

# The Supreme Court of the United States (SCOTUS)

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## Week 1



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Fall 2024

Jefferson County Library & The Salish Sea Fellowship

# JUSTICES OF THE U.S. SUPREME COURT

October Terms (OT) 2022 & 2023 & Upcoming OT 2024





## **Current Justices** by Appointment Year Who They Succeeded (Who Appointed Them)

- 1991 – Marshall → **Clarence Thomas** (Bush 1)
- 2005 – Rehnquist → **John Roberts** (Bush 2)
- 2006 – O'Connor → **Samuel Alito** (Bush 2)
- 2009 – Souter → **Sonia Sotomayor** (Obama)
- 2010 – Stevens → **Elena Kagan** (Obama)
- 2017 – Scalia → **Neil Gorsuch** (Trump)
- 2018 – Kennedy → **Brett Kavanaugh** (Trump)
- 2019 – Ginsburg → **Amy Coney Barrett** (Trump)
- 2022 – Breyer → **Ketanji Brown Jackson** (Biden)

# SCOTUS OT23 OVERVIEW #1

National Constitution Center & the Anti-Defamation League

<https://www.youtube.com/watch?v=Qeex1LqJ44Q>

**Erwin Chemerinsky**, Dean, U.C. Berkeley School of Law (5:30→10:30) characterizes this term:

- ▶ **Very divided court** – of 59 cases, 23 (39%) were decided 6:3 and 5 (8%) were 5:4. **Ideology** was the most common divide.
- ▶ Even in unanimous/nearly unanimous decisions (29 cases or 49%), **multiple opinions issued**. U.S. v Rahimi (8:1 w/Thomas dissent) with 7 opinions. Idaho/Moyle v. U.S. (9:0) with 4 opinions.
- ▶ Alito authored only 4 majority opinions, while **Barrett found her voice** and sided with liberals in two cases.
- ▶ Term Tone → **“Angry Scorpions in a Bottle”**

# SCOTUS OT23 OVERVIEW #2 - Oyez

Cornell's Legal Info Institute & Chicago-Kent College of Law

<https://www.oyez.org/media/2023-24-key-rulings> (3:12-->8:55)

**Vikram Amar – Professor, UC Davis School of Law** Many incendiary cases, often required to take

- Lots of incendiary cases, many the **Court felt compelled** to take
- **Court showed judgment & discretion, EXCEPT** in Trump Colorado & Immunity cases – terribly decided, clouding assessment of term

**Michael Dorf – Professor, Cornell Law School**

- Court looked partisan in several cases, but others were decided with minimalism. **Sought to avoid decisions** in cases from 5<sup>th</sup> circuit.
- **Barrett emerging as scholarly/thoughtful, moderating** other conservatives.



