

## The Third Branch: The Supreme Court of the United States (SCOTUS) – Week 1

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## The Federal Court System in a Nutshell

- The U.S. has a **dual system** of laws:
  - States (and tribes, generally) are sovereign entities with their own sets of civil and criminal laws.
  - The U.S. Federal law enacted by Congress includes both civil and criminal law and coexists with State law if it doesn't outright overrule state law under the Supremacy clause of the U.S. constitution.
  - States have no inherent power to enforce federal law, though there may be situations where enforcement of specific laws is authorized
  - The U.S. Federal Court system is generally the prime enforcement mechanism of Federal law and includes district courts, courts of appeal and the U.S. Supreme Court.

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## Makeup of the Federal Court System

- 94 Federal District Courts (670 judgeships) – each district includes civil, criminal and bankruptcy courts.
- U.S. Courts of International Trade (9 judgeships) – addresses cases involving international trade and customs issues.
- U.S. Court of Federal Claims (16 judgeships) – has jurisdiction over most claims for money damages against the US
- 13 Circuit Courts of Appeal including
  - 12 appellate courts for 11 geographic districts plus DC
  - Court of Appeals for the Federal Circuit (specialty court)

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## So How Do I Get to the Supreme Court?

- If four or more justices agree to take a case: the Justices review 'petitions for certiorari' and will grant a 'writ of certiorari' if **four or more** vote in favor
- **Typically**, a case must first go through lower Federal courts (e.g. first a Federal District Court and then appeal to a U.S. Circuit Court of Appeals) before it may be appealed to the U.S. Supreme Court.
- An appeal from **any state's supreme court decision that concerns matters of federal jurisdiction** (usually issues under the US constitution) may be taken up by the U.S. Supreme Court.

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## How Many Cases Make It?

- SCOTUS receives approximately 7,000-8,000 petitions each Term
- SCOTUS generally grants and hears oral argument in 60-80 cases
- October Term 2020, 67 cases went to decision

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## Supreme Court Process

- A petition to the Supreme Court is voted on at a session of the court called a *conference*, a private meeting of the nine Justices by themselves; the public and the Justices' clerks are excluded.
- The **shadow docket** refers to decisions made on emergency orders and summary decisions outside the court's main docket of argued cases. In 2015, a University of Chicago law professor gave the shadow docket its name, but it has been around for decades.
- The court **grants a petition** for cert only for "compelling reasons," spelled out in the court's Rule 10. Such reasons include:
  - Resolving a conflict in the interpretation of a federal law or a provision of the federal Constitution
  - Correcting an egregious departure from the accepted and usual course of judicial proceedings
  - Resolving an important question of federal law, or to expressly review a decision of a lower court that conflicts directly with a previous decision of the Court.

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## Supreme Court Process (cont.)

- Once a petition is accepted, the court goes through essentially five sequential steps: **Written arguments, oral arguments, conference, opinion writings, and announcement**
- At the conclusion of oral argument, the case is submitted for decision. Cases are decided by majority vote of the Justices. At the conclusion of oral argument, the Justices retire to another conference at which the preliminary votes are tallied, and the most senior Justice in the majority assigns the initial draft of the Court's opinion to a Justice on his or her side. Drafts of the opinion, as well as any concurring or dissenting opinions circulate among the Justices until the Court is prepared to announce the judgment.
- The chief, if in the majority, is automatically the senior Justice and thus decides who writes the opinion.

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## Supreme Court Process Outside of Usual Appellate Procedure

- In addition to normal process, **each justice is responsible for emergency applications and other matters from one or more of the 13 federal circuits.** Justices are sometimes asked to halt the implementation of a circuit court order, set a bond for a defendant, stop the deportation of an alien, or act on applications for requested stays of execution.
- The **shadow docket** refers to decisions made on emergency orders and summary decisions outside the court's main docket of argued cases. In 2015, a University of Chicago law professor gave the shadow docket its name, but it has been around for decades.
- As *SCOTUSBlog* has noted, **the shadow docket's importance has escalated over the past four years.** The court has increasingly used short, unsigned emergency orders to intervene in high-profile litigation before lower courts issue their rulings.

