing a stay without any legal reasoning and thwarting the agency’s ability to achieve Congress’s objective of regulating air pollution.<sup>42</sup>
- Republican-appointed Justices have repeatedly closed the courthouse doors on consumers, workers, and victims of discrimination, eroding access to the civil justice system. They have made it harder to band together to fight corporate wrongdoing through class actions.<sup>43</sup> They have pushed customers and workers into pro-corporate secret mandatory arbitration.<sup>44</sup> They have narrowed civil procedure rules to prevent individuals from having their case heard by a jury of their peers.<sup>45</sup> And just this month, the Republican Justices on the Court even said Congress did not have the ability to give victims of fraud their day in Court because those Justices, not Congress, decided the victims were not harmed enough.<sup>46</sup>
- And in case after case involving discrimination, from banks discriminating against tribal applicants<sup>47</sup> to workers facing age discrimination<sup>48</sup> or discrimination against persons with disabilities,<sup>49</sup> the Court has narrowly interpreted statutory protections to make those laws less effective and allow wealthy and powerful actors to mistreat ordinary Americans.

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<sup>38</sup> *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008).

<sup>39</sup> *The MacNeil/Lehrer NewsHour: Nuclear Nightmare?; First Freedoms* (PBS television broadcast Dec. 16, 1991) (quoting former Chief Justice Warren Burger).

<sup>40</sup> *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 688 (2014); *Little Sisters of The Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2372 (2020).

<sup>41</sup> See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep’t*, 984 F.3d 477 (6<sup>th</sup> Cir. 2020); *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1230 (9<sup>th</sup> Cir. 2020).

<sup>42</sup> *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

<sup>43</sup> See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342 (2011).

<sup>44</sup> See, e.g., *AT&T Mobility LLC. V. Concepcion*, 563 U.S. 333, 336 (2011).

<sup>45</sup> See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>46</sup> *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

<sup>47</sup> *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).

<sup>48</sup> See, e.g., *Gross v. FBL Financial Services*, 557 U.S. 167 (2009).

<sup>49</sup> For example, In the *Sutton* trilogy of cases the Court repeatedly misread the Americans with Disabilities Act to eliminate protections for millions of Americans with disabilities. It took Congress nearly a decade to reverse those decisions. During that time, millions were hurt, unable to get employment.

As these cases—and many, many others—demonstrate, the Court has repeatedly misused its awesome power to interpret our laws to harm the lives of millions of Americans.

### **The Court is Eroding our Democratic System of Government**

But beyond just achieving conservative policy objectives, Republicans are increasingly relying on the Court to warp the very rules of our democracy in their favor. Republicans have engaged in racial gerrymandering and partisan redistricting.<sup>50</sup> Republicans have made it harder for persons of color, Latinos, Native Americans, young people, and the economically disadvantaged to vote.<sup>51</sup> They have tried to rig the census to undercount minorities.

These efforts succeed often enough that the right to vote and the right to fair representation have been gradually eroded, tilting the scales toward Republican politicians. Rather than changing their platform to make obtaining majority support feasible, Republicans have relied on their appointed judges to change the rules of the game so they can win elections despite being unpopular. And so, in nearly 20 years' worth of decisions, the Republican-appointed Justices on the Supreme Court have thrust the Court into the middle of electoral politics and tilted the political playing field towards the wealthy and powerful. In case after case, Republican-appointed Justices have made it easier for Republicans to win elections.

In *Bush v. Gore*, five Republican-appointed Justices halted the recount of Florida's ballots in the 2000 election, which led to the selection of Republican George W. Bush as president.<sup>52</sup> And in *Rucho v. Common Cause*, they sided with Republican partisan gerrymandering.<sup>53</sup>

They have also supported direct restrictions on the rights of voters themselves. In 2013, in *Shelby County*—another 5-4 decision—they ignored scores of congressional findings to gut the Voting Rights Act, and Republican-controlled states followed with laws to make it more difficult for people of color to vote.<sup>54</sup> Just weeks ago, in *Brnovich*, they weakened the Voting Rights Act further, with Justice Gorsuch going so far as to suggest that the law does not even provide citizens with the ability to sue when they face discrimination.<sup>55</sup> Does anyone believe that John Roberts—who as an attorney at the Justice Department fought vigorously to undermine the Voting Rights Act—fairly and without bias read briefs and applied facts to the law in *Brnovich* and remarkably reached the conclusion that the law was what he *wished* Congress had adopted in 1982, rather than what they actually did adopt?

