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Statement of Janai S. Nelson, Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc.

Presidential Commission on the Supreme Court of the United States

September 1, 2021

Members of the Presidential Commission on the Supreme Court of the United States:

Thank you for the opportunity to address the Commission about the future of the highest court in our nation. My name is Janai Nelson, and I serve as Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. ("LDF").

LDF is the nation's first and foremost civil rights law organization. Founded in 1940 under the leadership of Thurgood Marshall, who subsequently became the first Black U.S. Supreme Court Justice, LDF has strived to secure equal justice under the law for all Americans and eliminate barriers that prevent Black people from realizing their full civil and human rights. LDF has represented many parties and acted as amicus curiae before the Supreme Court in more than 700 cases concerning desegregation of schools and public spaces, employment discrimination, voting rights, fair housing, criminal justice, LGBTQ rights, and nearly every issue that advances civil rights and presses our democracy to be more equal and representative for all. LDF's landmark cases before the Supreme Court include *Smith v. Allwright*, *Shelley v. Kraemer*, *Brown v. Board of Education*, *Cooper v. Aaron*, *Griggs v. Duke Power Co.*, *Grutter v. Bollinger*, *Texas v. Inclusive Communities Project*, *Fisher v. University of Texas at Austin*, *Shelby County, Alabama v. Holder*, *Buck v. Davis* and many more. The work of LDF—and all who turn to our judicial system to realize the rights promised by our Constitution and federal civil rights laws, but that are often unrealized in practice—depends on a transparent, impartial, and apolitical U.S. Supreme Court for some of its most critical work.

When operating at its best, the Court has played a fundamental role in advancing civil rights and expanding our democracy. In our multi-racial society still grappling with the stain of racism embedded in its systems, structures, and laws, the Court's position as a neutral body insulated from politics can help transcend the fissures of society to uphold the rule of law. The Court has served as a check on abuses of power[1] and vindicated fundamental rights for marginalized groups.[2] *Brown v. Board of Education* perhaps most exemplifies the central and authoritative role of the Court in pursuing equal justice under the law even when other branches of government and state governments resist.

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[1] *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974).
[2] *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

But the Court has not been consistent in upholding the ideals of our pluralistic, democratic society or in enforcing basic constitutional rights. At its nadir, the Court has permitted the government to impose race-based exclusions from the rights and privileges of society and failed to protect the fundamental right to vote.[3] Of great concern are recent decisions by the Court that contain echoes of this shameful history.[4]

As an unelected body whose decisions are unreviewable, the Court relies on the confidence of the American people to fulfill its role in our democracy. The public cannot vote for the Justices who are installed on the Court with lifetime tenure. Thus, the Court's legitimacy as the final voice of authority on legal issues that affect the lives of all people in this country derives not only from Article III of the Constitution, but also from the trust the people place in it as an institution.

Unfortunately, there is a growing crisis of confidence in the Court that threatens to undermine our democracy. In today's climate of hyper partisanship, amplified discrimination, and stoking of racial grievances, the Court's role as an impartial arbiter uninfluenced by politics is of paramount importance. The Court must be above the fray of politics and polarization, both in appearance and practice. However, many believe the Court has failed to live up to this role.[5] Specifically, there several key factors that erode public confidence in the credibility, objectivity, and integrity of the Court: (1) the Court's lack of diversity, (2) the Court's lack of neutrality, and (3) the Court's lack of transparency.

As civil rights lawyers, we see a Supreme Court that does not reflect the diversity of our society or even the diverse professional experiences of the legal profession. We see a Court that, on many issues of critical importance, does not neutrally apply the law or precedent but instead fashions outcomes aligned with certain political parties, ideologies, or positions of authority and often against marginalized communities. We see a Court that increasingly makes important decisions that upend lower court rulings through the opaque process of the so-called shadow docket. These trends diminish confidence that the Court can rise above polarization to render carefully reasoned decisions that are deliberative, disinterested, and dedicated to strengthening our democracy.

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[3] *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944); *Breedlove v. Suttles*, 302 U.S. 277 (1937); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
[4] *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).
[5] *See, e.g.*, Dylan Matthews, *The Supreme Court Is Too Powerful and Anti-Democratic. Here's How We Can Scale Back Its Influence*, VOX (Sept. 29, 2020, 9:10 AM), https://www.vox.com/policy-and-politics/21451471/supreme-court-justice-constitution-ryan-doerfler; Sabeel Rahman, *The US Supreme Court Has Become a Threat to Democracy. Here's How We Fix It*, GUARDIAN (Sept. 24, 2020, 8:19 AM), https://www.theguardian.com/commentisfree/2020/sep/24/supreme-court-threat-to-democracy-rbg-how-we-fix-it.

I. Lack of Diversity

The Court's authority is undermined when decisionmakers, advocates, and the personnel who serve as part of the intellectual machinery of the Court do not reflect our increasingly diverse society. The Court itself has long been an exclusive institution. Until 1967, every single Justice was a white man. Today, despite our increasingly multiracial society, the Court remains an elusive institution for marginalized communities. Of the 115 Justices that have served on the Court, 93.9 percent have been white men, 4.3 percent have been women, and 2.6 percent have been people of color.[6] All seventeen Chief Justices have been white men.