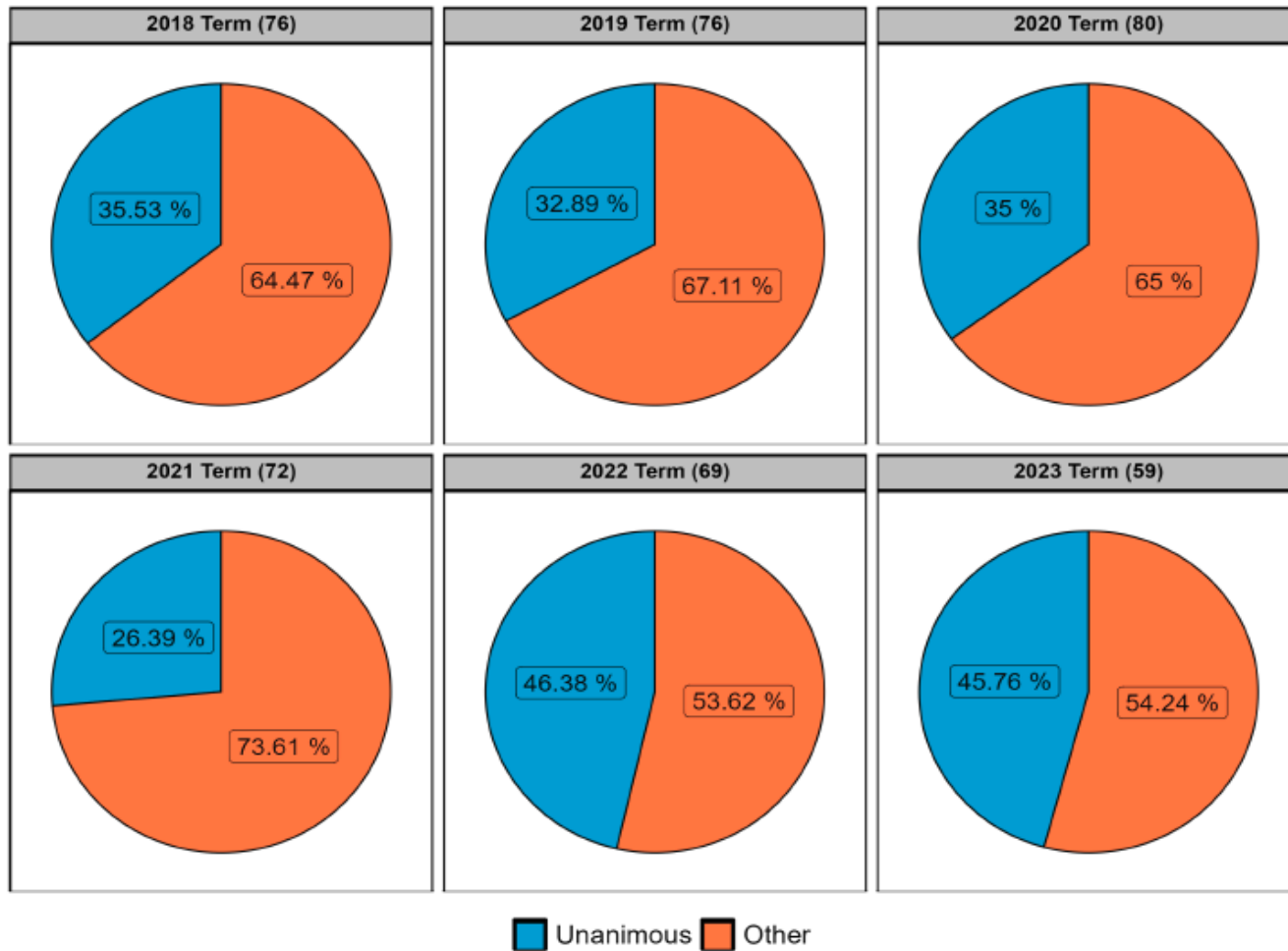
## OT 23 - SCOTUS by the NUMBERS

<https://empiricalscotus.com/2024/07/01/2023-stat-review/>

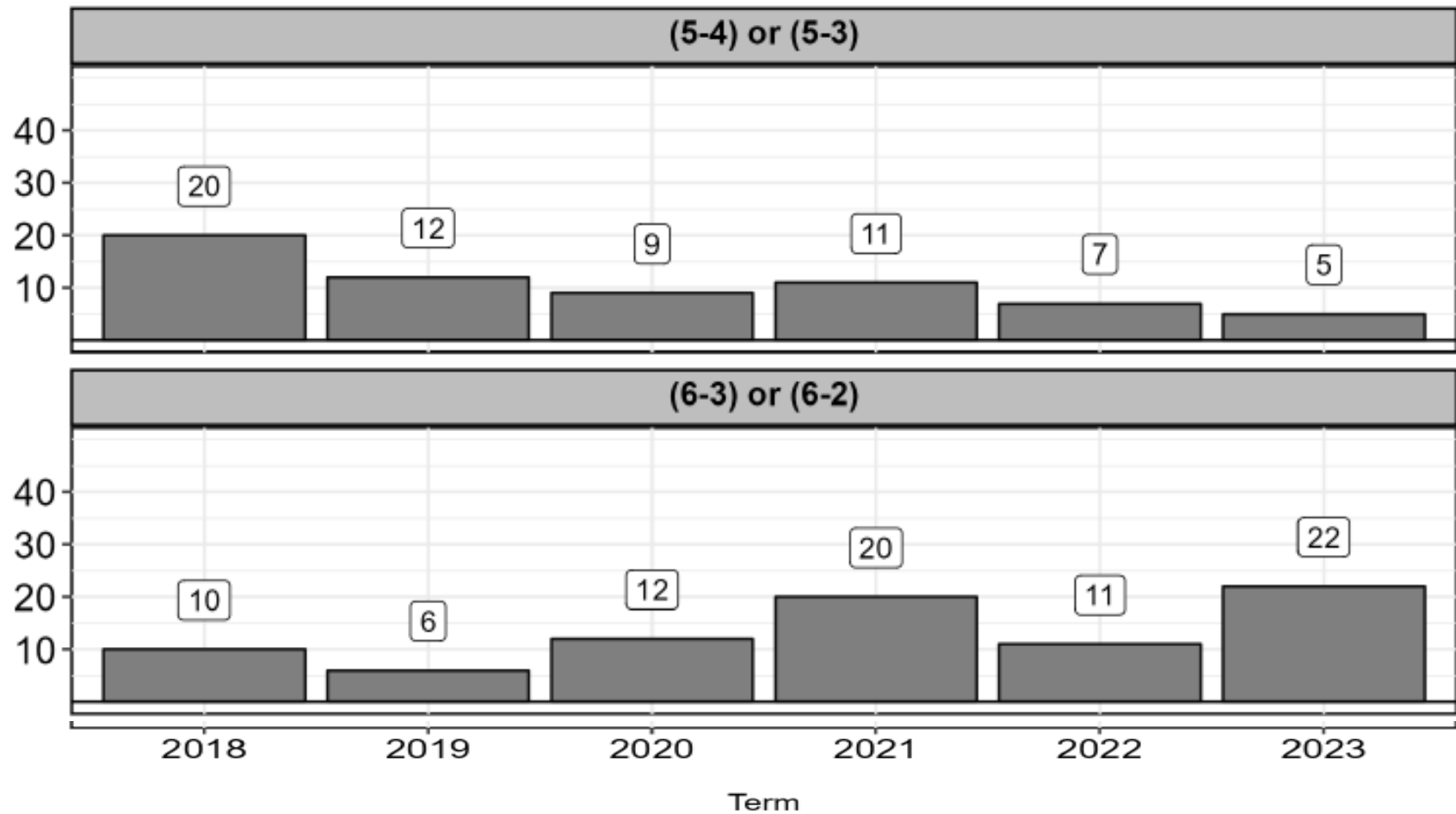
**59 MERITS CASES** – one more than last 2 terms

- ▶ Court seems to have **stabilized at ~50+ cases**
- ▶ **1<sup>st</sup> decade of Roberts Court** averaged >70 cases
- ▶ Last year of **Rehnquist Court (2004) - 80 Cases**
- ▶ **1980s average – 160 cases/yr.**