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### Supreme Court Process Outside of Usual Appellate Procedure

- These orders **often do not explain the court's reasoning or indicate how each justice voted**. Critics say the court uses the shadow docket inconsistently, intervening aggressively when, for instance, religious rights are at stake but declining to intervene to protect abortion rights in Texas.
- In official testimony, legal expert Stephen Vladeck explained that the court has issued **seven emergency writs of injunction since November 2020**, before which the court had issued only four emergency injunctions since Chief Justice John Roberts's 2005 confirmation.
- Vladeck also noted that **"the shadow docket rulings have been far more homogenously ideological than the merits docket."** Among all dissents from shadow-docket rulings this term, he said, "there was not a single one where a justice to the right of the chief justice joined a justice to the left."
- The Court's decision on the **Texas abortion law has been the impetus for much discussion of the shadow docket**, and we will discuss the case itself in our preview of the coming term.

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### Shadow Docket Statistics

#### The Solicitor General and the Shadow Docket

The justices have been bombarded with requests for emergency relief from the federal government in recent years, with the Trump administration asking them to jump in far more often than either of the previous two administrations.

Year	Granted or granted in part	Denied	Withdrawn	Held in abeyance
2002	1	0	0	0
2003	0	0	0	0
2004	2	0	0	0
2005	1	0	0	0
2006	0	0	0	0
2007	0	0	0	0
2008	1	0	0	0
2009	2	0	0	0
2010	0	0	0	0
2011	0	0	0	0
2012	0	0	0	0
2013	0	0	0	0
2014	1	0	0	0
2015	0	0	0	0
2016	0	0	0	0
2017	8	0	0	0
2018	8	0	0	0
2019	6	0	0	0
2020	15	0	0	0
2021	4	0	0	0

Source: Stephen I. Vladeck, University of Texas School of Law

LAW360 Pulse


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### Education/Religion of Supreme Court Justices

■ Chief Justice John G. Roberts Jr. (2005) Harvard law; Catholic	■ Justice Sonia Sotomayor (2009) Yale Law; Catholic
■ Justice Samuel Alito (2006) Yale law; Catholic	■ Justice Neil Gorsuch (2017) Harvard Law; Episcopalian
■ Justice Stephen Breyer (1994) Harvard Law; Judaism	■ Justice Brett Kavanaugh (2018) Yale Law; Catholic
■ Justice Clarence Thomas (1991) Yale Law; Catholic	■ Justice Amy Coney Barrett (2020) Notre Dame Law; Catholic
■ Justice Elena Kagan (2010) Harvard Law; Judaism	

**8/9 Justices Ivy League; 6/9 Catholic**

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### Amy Coney Barrett

- Graduated first in her class at Notre Dame law school (full tuition scholarship) and was Executive Editor of the law review
- Two years as a judicial law clerk, first for Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit from 1997 to 1998, then for Supreme Court Justice Antonin Scalia from 1998 to 1999.
- Three years in private practice incl. Baker Botts
- 2002–2017, law professor (Notre Dame, UVA)
- 2017 – appointed to Court of Appeals for the Seventh Circuit
- Barrett is a textualist and an originalist (of the original-public-meaning, rather than original-intent, variety).
- In a 2013 article in *Texas Law Review* on the doctrine of *stare decisis*, Barrett listed seven cases that she believed should be considered "superprecedents"—cases the court would never consider overturning. They included *Brown v Board of Education* and *Mapp v. Ohio* (incorporating the Fourth Amendment onto the states), but specifically excluded *Roe v. Wade* (1973).

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## SCOTUS OT 2020 OVERVIEW

Conference Co-sponsored by  
the National Constitution Center  
& the Anti-Defamation League

### Speaker:

Erwin Chemerinsky, Dean  
U.C. Berkeley School of Law

<https://www.youtube.com/watch?v=Efo2sQYvKMA>, ~8:10→15:15

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## SCOTUS – OT 2020



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## SCOTUS Stat Pack OT 2020 Key Findings

- **43% of cases were decided unanimously**, slightly below the average of 47% over the past decade.
- **15% of cases were polarized along ideological lines** (defined as every Republican-appointed justice in the majority and every Democratic-appointed justice in dissent).
- Justice **Kavanaugh was in the majority in 97%** of the court's decisions (and 95% of its non-unanimous decisions), the **highest** of any justice. (Last year, it was Roberts.)
- Justice **Sotomayor was in the majority in 69%** of the court's decisions (and 45% of its non-unanimous decisions), the **lowest** of any justice.