Racial diversity on the bench has a positive effect on "the judiciary's institutional capacity for openness to alternative views—not because judges of any given race will 'represent' a monolithic viewpoint, but because of the likelihood that judges of a particular race or ethnicity will be better positioned to understand and take seriously views held within their own racial or ethnic communities."[7] Diversity of lived-experience and a wide range of personal knowledge among judges helps to ensure the full and balanced consideration of all issues in the legal decision making process.[8] Racial, ethnic, and gender diversity allows for consideration of diverse perspectives and opinions on the real-world issues before judges in complex cases which, in turn, enriches judicial deliberations and outcomes thereby strengthening the Court's legitimacy.[9] As Justice Thurgood Marshall said, we condemn the courts to "one-sided justice" when we deprive the legal process of "differing viewpoints and perspectives on a given problem."[10]

A litigant's—and the public's—perception of the Court often turns on the fairness of the judicial process.[11] Therefore, a court that reflects the diversity of the populace increases the perception that regardless of the outcome, so long as litigants have had the opportunity to exercise

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[6] Leah M. Litman et al., *A Podcast of One's Own*, 28 MICH. J. GENDER & L. 51, 53-54 (2021).
[7] Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Public Morality*, 81 N.Y.U. L. REV. 1206, 1206 (2006).
[8] *See* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1218 (1992) (explaining the vital contribution of Justice Marshall's unique professional background to the court's decision-making, making "clear what legal briefs often obscure: the impact of legal rules on human lives").
[9] Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 160 (2004); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759, 1761-1783 (2005); Dermot Feenan, *Editorial Introduction: Women and Judging*, 17 FEMINIST LEGAL STUD. 1, 1–9 (2009).
[10] THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 260 (Mark v. Tushnet ed., 2001).
[11] Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW U. L. REV. 587, 625 (2011).

their democratic right to air their grievances to an impartial audience, justice has been done. As noted by Justice Kagan, "[p]eople look at an institution and they see people who are like them, who share their experiences, who they imagine share their set of values, and that's a sort of natural thing and they feel more comfortable if that occurs."[12] A diverse bench—one that is reflective of the diversity of the populace—can decrease perceived gaps between the "judges and the judged."[13] The integrity and public legitimacy of our entire judicial system is undermined if the Justices making final and monumental legal decisions do not reflect the diversity of the communities affected by those decisions. Indeed, just this year the House of Representatives heard from multiple federal judges about the importance of diversity in the judiciary in their own decision making.[14] As the country diversifies, so must the Court.

In addition to the Court's lack of racial and gender diversity, it retains a dearth of professional and educational diversity. In the entirety of the Court's history, with notable exceptions like Justices Thurgood Marshall, Ruth Bader Ginsburg, Sonia Sotomayor, and Arthur Goldberg, the vast majority of the Justices did not spend any of their prejudicial career representing indigent clients, working in civil rights, public defense, or advocating for workers and consumers.[15] Instead, the Court has been consistently and almost impenetrably composed of elite, Ivy League-educated lawyers with backgrounds as prosecutors or representing corporations.[16] Taken as a whole, the current Court[17]—and indeed, past Courts—has had little professional

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[12] Adam Liptak, *Sonia Sotomayor and Elena Kagan Muse over a Cookie-Cutter Supreme Court*, N.Y. TIMES (Sept. 5, 2016), https://www.nytimes.com/2016/09/06/us/politics/sotomayor-kagan-supreme-court.html.
[13] *See* LAW.'S COMM. FOR C.R. UNDER L., ANSWERING THE CALL FOR A MORE DIVERSE JUDICIARY 8 (2005) (discussing the "palpable friction" between parties and judges when those parties feel that they are underrepresented in the judiciary); Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 45, 49 (2009) ("[T]he interplay of perspectives of judges from diverse backgrounds and experiences makes for better judicial decisionmaking, especially on our appellate courts."); Byron White, *Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992) ("Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match.").
[14] *The Importance of a Diverse Federal Judiciary*: *Hearing Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 117th Cong. (2021); *The Importance of a Diverse Federal Judiciary, Part 2: The Selection and Confirmation Process*: *Hearing Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 117th Cong. (2021).
[15] *See* Kristen Bialik, *What Backgrounds Do U.S. Supreme Court Justices Have?*, PEW RSCH. CTR. (Mar. 20, 2017), https://www.pewresearch.org/fact-tank/2017/03/20/what-backgrounds-do-u-s-supreme-court-justices-have/.
[16] Dara Lind, *There Hasn't Been a Criminal Defense Lawyer on the Supreme Court in 25 Years. That's a Problem*, VOX, (Mar. 22, 2017, 10:54 AM), https://www.vox.com/2016/3/28/11306422/supreme-court-prosecutors-career.
[17] Of the current Justices, six worked at private law firms, often representing large corporate clients. *see* Maggie Jo Buchanan, *The Startling Lack of Professional Diversity Among Federal Judges*, CTR. FOR AM. PROGRESS (June 17, 2020, 9:03 AM), https://www.americanprogress.org/issues/courts/news/2020/06/17/486366/startling-lackprofessional-diversity-among-federal-judges/.

experience or exposure to the intricacies, nuances, and difficulties of advocating for the rights of marginalized people and communities.

An important contributing factor to the current and past homogeneity of the Court, is the lack of educational diversity. Notably, before the confirmation of Justice Barrett, all of the current Justices of the Court attended either Yale Law School or Harvard Law School.[18] This trend is not coincidence and cannot be explained by merit. It instead reflects the insular and exclusionary nature of an institution that should instead reflect the racial, gender, social and economic diversity of our pluralistic democracy.[19]

The entire apparatus surrounding the Court—from its clerks to the oralists who appear before the Court—similarly lacks diversity. Despite the growing diversity of students in law schools,[20] from 2005 to 2017, 85 percent of Supreme Court clerks were white, and only 4.1 percent were Black. While most law graduates during this period were women, only one third of Supreme Court clerks during that period were women.[21]

Like the premium placed on institutional elitism in the selection of Justices, Justices in turn place too high a premium on hiring clerks from elite law schools. From 1950 to 2014, Harvard students accounted for nearly a quarter of all Supreme Court law clerks, and students from Yale accounted for another 19 percent. During the same span, just 10 law schools combined accounted for nearly 82 percent of all Supreme Court clerks.[22]

The composition of the Supreme Court Bar is similarly homogenous, lacking demographic and experiential diversity. From 2012 to 2019 only 12 to 21 percent of advocates appearing before the Court were women.[23] In the 2019 term, there were 155 oral arguments made before the Court,