The list goes on and on, from upholding voter purges in *Husted v. A. Philip Randolph Institute* to condoning racial discrimination in *Texas Democratic Party v. Abbott* to allowing the state to

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<sup>50</sup> See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018).

<sup>51</sup> See, e.g., *Bartlett v. Strickland*, 556 U.S. 1, 6 (2009); *Brakebill v. Jaeger*, 139 S. Ct. 10, 12 (2018); *Brnovich v. Democratic Nat. Comm.*, 141 S. Ct. 1263 (2021).

<sup>52</sup> *Bush v. Gore*, 531 U.S. 98, 100 (2000).

<sup>53</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

<sup>54</sup> *Shelby County v. Holder*, 570 U.S. 529, 534 (2013).

<sup>55</sup> *Brnovich v. Democratic Nat. Comm.*, 141 S. Ct. 1263 (2021).

limit Native voting rights in North Dakota, to restricting access to safe and healthy voting in Wisconsin during the peak of the COVID-19 pandemic.<sup>56</sup>

It is long past time to be surprised when these Republican-appointed judges take sides. There is no longer any pretense that they are independent jurists rather than partisans. While most conservatives hide behind the banal platitude that they want “judges who will interpret the law, not make it” the reality is they want no such jurist. Conservatives want movement lawyers who, once confirmed, will use their positions to hamper the ability of the American people, through their elected officials, to address critical issues. And that is precisely what has been done.

### **The Court’s Politicization has Created a Legitimacy Crisis and Expanding the Supreme Court is the Most Effective Way to Restore Balance**

It is this partisan, undemocratic activity by the Court—not the suggestion of Court reform—that is creating a legitimacy crisis. And this is a form of legitimacy crisis that carries real consequences.

The slew of examples I just detailed of overtly partisan decisions made by Supreme Court Justices illustrates the challenges presented by a Court that has been captured by Justices who are increasingly prone to viewing themselves as partisan warriors instead of neutral jurists. It is abundantly clear that we *must* act to fix the Court, bring balance to our justice system, and restore public confidence in our institutions and the people’s ability to self-govern.

Alliance for Justice applauds President Biden’s prioritization of the judiciary and recognition of the need to nominate and confirm demographically and experientially diverse lawyers with a demonstrated commitment to equal justice. It is a breath of fresh air to have a president who has devoted his career to the wellbeing of the middle class and who understands how important the courts are to the rights and opportunities of all Americans.

Alliance for Justice also supports any and all reforms that would return our laws and our Courts to the American people. Of course, at a minimum, we need a Code of Ethics that applies to the Supreme Court, just like lower court judges. The Court’s legitimacy would also be improved by implementing a set of term limits for Justices. The average tenure of a Supreme Court Justice has significantly lengthened since the Constitution was adopted, giving outsize power to nine individuals in a way the framers of the Constitution could never have imagined.

But we believe the most effective way to restore balance to our Court is through expansion, something that has been done time and time again in the past. Through a simple act of Congress, the Court can be made to actually reflect America and to adhere to our nation’s past practice of having one Supreme Court Justice per judicial circuit. Polling shows that a majority of Americans support expanding the Court, perhaps because doing so would remedy the

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<sup>56</sup> *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018); *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Brakebill v. Jaeger*, 139 S. Ct. 10 (2018); *Democratic Nat. Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020).

institution's clear partisanship and favoritism of corporate interests.<sup>57</sup> And to be clear, expansion is not a tool to simply swing the Court the other way, but instead to eliminate its existing bias and help preserve democratic institutions by allowing the American people to self-govern and participate in fair and open elections. The need for reform is not about the judicial philosophy of the Justices, but about the growing and clear antagonism to democracy coming from Republican politicians and the jurists they put on the bench.