## % of Cases Decided Unanimously OT 2018→2023



## 5:4 and 6:3 Decisions OT 2018→2023

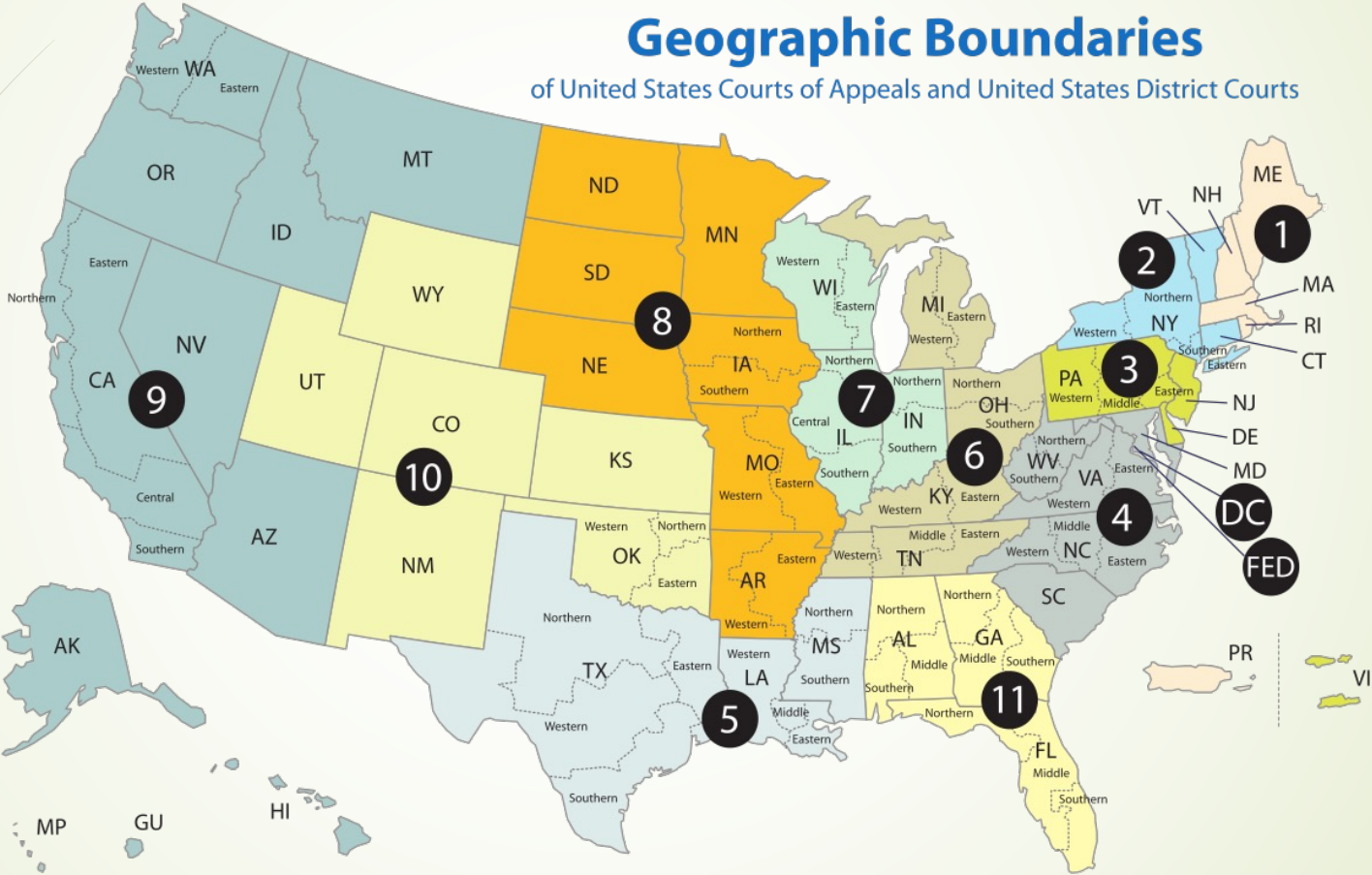




# Circuit Court Map

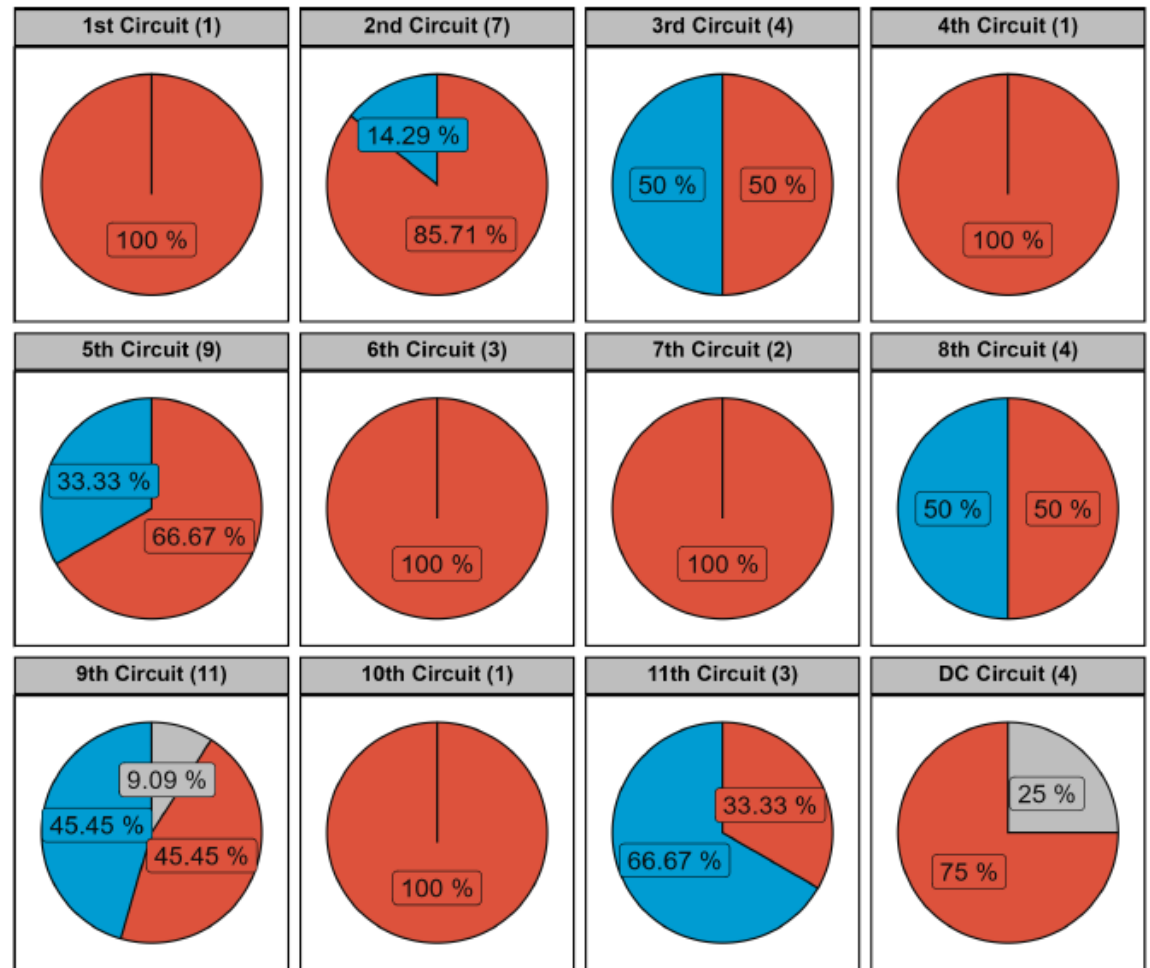
## Geographic Boundaries

of United States Courts of Appeals and United States District Courts