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[18] Justices Roberts, Breyer, Gorsuch, and Kagan attended Harvard Law School. Justices Alito, Kavanaugh, Sotomayor, and Thomas attended Yale Law School. Justice Barrett attended Notre Dame Law School.
[19] Valerie Strauss, *The 'Cloistered' Harvard-Yale Law Monopoly on the Supreme Court*, WASH. POST (July 10, 2028), https://www.washingtonpost.com/news/answer-sheet/wp/2018/07/10/the-cloistered-harvard-yale-law-monopoly-on-the-supreme-court/.
[20] *See Longitudinal Chart: Totals and Minority Students (2011-2016)*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives/ (last visited Aug. 18, 2021).
[21] Tony Mauro, *Mostly White and Male: Diversity Still Lags Among SCOTUS Law Clerks*, NAT'L L.J. (Dec. 11, 2017, 4:00 AM), https://perma.cc/6R52-VFJ9.
[22] Jason Iuliano & Avery Stewart, *The New Diversity Crisis in the Federal Judiciary,* 84 TENN. L. REV. 247, 297 (2016).
[23] Adam Feldman, *Final Stat Pack for October Term 2019 (updated)*, SCOTUSBLOG (July 10, 2020 7:36 PM), https://perma.cc/3E2H-NTN8.

only 20 of which were made by women and only 27 of which were made by advocates of color.[24] In the entire 2019 term, only one woman of color appeared before the Court.[25] This small group of highly specialized, elite lawyers—the vast majority of which is white and male, and in large part drawn from former Supreme Court clerks—is entirely unrepresentative of the American people and the legal profession at large.

The Court relies on public trust for legitimacy, and diversity among the Justices helps improve both public trust and balanced judicial decision making.[26] We encourage the Commission to examine opportunities to diversify the Court and its tangential professions. The Court has an important role to play in encouraging more diversity among oralists and clerks, through demographic data collection of staff, oralists and clerks, and articulating an affirmative principle of diversity, equity and inclusion.

II. Lack of Neutrality

The Supreme Court regularly asserts it is a neutral body simply applying the law. But its hostility toward civil rights and public interest legislation, willingness to second-guess judgments of Congress about matters within Congress's constitutional authority, and increasing disregard for precedent and the requirements of Article III of the U.S. Constitution, undermine those assertions. As civil rights lawyers, we have been particularly troubled by decisions over the last two decades in which an activist Court has created new legal rules that erode our democracy and jeopardize voting rights for African Americans and other people of color.

A. Voting Rights

The Supreme Court's democracy jurisprudence has eroded the confidence of the American public in the Court's impartiality. The arc of the Court's largely one-sided judicial activism in this space has diminished access to the franchise and emboldened attacks on the very foundation of our democracy.

In its fateful decision ending the U.S. presidential election of 2000 and effectively ceding the U.S. presidency to George W. Bush, the Supreme Court began its legal analysis of the structure of our popular democracy with the following: "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the

[24] Litman et al., *supra*, at 57-58.
[25] *Id*.
[26] Maya Sen, *Diversity, Qualifications, and Ideology: How Female and Minority Judges Have Changed, or Not Changed, Over Time*, 2017 WIS. L. REV. 367 (2017).

electoral college."[27] Having emphasized the lack of any federal constitutional right to vote for President, the Court proceeded to intervene by overruling the Florida Supreme Court's judgment that the voices of all Floridians who cast ballots must be heard in deciding the 2000 election, and crowning a winner itself. The Court used the Equal Protection Clause of the U.S. Constitution to rationalize the outcome reached, but the Court's ominous starting point—trivializing the voting rights of the American people—has been reflected in its democracy jurisprudence since *Bush v. Gore*.

In particular, the Court has engaged in judicial activism to erode the protections of the Voting Rights Act of 1965. In a pair of monumental decisions, the Court has sharply curtailed the ability of the Act to protect Black and Latino/a voters from election laws and procedures that, throughout America's history, have in purpose and practice operated to diminish their political participation.

The first of those decisions was *Shelby County, Alabama v. Holder*.[28] In *Shelby County*, the Court invalidated the geographic coverage mechanism in Section 4 of the Voting Rights Act, thereby eviscerating the preclearance protections in Section 5 of the Act—which the Court had previously acknowledged lay at the "heart" of what previous Courts hailed the crown jewel of civil rights legislation.[29] By blocking discriminatory changes in voting laws and procedures before they could be implemented, Section 5 played a crucial role in remedying voting discrimination in the covered jurisdictions.[30] While acknowledging that the "Act ha[d] proved immensely successful at redressing racial discrimination and integrating the voting process" and that Congress had likely devised the coverage formula in the Voting Rights Act *after* identifying the States whose recalcitrance to Black Americans' voting rights had been well documented, the Court asserted that the coverage formula was no longer tied to "current conditions" and that, today, "[b]latantly discriminatory evasions of federal decrees are rare." Both assertions were contradicted by the record before Congress. Yet, relying on those incorrect premises, and failing to give proper respect to four prior decisions upholding Sections 4 and 5, the Court second-guessed Congress's judgment and ruled that geographic pre-clearance was no longer constitutional unless Congress created a new mechanism for coverage.[31] It did so even though, as the Court has repeatedly acknowledged, the Fourteenth and Fifteenth Amendments explicitly assign to Congress, not the Supreme Court, the authority to determine which measures are necessary to enforce them. "Things have changed in the South," the Court promised.[32]

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[27] *Bush v. Gore*, 531 U.S. 98, 104 (2000).
[28] *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013)
[29] *See, e.g.*, *Beer v. United States*, 425 U.S. 130, 147 (1976).
[30] *Shelby Cnty.*, 570 U.S. 529.
[31] *Id.* at 545-53.
[32] *Nw. Austin Mun. Utility Dist No. One v. Holder*, 557 U.S. 193, 203 (2009).