Democratizing the Court is also essential to addressing the stark lack of demographic and experiential diversity on our nation's highest Court. In our nation's 244-year history, there have been 115 Supreme Court Justices; of them, 110 have been men, and 112 have been white.<sup>58</sup> Additionally, with notable exceptions like Thurgood Marshall, Ruth Bader Ginsburg, Sonia Sotomayor, and Arthur Goldberg, almost no Justice has had prior legal experience in civil rights, public defense, or in advocating for workers and consumers.<sup>59</sup> Instead, our Court has historically been composed of elite, Ivy League-educated lawyers with backgrounds representing corporations or working as prosecutors.<sup>60</sup>

As a result, the Supreme Court, which makes decisions critical to every American, does not reflect the diversity of our people or of our country's legal profession. In addition to the implicit bias this creates, it also reduces the public's faith in the Court and harms the Court's legitimacy. By expanding the Court, we can ensure that it actually looks like America, and includes Justices with diverse backgrounds and experiences who will bring important perspectives to major decisions.

### **“Norms” are not More Important than Our Democracy**

Critics have argued that we simply cannot implement reforms, however vitally necessary they are, because they would go against the “norms” of the Supreme Court and the “institutional cost” would be too great—even though the Court as an institution has repeatedly changed dramatically over its long history.<sup>61</sup> They have argued the importance of keeping the Justices cordial and non-political, claiming reform would “politicize the system” even as the Court is openly partisan before our very eyes.<sup>62</sup> They have decried turning the number of Justices on the bench into political football, even as Republicans have abandoned their own principles to snap up control of two additional Supreme Court seats. And they say all this while upholding “norms” as a set of

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<sup>57</sup> Gabriela Schulte, *Poll: Slim majority support adding more seats to Supreme Court*, THE HILL (Nov. 10, 2020), <https://thehill.com/hilltv/what-americas-thinking/525305-poll-majority-of-voters-support-increasing-the-number-of-seats>.

<sup>58</sup> Jessica Campisi and Brandon Griggs, *Of the 114 Supreme Court justices in US history, all but 6 have been White men*, CNN (Sep. 26, 2020), <https://www.cnn.com/2020/09/25/politics/supreme-court-justice-minorities-history-trnd/index.html>.

<sup>59</sup> Kristen Bialik, *What backgrounds do U.S. Supreme Court justices have?*, PEW RESEARCH CENTER (Mar. 20, 2017), <https://www.pewresearch.org/fact-tank/2017/03/20/what-backgrounds-do-u-s-supreme-court-justices-have/>.

<sup>60</sup> *Id.*

<sup>61</sup> Ruth Marcus, *I feel Democrats' fury over the Supreme Court. Adding justices is the wrong fix.*, THE WASHINGTON POST (Apr. 15, 2021), <https://www.washingtonpost.com/opinions/2021/04/15/expand-supreme-court-bill-democrats-wrong-fix/>.

<sup>62</sup> W. James Antle III, *Supreme Court packing via a Democratic bill will politicize the system even more*, NBC NEWS (Apr. 19, 2021), <https://www.nbcnews.com/think/opinion/supreme-court-packing-democratic-bill-will-politicize-system-even-more-ncna1264553>.

neutral, unimpeachable ideals, when in reality, the traditions surrounding our Court today serve to perpetuate a harmful status quo that favors the wealthy and powerful, an anti-democratic subversion of the majority of Americans that is only becoming worse with time.

Hearing these criticisms, I am reminded of D.C. lawyers praising Neil Gorsuch after his nomination to the Supreme Court, calling him “thoughtful and brilliant” or “smart” and “unfailingly polite.”<sup>63</sup> This may be true, but let’s remember Alphonse Maddin, a truck driver whose case came before Neil Gorsuch on the Tenth Circuit. Mr. Maddin was driving through Illinois one winter, in -14-degree weather, when the brakes on this trailer broke, and he was left stranded without heat in his cab. After several hours, when frostbite began to set in, he left his trailer behind to seek shelter and was fired for it. Luckily, Congress had passed a worker protection law allowing Mr. Maddin to sue to enforce his rights; a law explicitly designed to protect the health and safety of transportation workers. Mr. Maddin was successful in his lawsuit, but one judge (out of seven total that considered his case) dissented, writing that his employer could force Mr. Maddin to choose between his job and his life, and Congress’s intent to protect him be damned.<sup>64</sup> That judge was Neil Gorsuch. And what was absent from the praise for Gorsuch after his Supreme Court nomination from too many in the legal profession, including so-called progressives,<sup>65</sup> was any concern, or even acknowledgment, of this or scores of other opinions of his eviscerating the rights and legal protections of ordinary Americans.