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## Key Findings (continued)

- Justices **Thomas and Sotomayor wrote the most total opinions**, driven largely by their high numbers of concurring opinions and dissents.
- Among **23 close cases** (generally, those decided 6-3 or 5-4):
  - **13 cases** had an outcome we coded as "conservative,"
  - **3 cases** had an outcome we coded as "liberal," and
  - **7 cases** had an outcome we coded as "mixed."
- Of the **106 lawyers who argued before the court** this term, **79% are men and 21% are women**.
- The court decided 16 cases from our 9<sup>th</sup> Circuit (far more than any other circuit). It **reversed the 9<sup>th</sup> Circuit in 15 of them and affirmed only once**.

<https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.6.21.pdf>

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## Cases Considered in OT 2020

The 67 decisions handed down that constitute formal opinions of the court fall into **three categories**:

- 57 decisions in **merits cases** in which **oral arguments were heard and signed opinions rendered** (2<sup>nd</sup> fewest since Civil War, after OT 2019),
- 8 “**summary reversals**” (unsigned decisions **reversing a lower court without oral argument**), and
- 2 unsigned “**shadow docket**” decisions granting emergency relief. (Petitions requesting emergency relief issued with minimal or no written opinions. Such orders have reshaped the legal landscape in recent years on high-profile matters like changes to immigration enforcement, disputes over election rules, and public-health orders barring religious gatherings and evictions during the pandemic.)
  - required Pennsylvania to extend the deadline for counting mail-in ballots (a result favored by Democrats) and
  - allowed Alabama officials to reinstate a ban on curbside voting (a result favored by Republicans).

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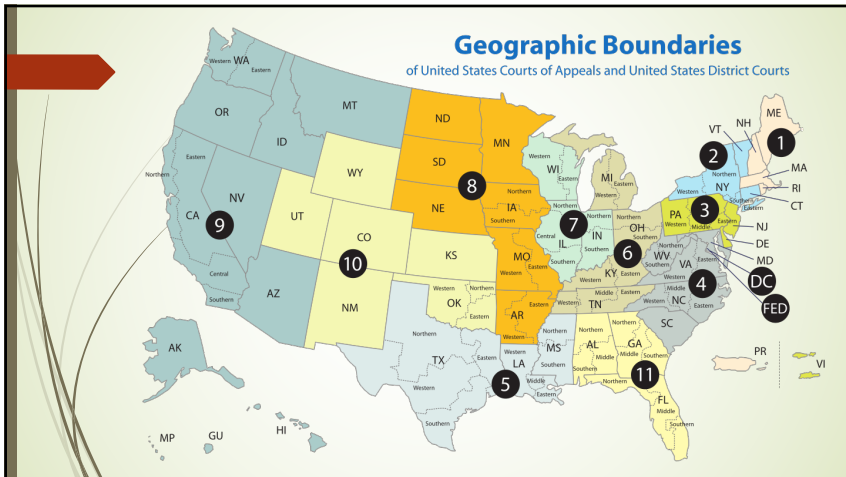
## Major Areas of Law in the OT 20 Merits Docket Cases

Area of the Law	# & % of Merits Cases
Criminal Law	9 or 15.8%
Environmental Law	7 or 12.3%
Immigration Law	6 or 10.5%
Article III Standing	5 or 8.8%
Search & Seizure	4 or 7%
Administrative Law	4 or 7%
Civil Procedure	4 or 7%
19 other categories	18 or 31.6%