The Court's error in substituting its judgment for Congress's became immediately apparent. To name but one example, on the day the Supreme Court issued its decision in *Shelby County*, the State of Texas announced its plan to implement a discriminatory photo-identification requirement that did not obtain preclearance under Section 5.[33] In response, LDF and several other civil rights groups spent more than six years fighting to block implementation of Texas' voter ID law under Section 2 of the Voting Rights Act. In April 2017, a federal district court found that Texas bill SB 14—the strictest photo ID law in the country—was enacted to purposefully discriminate against Black and Latino voters.[34] To this day, the Texas legislature continues to advance its mission to adopt new voting restrictions, which have spurred intense public outcry and political fallout. Texas lawmakers had to flee the state to forestall the disenfranchisement of their predominately Black and Latino/a constituents through these new voting restrictions.[35] As Justice Kagan recently noted, in the days following the Court's *Shelby County* decision, other states, including Alabama, Virginia and Mississippi, "fell like dominoes, adopting measures similarly vulnerable to preclearance review."[36] Georgia, Florida, and now most recently, Texas enacted similar measures that threaten to disenfranchise Black voters and other voters of color, prompting lawsuits by LDF and other voting rights advocates and even leading some corporations to pull business out of those states.[37]

These are just a few examples. In its online report *Democracy Diminished*, LDF continually catalogues the proliferation of voter suppression laws enacted in states formerly covered by Section 5 of the Voting Rights Act in the wake of the Court's *Shelby County* decision.[38]

The Supreme Court, however, has not taken the lessons of *Shelby County* to heart. On the contrary, at the end of last term, the Court issued a new decision significantly curtailing Section 2, the other key provision of the Voting Rights Act—which the Court in *Shelby County* stressed would remain an operative provision to protect the right to vote. Section 2 of the Voting Rights

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[33] *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2355 (2021) (Kagan, J., dissenting) (citing Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2145–2146 (2015).
[34] *Veasey v. Abbott*, 249 F. Supp. 3d 868 (S.D. Tex. 2017).
[35] Alex Ura & Cassandra Pollock, *Texas House Democrats Flee the State in Move That Could Block Voting Restrictions Bill, Bring Legislature to a Halt*, TEX. TRIB. (July 12, 2021, 8:00 PM), https://www.texastribune.org/2021/07/12/texas-democrats-voting-bill-quorum/; Amy Gardner, *As the Voting-Rights Fight Moves to Texas, Defiant Republicans Test the Resolve of Corporations That Oppose Restrictions*, WASH. POST (Apr. 22, 2021, 3:36 PM), https://www.washingtonpost.com/politics/texas-voting-restrictions-gop corporations/2021/04/21/a2746b8c-a1e4-11eb-a774-7b47ceb36ee8_story.html.
[36] *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. at 2355.
[37] Hannah Denham & Jena McGregor, *HP, Dow, Under Armour Among Nearly 200 Companies Speaking out Against Voting Law Changes in Texas, Other States*, WASH. POST (Apr. 2, 2021, 7:00 PM), https://www.washingtonpost.com/business/2021/04/02/companies-against-state-voter-restrictions/.
[38] NAACP LEGAL DEF. FUND, DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST *SHELBY COUNTY, ALABAMA V. HOLDER* (2021), *available at* https://www.naacpldf.org/wp-content/uploads/LDF_01192021_DemocracyDiminished-4b_06.24.21.pdf.

Act applied nationwide and broadly prohibits any election laws or policies that result in minority voters being denied an equal opportunity to participate in the political process. Yet, rather than respect the breadth of the plain text of Section 2, in *Brnovich v. Democratic National Committee*, the Court effectively re-wrote that provision to lay out its own standard for vote denial cases that will be more difficult for plaintiffs in voting rights cases to satisfy.[39]

Justice Kagan astutely identified the textual and analytical confusion of the majority's decision in *Brnovich*, explaining that

> The Court always says that it must interpret a statute according to its text—that it has no warrant to override congressional choices. But the majority today flouts those choices with abandon. . . . No matter what Congress wanted, the majority has other ideas. This Court has no right to remake Section 2. Maybe some think that vote suppression is a relic of history—and so the need for a potent Section 2 has come and gone. *Cf. Shelby County*, 570 U.S. at 547 ("[T]hings have changed dramatically"). But Congress gets to make that call. Because it has not done so, this Court's duty is to apply the law as it is written.[40]

The conservative majority's newly-created "guideposts" in *Brnovich* instruct, among other things, courts to compare a challenged voting restriction to the burdens of voting as they existed in 1982, when Section 2 was amended by Congress. This "guidepost" contravenes the text and purpose of Section 2, which is to prohibit racial discrimination in voting, not to impose 1982 as a reference point for evaluating whether today's laws are discriminatory. As Justice Kagan observes, "Section 2 was meant to disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber."[41] Possibly more concerning, the Court also established as a "guidepost" in Section 2 cases, the size of the discriminatory burden established by a voting restriction in absolute terms, allowing the Court the flexibility to leave in place discriminatory voting laws simply because a court decides the overall effect is insufficiently broad. Specifically, Justice Alito, writing for the majority, suggested that a small racial disparity produced by voting burdens is not cognizable regardless of other indicia of racial discrimination. As Justice Kagan again explained "[m]aking one method of voting less available to minority citizens than to whites necessarily means giving the former 'less opportunity than other members of the electorate to participate in the political process.'"[42]

The election systems in states formerly fully covered by Section 5 of the Voting Rights Act are significantly less open to Black and Latino/a Americans than they were just a decade ago, and this is a direct result of the Court's decision in *Shelby County*. It remains to be seen what profound

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[39] *Brnovich v. Democratic Nat'l Comm*., 141 S. Ct. 2321 (2021).
[40] *Id.* at 2372-73.
[41] *Id.* at 2363-64.
[42] *Id.* at 2363.

and discriminatory incursions on the right to vote will take root if the Court's decision in *Brnovich* remains the law of the land—and the resulting impact on the Court's credibility.