What does it matter to Mr. Maddin that Neil Gorsuch is polite at D.C. galas and cocktail parties (where I should add, he, after his confirmation, got huge laughter from a Federalist Society crowd when he explicitly mocked the so-called “Frozen Trucker”)?<sup>66</sup> What does it matter to the workers who have a hard time feeding their families, or affording rent, education, or retirement because Neil Gorsuch in *Epic Systems* made it easier for corporations to commit wage theft, that he is purportedly a good writer?

I met with Mr. Maddin—he had lost his job, lost his livelihood, and was blackballed by the trucking industry. He recounted to me a story of stress and poverty, of spending time homeless, of the emotional toll that damaged his relationship with his only daughter, who was nine when he was fired. His perspective of the court system, including about one very powerful person hostile to Congress’s ability to protect him, is one that deserves to be heard.

This Commission should not make the same mistake that too many legal elites made then. Our focus on “norms” is the same as elite lawyers praising Gorsuch because he is smart and polite—it misses the central point. It ignores the fact that the structure of the Court directly impacts the

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<sup>63</sup> *Gorsuch in the Mainstream*, THE WALL STREET JOURNAL (Feb. 9, 2017), <https://www.wsj.com/articles/gorsuch-in-the-mainstream-1486513094>; Letter from members of the Supreme Court Bar to Sens. Chuck Grassley and Dianne Feinstein (Feb. 28, 2017), [https://www.scotusblog.com/wp-content/uploads/2017/03/Gorsuch\\_Supreme\\_Ct\\_Advocates\\_Let.pdf](https://www.scotusblog.com/wp-content/uploads/2017/03/Gorsuch_Supreme_Ct_Advocates_Let.pdf).

<sup>64</sup> *TransAm Trucking, Inc. v. Administrative Review Board*, 833 F.3d 1206 (10th Cir. 2016).

<sup>65</sup> Jonathan H. Adler, *Judge Gorsuch attracts broad bipartisan support among legal elites*, THE WASHINGTON POST (Mar. 13, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/13/judge-gorsuch-attracts-broad-bipartisan-support-among-legal-elites/>.

<sup>66</sup> Ian Millhiser, *At conservative conference, Neil Gorsuch cracks joke about frozen trucker nearly left to die*, THINKPROGRESS (Nov. 16, 2017), <https://archive.thinkprogress.org/at-conservative-conference-neil-gorsuch-cracks-joke-about-frozen-trucker-nearly-left-to-die-e4b5fc0e4f5f/>.

quality of people's lives. The Constitution, our Court, our laws, can literally be a matter of life and death, and way too many before this Commission and in legal circles simply discuss norms.

The four million people who need health care but cannot get on Medicaid because of John Roberts' made-up legal theory in *Sebelius* do not care about "norms."<sup>67</sup> The worker who is being paid less and has worse working conditions because they are unable to join a union does not care about "norms." Nor do the women being denied contraception by their employer, the voters being wrongfully purged from their state's voter rolls, or the people exposed to polluted air and dirty water. They may not know what the "norms" surrounding the Supreme Court even are, but they have been harmed by its decisions nevertheless.

The Commission must hear from these people: from the victims of wage theft who are struggling to provide for their families because of five Republican members of the Court; from the millions of Americans who do not have access to health care because of John Roberts' decision to hamstring Medicaid expansion; from Wisconsinites who had to risk their health or lives to vote in the middle of a pandemic—only to see COVID-19 cases spike after Election Day<sup>68</sup>—because Republican-appointed Justices thought it okay to make it harder to vote.

Real people's lives are at stake. I implore you—an esteemed group of scholars and lawyers—to hear from the people impacted.

The preoccupation with norms is detached from reality and fails to recognize the real, concrete harm that the Court is doing to the American people. Because what good are norms if those norms perpetuate a Court that continues to erode and eliminate the rights and protections of millions? Shouldn't this indicate that these norms may not be worth adhering to?