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## Geographic Boundaries

of United States Courts of Appeals and United States District Courts



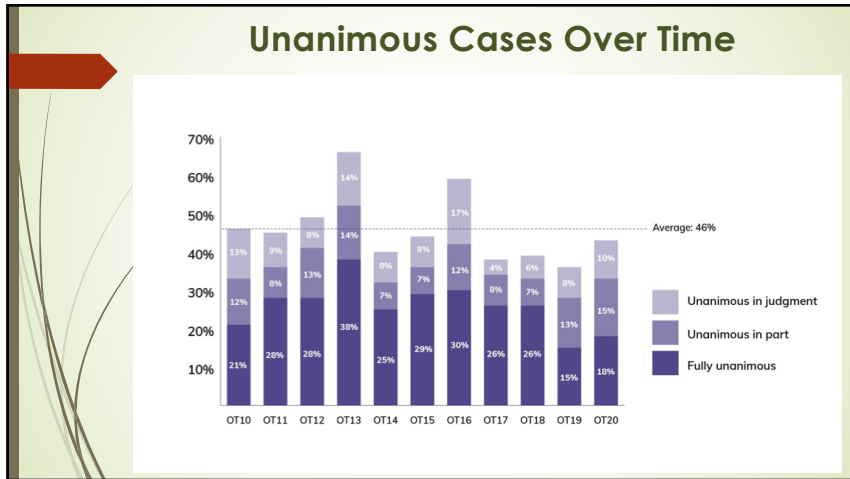
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## Circuit Scorecard

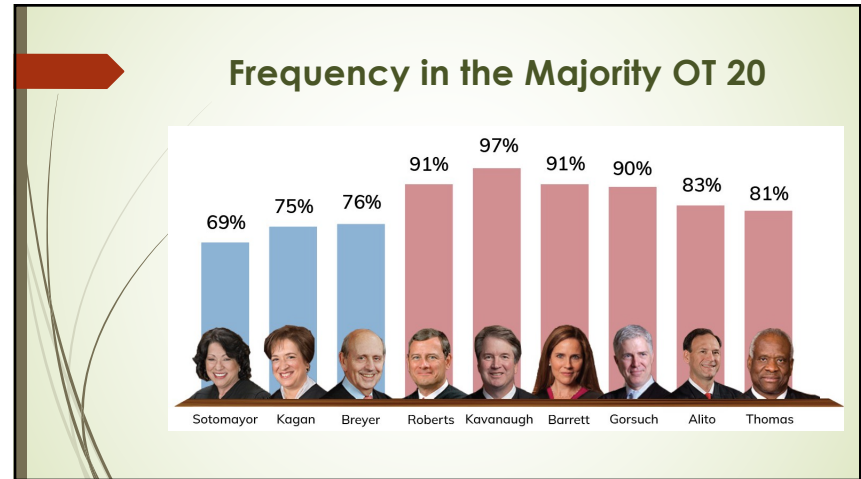
- 1. Main appellate court for many issues of American **administrative and constitutional law**.
- 2. Main appellate court for **patent law** cases.
- 3. Exercises worldwide appellate jurisdiction over **members of the United States Armed Forces on active duty** and other persons subject to the **Uniform Code of Military Justice**.
- 4. Appellate cases directly from state Supreme Courts.
- 5. Appellate cases directly from a Federal District Court, bypassing Circuit Court.
- 6. Appellate cases involving suits between two states.

Court Below	# (% of Cases)	# (%) Affirmed	# (%) Reversed
1 <sup>st</sup> Circuit	1 (1%)	0 (0%)	1 (100%)
2 <sup>nd</sup> Circuit	3 (4%)	1 (33%)	2 (67%)
3 <sup>rd</sup> Circuit	6 (9%)	2 (33%)	4 (67%)
4 <sup>th</sup> Circuit	3 (4%)	0 (0%)	3 (100%)
5 <sup>th</sup> Circuit	7 (10%)	2 (29%)	5 (71%)
6 <sup>th</sup> Circuit	5 (7%)	0 (0%)	5 (100%)
7 <sup>th</sup> Circuit	1 (1%)	0 (0%)	1 (100%)
8 <sup>th</sup> Circuit	4 (6%)	1 (25%)	3 (75%)
9 <sup>th</sup> Circuit	16 (23%)	1 (6%)	15 (94%)
10 <sup>th</sup> Circuit	3 (4%)	0 (0%)	3 (100%)
11 <sup>th</sup> Circuit	5 (7%)	2 (40%)	3 (60%)
D.C. Circuit	4 (6%)	0 (0%)	4 (100%)
Federal Circuit	3 (4%)	0 (0%)	3 (100%)
Armed Forces	1 (1%)	0 (0%)	1 (100%)
State Court	4 (6%)	3 (75%)	1 (25%)
District Court	1 (1%)	0 (0%)	1 (100%)
Original	2 (3%)	2 (100%)	0 (0%)
<b>TOTAL</b>	<b>69 (100%)</b>	<b>14 (20%)</b>	<b>55 (80%)</b>