B. Money as Speech

The Supreme Court's decisions in the field of campaign finance further evidence the Court's lack of neutrality. By equating speech with spending, and again disregarding prior precedent respecting Congress's judgment about the need to limit campaign spending, the Court has empowered the wealthy, predominately white, donor class to dominate politics.[43]

In *Citizens United v. Federal Election Commission*, the Court invalidated corporate campaign spending limits as violative of the First Amendment's free speech guarantees, asserting that the anti-distortion rationale[44] for campaign finance regulation was not a compelling state interest. The Court instead declared that the only kind of corruption that can justify campaign finance restrictions is "quid pro quo corruption," and that "[i]ngratiation and access . . . are not corruption."[45] In so doing, the Court overruled prior precedent, which had recognized what a majority of the American public know: that corporate contributions can have a distorting influence on the nature of a democracy even absent proof of "quid pro quo corruption."[46] Indeed,

> Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. . . . The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.[47]

Yet, brushing *stare decisis* aside, in *Citizens United*, a sharply divided Court stated that the public has no compelling interest in curtailing the distorting influence of money in politics. Since *Citizens United*, special interest groups and a small cadre of primarily-white wealthy donors and donor groups have exponentially increased their political spending. In 2017 research conducted by

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[43] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).
[44] *See Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990) (recognizing that eliminating the distortion caused by corporate spending in the political process, while also allowing corporations to express their political views, was a compelling state interest sufficient to justify any burden the legislation had on corporate speech).
[45] *Citizens United*, 558 U.S. at 357-58.
[46] *Id.*
[47] *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257-58 (1986); *aff'd by Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310.

Demos found that the largest donor group in the 2016 presidential elections was white men, and that the influence of a white, wealthy, and male donor class tended to push public policy to the right, potentially at the cost of progress on gender and racial equity.[48]

The Court must return to reality—corporate spending is not equivalent to individual spending in the context of funding elections for public office. The Court's role is to curb distorting influences on U.S. elections and their outcomes, mindful of the critical need to safeguard the First Amendment. This is a balance the Court is uniquely positioned to walk, and one that is critical to restoring confidence in U.S. elections and their outcomes.

C. Gerrymandering

"Redistricting is the great game of modern politics, and the arms race for the next decade's maps promises to be the most extensive—and most expensive—of all time."[49] But this is not the way a democracy should accept, much less conceptualize, the appropriate process for redrawing electoral districts to account for population changes.

The Supreme Court's decision in *Rucho v. Common Cause* paves the way for state politicians to use the increasingly sophisticated technology at their disposal to unfairly advantage particular groups to the detriment of Black, Latino, and socio-economically disadvantaged populations.[50] *Rucho* represents yet another example of the Supreme Court's overruling of gradually and carefully developed precedent.

In a 1986 case, *Davis v. Bandemer*,[51] the Court held that political gerrymandering presented a justiciable case or controversy appropriate for judicial review, even as the Court struggled to identify the appropriate standard to apply in these cases.[52] A plurality would have required the claims be adjudicated using traditional Equal Protection principles: requiring that for a political gerrymandering claim to succeed, a plaintiff would need to demonstrate intent to discriminate against a particular group and actual discriminatory effect of the challenged plan.

Again, in *Vieth v. Jubelirer*,[53] the Court's majority refused to accept that partisan gerrymandering was nonjusticiable. In *League of United Latin American Citizens v. Perry*, the

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[48] Sean McElwee et al., *Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections,* DEMOS (Dec. 8, 2016), https://www.demos.org/research/whose-voice-whose-choice-distorting-influence-political-donor-class-our-big-money.
[49] Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATL. (Oct. 28, 2017), https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/.
[50] *Rucho v. Common Cause,* 139 S. Ct. 2484 (2019).
[51] *Davis v. Bandemer,* 478 U.S. 109 (1986).
[52] *Id.* at 118-26.
[53] *Vieth v. Jubelirer,* 541 U.S. 267 (2004).

Court flatly stated that following *Davis* and *Vieth*, the justiciability of partisan gerrymandering had been determined, and only the applicable standard remained to be determined.[54] Nevertheless, in *Rucho v. Common Cause*, the Roberts Court abrogated this precedent, instead holding that partisan gerrymandering, no matter how egregious, presents a non-justiciable political question that cannot be addressed by the federal courts.[55]

The unique function of Supreme Court review in our democracy is to address blockages in the political process, to protect minority group rights infringed upon by the majoritarian political process particularly when those groups face structural barriers in the political process itself. Yet the Court has at best retreated from this goal and at worst sought to undertake an opposite agenda entirely. The standard put forward by plaintiffs to the Court in *Rucho* was judicially manageable, as demonstrated by the extensive record developed by the lower courts in that case. But even if the Court disagreed with that standard, it should not have abrogated precedent and declared all such cases nonjusticiable. The historically unparalleled injection of dark money and influence into American politics resulting from the Court's decision in *Citizens United*, coupled with the Court's decision in *Rucho* to place partisan gerrymandering wholly beyond judicial review, has left American politics up for sale and left the public increasingly skeptical of deference to the Court. The Court must immediately reverse course on its decisions in *Citizens United* and *Rucho* and re-establish respect for precedent established carefully over decades.

In the absence of a Court engaged in ensuring the majoritarian political process operates to protect minority group rights and prevent distortions to the political process, as the late Justice Scalia said in *Vieth*, the Constitutional remedy is for the Congress to "make or alter" gerrymandered districts,[56] among other things.

III. Lack of Transparency

"The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification."[57]

Those prescient words, penned by Judge Frank H. Easterbrook in 2000, help explain an additional and equally disturbing source of the crisis of confidence in the Supreme Court of particular concern to us as civil rights lawyers: the opaque mechanism on which the Court has increasingly relied to make decisions on matters of significant public import, the so-called

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[54] *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 414 (2006) ("We do not revisit the justiciability holding but do proceed to examine whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.").
[55] 139 S. Ct. 2484.
[56] U.S. Const. art. I, § 4; *Vieth*, 541 U.S. 267.
[57] *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