Though there is no shortage of those urging caution and inaction who argue that reform is not achievable, that it is not something we can see during our lifetimes, I respond that much of the history of our Court was once seen as not achievable, or even imaginable. Nobody imagined a Senate that would hold a Supreme Court vacancy open for over a year, or kill the filibuster for Supreme Court Justices to confirm a divisive nominee, or confirm a nominee who had hidden documents and who faced credible allegations of sexual assault, or fill a vacancy mere days before a Presidential election—until Republicans did all of those things.

Surely, nobody imagined a Black Justice sitting on the bench—until Lyndon Johnson nominated Thurgood Marshall, who served admirably for decades. Nobody imagined a woman sitting on the bench—until Sandra Day O'Connor, making history, did just that. Nobody imagined a Latina sitting on the bench—until President Obama nominated Sonia Sotomayor, who today is a voice for fairness, equality, and the rights of *all* Americans.

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<sup>67</sup> Rachel Garfield, Kendal Orgera, and Anthony Damico, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAMILY FOUNDATION (Jan. 21, 2021), <https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/>.

<sup>68</sup> JR Radcliffe and Erin Caughey, *A timeline of how the COVID-19 pandemic has played out in Wisconsin*, MILWAUKEE JOURNAL SENTINEL (Mar. 11, 2021), <https://www.jsonline.com/in-depth/news/local/milwaukee/2021/03/11/timeline-how-covid-19-has-played-out-wisconsin/4522813001/>.

Time and again, we've shown that a lot of things are unimaginable right until they happen, and that the best way to make something achievable is to go out and achieve it. Not only are these reforms eminently possible, constitutional, and consistent with the history of a country that regularly adjusted the number of Justices on the Court, but they are also the right thing to do. That is why it is imperative that this administration and federal lawmakers listen to advocates and scores of Americans across the country who have organized and spoken out about the need to rebalance our Court and who continue to make it a top priority to restore fairness to the bench.

As I mentioned at the outset, I understand the gravity of Court reform. In my over 40 years as head of AFJ, I would never before have thought I would be sitting before this Commission and advocating for court expansion. It is not something I ever contemplated. But I believe that at this point, there is truly no other choice. Because if the Court continues to undermine our democracy and continues to favor the wealthy and powerful and consistently erode any semblance of equal justice under the law, the only possible conclusion is that reform is imperative.

Members of the Commission:

If the Court continues to work hand in fist with Republicans to undermine free and fair elections, then the only possible conclusion is that reform is imperative.

If the Court proceeds to wipe away reproductive rights, in spite of decades of precedent and overwhelming public support for those rights, then the only possible conclusion is that reform is imperative.

If the Court continues to undercut a democratically elected majority's efforts to prevent discrimination against people of color, women, immigrants, the LGBTQ community, and people with disabilities, then the only possible conclusion is that reform is imperative.

If the Court refuses to allow the American people to ensure the air they breathe and water they drink is clean, then the only possible conclusion is that reform is imperative.

If the Court continually blocks the people's efforts to protect themselves and their loved ones from the scourge of gun violence, then the only possible conclusion is that reform is imperative.

If the Court, day after day, continues to side with the wealthy and powerful over the rights of all workers and consumers, then the only possible conclusion is that reform is imperative.

In short, if the Court continues to subvert the will of the majority of the American people and quash the power of their elected representatives, then the only possible conclusion is that reform is imperative.

The central question for this Commission is whether six partisan individuals, unelected and unaccountable, should continue to have awesome and virtually unchecked power over our Constitution, our government, and the very wellbeing of the American people. Whether, for the sake of "norms," we as a nation will continue to allow powerful interests to use our courts as a bludgeon to amplify their power and privilege; to allow a minority of the country to entrench

itself in power and subjugate the will of the majority; to allow lifetime appointed ideologues—unelected and unaccountable—to constrain the American people’s ability, through their elected officials, from addressing our nation’s problems.

I urge you to truly recognize the real and harmful effect the Court is having on our people and our government, and to recommend reforms that restore fairness to our democracy. Thank you again for the opportunity to testify.