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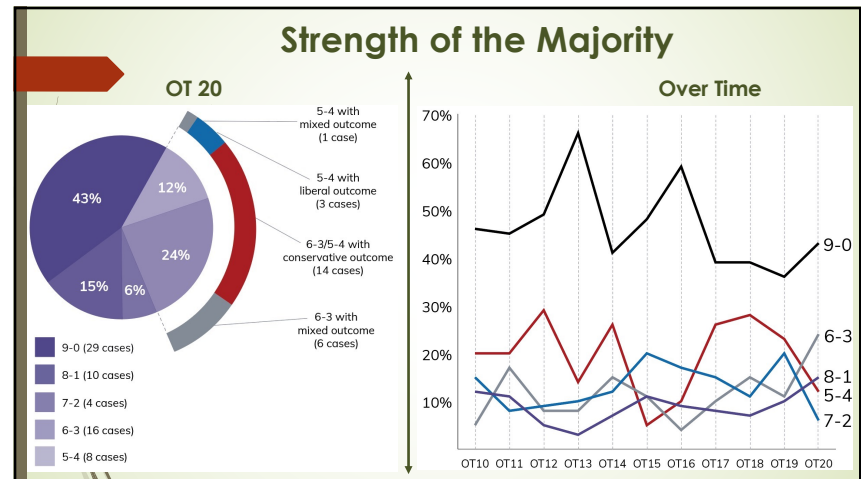
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### Current Justices Frequency (%) in the Majority Over Time

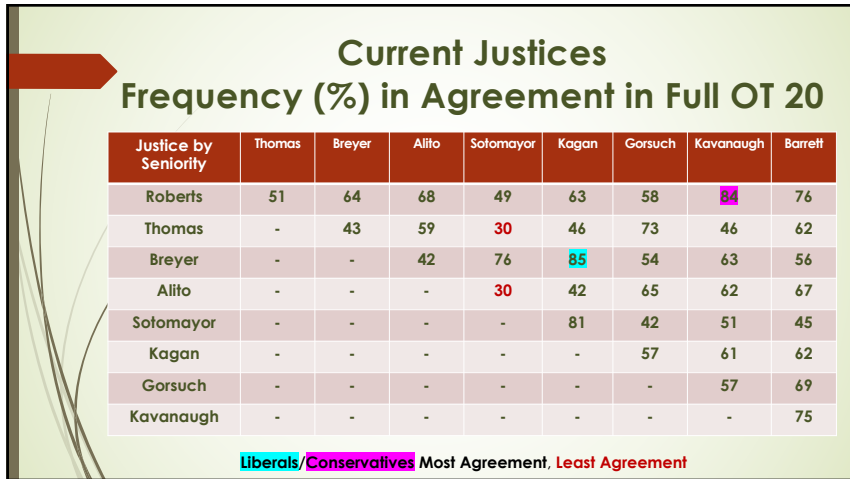
Justice by Seniority	OT 20	OT 19	OT 18	OT 17	OT 16	OT 15	OT 14	OT 13	OT 12
Roberts	91	97	85	93	93	92	80	92	86
Thomas	81	72	75	81	82	72	61	88	79
Breyer	76	77	76	73	90	94	92	88	83
Alito	83	73	82	79	86	84	72	88	79
Sotomayor	69	72	75	68	90	83	89	82	79
Kagan	75	78	82	74	93	95	85	92	81
Gorsuch	90	89	75	85	82	-	-	-	-
Kavanaugh	97	93	91	-	-	-	-	-	-
Barrett	91	-	-	-	-	-	-	-	-