"shadow docket." The shadow docket refers to the work of the court that takes place outside of its normal merits docket. Although rulings issued on the shadow docket are nominally procedural—often styled as temporary emergency orders staying a lower court injunction pending appeal—in the last term alone, these orders served as final decisions on critically important issues with real-world impacts on the conduct of elections, the Census count, COVID-19 restrictions, and the execution of death row prisoners, despite being unsigned orders that did not include any reasoning or disclose how some Justices voted. The work of the shadow docket has grown in prominence since 2017, with the Court increasingly turning to this mechanism to resolve controversial issues and change the status quo.[58] Decisions on the shadow docket have also grown increasingly divided, with more public dissents and more public vote counts along ideological lines.[59] Even more troubling, these rulings frequently granted this extraordinary relief in favor of the then-current administration and against civil rights litigants and death row prisoners, evincing a bias by the Court in deploying shadow docket rulings.[60] The shadow docket represents decision making with little transparency, scant deliberation, and no accountability. It is more akin to lawmaking by judicial fiat than the neutral and transparent judicial review contemplated by our constitutional system. Already, the expanded use of this practice has attracted bipartisan criticism.[61]

A. A Procedural End-Run Distorts Court Decision-Making and the Balance of Power within the Judiciary

By shifting important decisions to the shadow docket, the Court has shrouded its work from public view, leaving litigants, lower courts, and the American people in the dark about the basis for its rulings and casting doubt on the integrity of those rulings. The normal process by which lawsuits wend through the federal courts encourages deliberative and transparent consideration through development of the record, merits briefing and argument in the lower courts, extensive briefing before the Court, input from amicus curiae, oral argument, ample time for consideration by the Justices, all culminating in written Court opinions supported by reasoning, and disclosing which Justices were in the majority or the dissent. The press and public have visibility into this process at most stages. By contrast, shadow document orders lack many of these hallmarks; they short-circuit the traditional appellate process, are often rendered before a final judgment from lower courts, and are decided by the Court without argument and with limited, expedited briefing over the course of a few days. Ruling on high-profile issues of national concern through a process

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[58] *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 4 (2021), (testimony of Stephen Vladek, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law) (hereinafter "Vladek").
[59] *Id.* at 5-6; Mark Joseph Stern, *Congress Finally Scrutinizes One of SCOTUS's Most Disturbing Practices*, SLATE (Feb. 18, 2021, 6:53 PM), https://slate.com/news-and-politics/2021/02/supreme-court-shadow-docket-house-hearing.html.
[60] Vladek, *supra*, at 4-5.
[61] *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2021).

that eschews the procedural safeguards intended to promote reasoned judicial decision-making undermines the integrity of the Court's rulings, especially when those rulings go unexplained.

These summary orders also distort the development of legal doctrine, often quickly resolving a controversial issue but leaving questions about their precedential effect.[62] Even when the Court issues a summary order without analysis, the outcome shapes the behavior of lower courts and actors beyond the immediate case, who must engage in a reading of tea leaves to decipher the Court's reasoning and adjust their behavior when facing similar issues. Through its shadow docket rulings, the Court is building a body of de facto precedent while offering no clear guidance.

Through increased reliance on the shadow docket, the Court has also upended the balance of power with the rest of the federal judiciary, undermining the important role that district courts and courts of appeal serve in our democracy. Emergency stays of lower court injunctions are extraordinary relief, but the Court has demonstrated a growing appetite to grant them. This willingness to brush aside a lower court decision before a case has worked its way up to the Court through normal procedures allows the Court to step into the shoes of the trial judge and prejudge the merits of the case, as Justice Sotomayor observed:

> Stay applications force the Court to consider important statutory and constitutional questions that have not been ventilated fully in the lower courts, on abbreviated timetables and without oral argument. They upend the normal appellate process, putting a thumb on the scale in favor of the party that won a stay.[63]

Our judicial system depends on litigants having a full opportunity to develop a factual record and present evidence at the district court level. Weighing this evidence and making factual findings is the task of a district court, and those conclusions are subject to deferential appellate review. Thus, it makes sense for the district court, which actually sees the evidence up close, to decide the appropriate remedy even when cases are time sensitive. The expedited nature of a case does not justify the Court's more aggressive, interventionist approach of staying reasoned, fact-rich lower court rulings. Deferential appellate review should still apply, but the Court seems to have abandoned this principle when it comes to its work on the shadow docket. Although the Court professes that it is not a forum for error correction, it seems increasingly inclined to intervene prematurely in a case to correct what it views as the wrong outcome rather than deferring to the court closer to the facts, allowing the record to develop, and letting the legal issue percolate up through the appellate process. In this way, the Court ignores judicial restraint and aggrandizes its role in our judicial system at the expense of lower court authority and even its own merits docket.

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[62] *See* Vetan Kapoor & Judge Trevor McFadden, *Symposium: The Precedential Effects of Shadow Docket Stays,* SCOTUSBLOG (Oct. 28, 2020, 9:18 AM), https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/.

[63] *Wolf v. Cook Cnty.*, 140 S. Ct. 681, 683-84 (2020) (mem.) (Sotomayor, J., dissenting).

Especially troubling is that the Court seemed particularly inclined to issue extraordinary relief to advance the policies of the Trump Administration. During the sixteen years of the Bush and Obama administrations, the Department of Justice filed eight applications for emergency relief with the Court, compared to 41 such applications during the four years of the Trump administration.[64] And, the Court obliged, granting 24 of the Trump administration's applications in full and four in part.[65] In these shadow docket rulings, the Court frequently reversed lower courts, altering the status quo to allow a raft of Trump Administration policies to take effect: limiting access to an abortion drug, banning transgender people in the military, imposing a travel ban primarily against Muslim countries, funding construction of a border wall that Congress had rejected, expanding the public charge rule to turn it into a kind of wealth test for immigrants seeking to come to the U.S. or gain status, enacting a "remain in Mexico" asylum policy, halting the Census count, and others.[66] Almost none of these cases returned to the Court's merits docket for plenary review.

Regarding this pattern, University of Chicago law professor William Baude, who coined the term "shadow docket" in 2015,[67] observed "[t]here is clear one-sidedness here," in which "[t]he government, especially the federal government, has a special ability to get the court's attention."[68] This one-sidedness is not only pro-government but was especially pronounced in responding to requests from the Trump Administration. The Court's lack of neutrality, discussed in the preceding section, is perhaps nowhere more on display than in its use of the shadow docket, which revealed the Court's willingness to circumvent normal procedures in order to install the Trump administration's agenda. At the same time, as described below, the Court has also used the shadow docket to second-guess district court decisions designed to ensure death row prisoners have a fair opportunity to litigate facially meritorious claims before they are put to death, and to allow voters to participate in the 2020 election without risking their health and safety during the COVID-19 pandemic.

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[64] Vladek, *supra*, at 4.
[65] *Id.* at 5.
[66] *See FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578 (2021) (mem.); *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (mem.); *Trump v. Hawaii*, 138 S. Ct. 542 (2017) (mem.); *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.); *Wolf v. Cook Cnty.,* 140 S. Ct. 681 (2020) (mem.); *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019) (mem.); *Ross v. Nat'l Urb. League*, 141 S. Ct. 18 (2020) (mem.).
[67] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015).
[68] Lawrence Hurley et al., *The 'Shadow Docket': How the U.S. Supreme Court Quietly Dispatches Key Rulings*, REUTERS (Mar. 23, 2021, 6:29 AM), https://www.reuters.com/article/legal-us-usa-court-shadow-video/the-shadow-docket-how-the-u-s-supreme-court-quietly-dispatches-key-rulings-idUSKBN2BF16Q.

B. Life or Death Decision-Making in the Shadows

Shadow docket decisions are often the last word on whether a death row inmate will be executed. Indeed, in a flurry of shadow docket activity last summer, the Court cleared the way for the resumption of the first federal executions in seventeen years. In eight orders supported by little to no reasoning, the Court lifted lower court stays of federal executions, denying the inmates a fair opportunity to present evidence for their claims.[69]

Without this extraordinary procedural intervention by the Court, the Trump administration would not have been able to rush through thirteen executions in the last six months of its tenure, more than three times the number of federal executions in the previous six decades.[70] After federal executions had been on hold for nearly two decades, the Court often gave no reason for its haste as it denied inmates the additional weeks or months necessary to fully litigate challenges to their recently scheduled executions. The Court's failure to even offer an explanation when sending an inmate to imminent death when lower courts penned opinions finding the inmate had a credible legal claim was a striking indication of its lack of both transparency and neutrality. As Justice Sotomayor put clearly, employing shadow docket rulings in this manner is antithetical to seeking justice:

> Throughout this expedited spree of executions, this Court has consistently rejected inmates' credible claims for relief. The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners' challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale.
>
> This is not justice. After waiting almost two decades to resume federal executions, the Government should have proceeded with some measure of restraint to ensure it did so lawfully. When it did not, this Court should have.[71]

At times, the Court's shadow docket rulings are also contradictory and irreconcilable, leaving questions about the state of the law. This is especially troubling when the issue is a matter of life and death. For example, in a trio of death penalty cases, the Court offered no explanation for its different treatment of three men on death row seeking the presence of a spiritual advisor during their executions. In *Dunn v. Ray*, the Court overruled the Eleventh Circuit's stay of execution where the Circuit found the prison's denial of a Black Muslim man's request to have an

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[69] *Id.*
[70] *United States v. Higgs*, 141 S. Ct. 645, 647 (2021) (mem.) (Sotomayor, J. dissenting).
[71] *Id.*

imam present at his execution when Christian chaplains were routinely provided to Christian inmates, likely violated the First Amendment's Establishment Clause.[72] Without addressing the Establishment Clause issue, the unsigned order by the Court brushed aside the stay and allowed Mr. Ray to be put to death before the lower courts could consider his claim on the merits.[73] As Justice Kagan explained in her dissent, "[t]his Court is ordinarily reluctant to interfere with the substantial discretion Courts of Appeals have to issue stays when needed," but here inexplicably "short-circuits that ordinary process."[74]

The following month, in *Murphy v. Collier*, the Court *granted* a stay of execution in a remarkably similar case,[75] holding with no reasoning that a Texas prison could not carry out the execution of a Buddhist man unless it provided him with a Buddhist spiritual advisor during the execution.[76] Although there was no substantive majority opinion, in concurrence, Justice Kavanaugh reasoned, in conflict with the Court's decision to lift the stay in *Ray*, that the Texas prison's policy of providing Christian or Muslim spiritual advisors but not Buddhist ones was denominational discrimination prohibited by the Constitution.[77]

Finally, in *Dunn v. Smith*, in an unsigned order, the Court again granted a stay of execution when a Christian inmate was denied a pastor under Alabama's new policy equally barring all spiritual advisors.[78] Again, the Court provided no majority opinion attempting to reconcile this outcome with *Ray*, although a concurrence by Justice Kagan offers some rationalizations.[79]

The result is that the Court's jurisprudence on the death penalty and spiritual advisors is a black box, providing little guidance to the lower courts, lawyers, and prison administrators whose decisions have life or death consequences. Advocates must parse the concurrences and dissents to divine whether the Court's majority has announced a shift in the Establishment Clause or religious exercise doctrine or what explained the different outcomes for these prisoners. Worse still, these unexplained decisions create the impression—merited or not—that bias or religious preference

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[72] *Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.).
[73] In its single paragraph of analysis, the Court's majority opinion states only that the Court may consider the "last-minute nature of an application to stay execution in deciding whether the grant equitable relief," a particularly callous reason for allowing Mr. Ray to be put to death, particularly given the fact that only five days elapsed between the prison's denial of Mr. Ray's request for an imam and when he filed his complaint. *Id.* at 662 (Kagan, J., dissenting).
[74] *Id.*
[75] *See* Leah Litman, *Relitigating Dunn v. Ray*, TAKE CARE (Apr. 17, 2019), https://takecareblog.com/blog/relitigating-dunn-v-ray (discussing the similarities between the facts of *Ray* and *Murphy*, including the prisons' policies, inmates' requests, and timing of the civil rights complaints).
[76] *Murphy v. Collier*, 139 S. Ct. 1475 (2019) (mem.).
[77] *Id.* at 1475 (Kavanaugh, J., concurring).
[78] *Dunn v. Smith*, 141 S. Ct. 725 (2021) (mem.).
[79] *Id.* at 725-26 (Kagan, J., concurring) (concluding that the Alabama prison's action substantially burdened Mr. Smith's religious exercise and did not satisfy strict scrutiny in violation of the Religious Land Use and Institutionalized Persons Act).

may have influenced the Court's decisions about who the state may lawfully kill, further undermining its neutrality.