Highest % and Lowest %

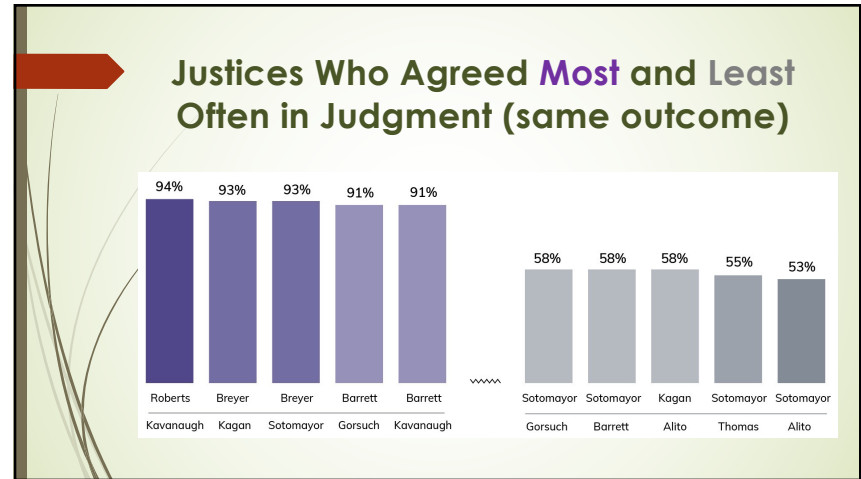
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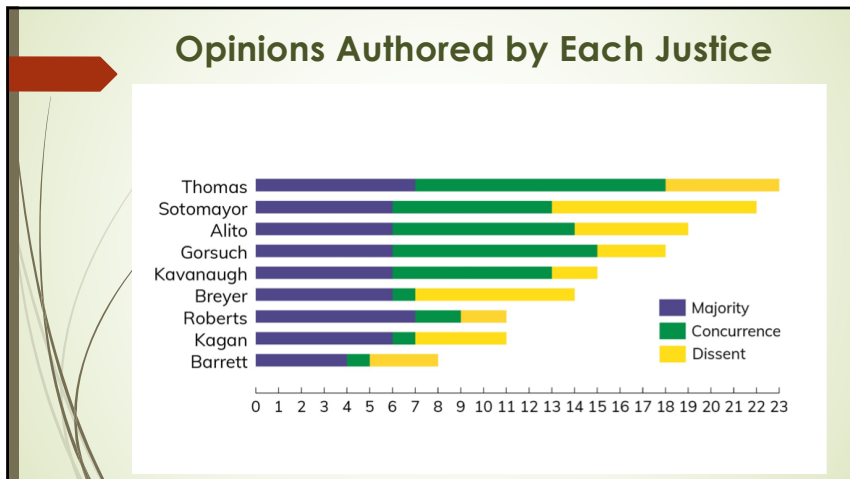
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### Preview of Cases for Week 2 October 14, 2021

- Fulton v. City of Philadelphia**
  - This case continues the Court's interest in so-called Religious Freedom under the 1<sup>st</sup> Amendment.
  - A religious-backed foster care agency was denied a new contract by the City of Philadelphia due to the agency's refusal on religious grounds to provide service to married same-sex couples.

In recent years each term seems to include at least one case attempting to push the boundaries of the free exercise clause of the 1<sup>st</sup> Amendment:

*"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."*

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### ► **Texas v. California**

- This is the third case to come to the Supreme Court dealing with the validity of the Affordable Care Act, aka Obamacare.
- The constitutionality of the law was upheld previously on a 5-4 vote; the issue was the individual mandate. While the court would not uphold the law based on the power of congress to regulate interstate commerce, it would uphold the law based on the taxing power of the Federal Govt.
- Under the Trump administration the individual mandate penalty was lowered to zero. As a result, it was argued that the law was now unconstitutional.

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### ► **Nestle/Cargill v. Doe**

- This is another case based on the Alien Tort Statute (ATS), a 1789 federal law intended to hold accountable people who violate "laws of nations," such as piracy, assaults against ambassadors, and violations of safe passage.
- Since the 80s, there have been repeated attempts to use ATS to hold accountable international human rights abusers.
- Plaintiffs were former enslaved children forced to work on cocoa farms in the Ivory Coast they claimed were under control of U.S. Cocoa Corporations.

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### ► **Brnovich v. Democratic National Committee**

- This is challenge to two new voting laws in Arizona which the DNC charged violated the remaining Section 2 (general provision) of the Voting Rights Act
  - Any ballot filed out of precinct must be totally thrown out
  - Anyone collecting and delivering another person's early voting ballot could be prosecuted.

***Hope to see you next week!***

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