Finally, it is worth noting that death penalty litigation is not the only area where the Court's shadow docket rulings have life of death consequences. The Court has also issued several orders regarding states' health and safety regulations during the COVID-19 pandemic, and in the prison context, notably blocking lower court orders requiring correctional facilities to take steps to protect inmates from the virus.[80]

C. Interventions in the Functions of Democracy

Disputes over election administration and voter access, issues fundamental to the operation of our democracy, also played out on the shadow docket in the Court's most recent term. In the leadup to the 2020 general election, the Court showed little hesitation to issue emergency orders imposing its view about the proper procedures by which leaders in the other two branches of government, as well as state offices, should be elected. These cases were especially fraught, given the risks presented by in-person voting during the pandemic and the fact that any decision by the Court would certainly be the final word on the matter because the approaching election would moot the case. Especially given these stakes, the Court should have followed its own stated criteria for considering emergency motions, by exercising restraint when considering applications to displace rulings by lower courts that were much closer to the facts concerning a rapidly changing public health emergency, the capabilities of local elections officials, and the burdens on voters.

Yet, in key cases, the Court chose the path of extraordinary intervention, upending lower court injunctions to reinstate rather than alleviate obstacles to voting and having a ballot counted. In *Merrill v. People First of Alabama*, a case brought by LDF and co-counsel challenging Alabama's voting restrictions in the context of the pandemic, the Court twice stayed injunctions imposed by the district court and Eleventh Circuit against, among other things, Alabama's policy banning curbside voting, once before the run-off election and again before the general election.[81] The lower courts' injunctions were narrow and supported by fact-dense, thoroughly reasoned opinions. They did not require Alabama elections officials to offer curbside voting, nor did they enjoin a law, since no state law prohibited curbside voting. They merely prevented the Alabama Secretary of State from enforcing a policy prohibiting localities that chose to offer curbside voting from doing so. Nevertheless, the Court "substitute[d] the District Court's reasonable, record-based findings of fact with [its] own intuitions about the risks of traditional in-person voting during th[e] pandemic or the ability of willing local officials to implement adequate curbside voting procedures," in two unsigned, unexplained orders, foreclosing a way for Alabamians to vote

[80] *See Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (mem.); *Williams v. Wilson*, No. 19A1047, 2020 WL 2988458 (June 4, 2020) (mem.); *Valentine v. Collier*, 140 S. Ct. 1598 (2020) (mem.).
[81] *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.); *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (mem.).

without risking their health.[82] One of the plaintiffs in the case, Mr. Howard Porter Jr., a Black man in his seventies with chronic health conditions, gave moving testimony in the district court: "[S]o many of my [ancestors] even died to vote. And while I don't mind dying to vote, I think we're past that – we're past that time."[83] Based on its shadow docket order, it appears the Court did not agree.

Similarly, in *Andino v. Middleton*, the Court reinstated South Carolina's requirement that absentee ballots be signed by a witness, overturning rulings by the district court and the en banc Fourth Circuit in an unsigned, unexplained emergency order.[84] Due to the pandemic, South Carolina had not required a witness signature for absentee ballots during the June 2020 primary election, and the lower court injunctions sought to maintain this status quo for the November general election.[85] The Supreme Court's ruling, however, changed the rules while voting was already underway, creating voter confusion and heightening the risk that ballots of voters not closely following the Court's shadow docket proceedings would be discarded. While the Court offered a reprieve for absentee ballots cast without a witness signature before its ruling and received within two days of the order, three Justices stated that they would have rejected even those ballots, which would have effectively disenfranchised voters who simply relied on lower court rulings in place at the time that they cast their ballots.[86]

Emergency requests in elections cases are expected to some degree, given the fast-moving nature of elections litigation and the looming deadline of election day. But while elections-related activity on the shadow docket may not be remarkable, the Court's willingness to issue shadow docket orders that make it harder to vote, even when those decisions upend carefully crafted lower court rulings, the status quo, and reliance interests is remarkably anti-democratic.

We advise the Commission to consider reforms concerning the operation of the shadow docket. First, the Court should decrease reliance on shadow docket rulings, which should be reserved for truly urgent and extraordinary circumstances. The Court should take seriously the traditional criteria that govern whether it should disrupt normal procedure and intervene to overturn a lower court ruling on an emergency application. These considerations should not be driven by the Court's assessment of the merits of a case, but whether the circumstances are truly extraordinary—a standard very few cases meet. Second, when the Court does entertain an emergency application, it should allow greater opportunity for briefing and perhaps even limited argument. Very few emergency applications demand resolution in a matter of days; in many, expediated briefing over a reasonably truncated time period, along with time for the justices to deliberate and discuss in conference, is possible. Finally, shadow docket orders should disclose

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[82] *People First of Ala.*, 141 S. Ct. 25 at 27 (Sotomayor, J., dissenting).
[83] *Id.*
[84] *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.).
[85] *Middleton v. Andino*, 990 F.3d 768, 768-69 (4th Cir. 2020) (en banc).
[86] *Andino*, 141 S. Ct. at 10 ("Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application in full.").

how each Justice voted. As discussed above, these ostensibly procedural decisions can have significant real-world impact, and the public deserves to know where the Justices stand on the issue.

Conclusion

When the Court loses the confidence of the people, it loses its ability to faithfully serve its critical role in our democracy. We urge the Commission to consider how the Court can avoid this fate and regain legitimacy and integrity in the eyes of the public. This is an urgent task at a time when our society and its institutions seem increasingly riven by polarization and democratic norms are in decline. The Court is integral to ensuring the future of our country. And, while there are many ways its standing can be rehabilitated, including through ethics rules to facilitate recusal, limitations on tenure, and other reforms, repairing the lack of diversity, neutrality and transparency is critical to this enterprise.

Thank you for the opportunity to inform the work of the Commission.