# OT 2023 Circuit Scorecard

50 Circuit Cases  
5<sup>th</sup> – 9 (18%)  
9<sup>th</sup> – 11 (22%)



■ Affirmed
 ■ Reverse, Vacate, (and/or) Remand
 ■ Other



Roberts



Thomas



Alito



Sotomayor



Kagan



Gorsuch



Kavanaugh



Barrett



79.66



82.76

89.66



71.19

50.85

53.45



71.19

50.85

53.45

96.61



76.27

83.05

82.76

61.02

61.02



94.92

77.97

84.48

69.49

69.49

74.58



88.14

81.36

81.03

69.49

69.49

77.97

89.83



69.49

52.54

58.62

91.53

91.53

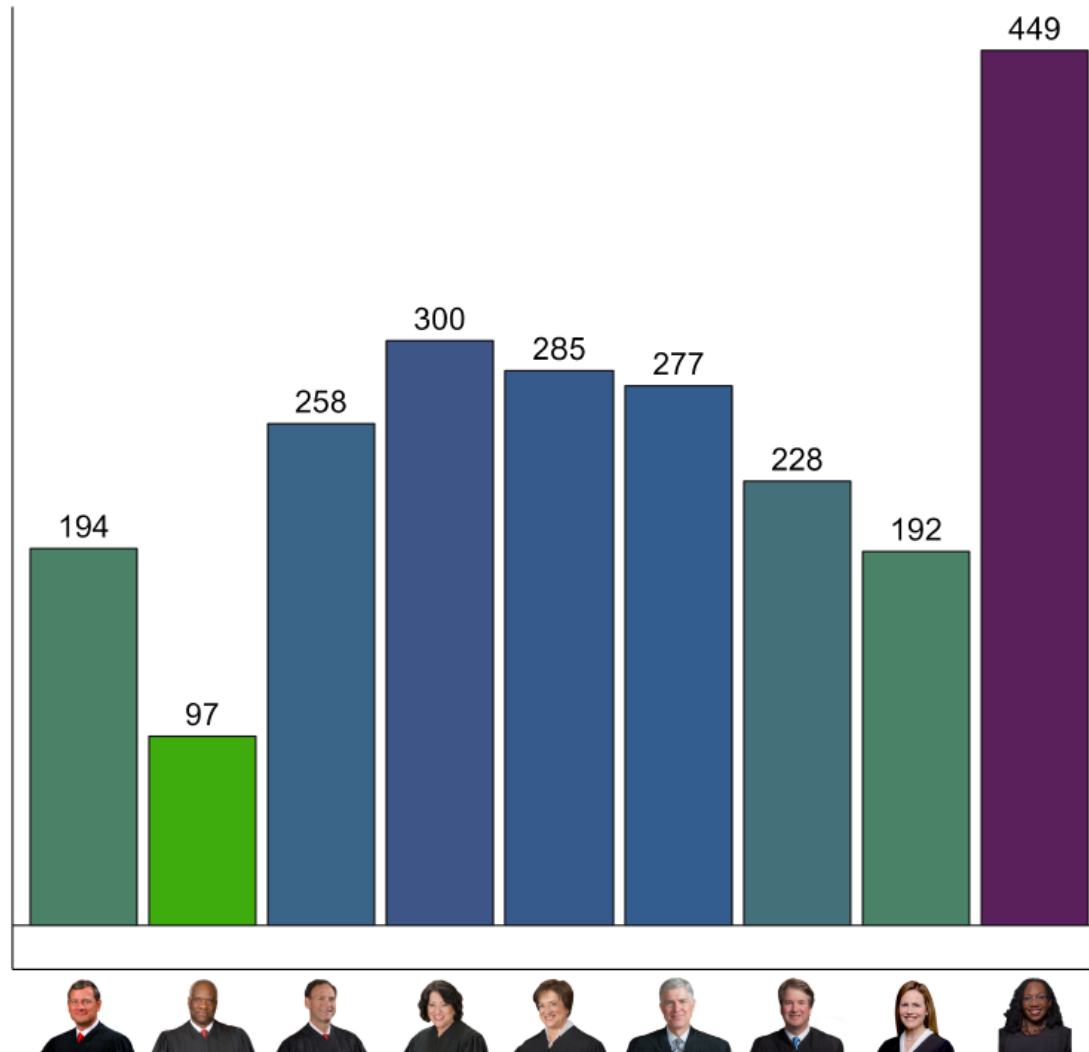
62.71

71.19

67.8

# OT 2023 Justice-Level Agreement

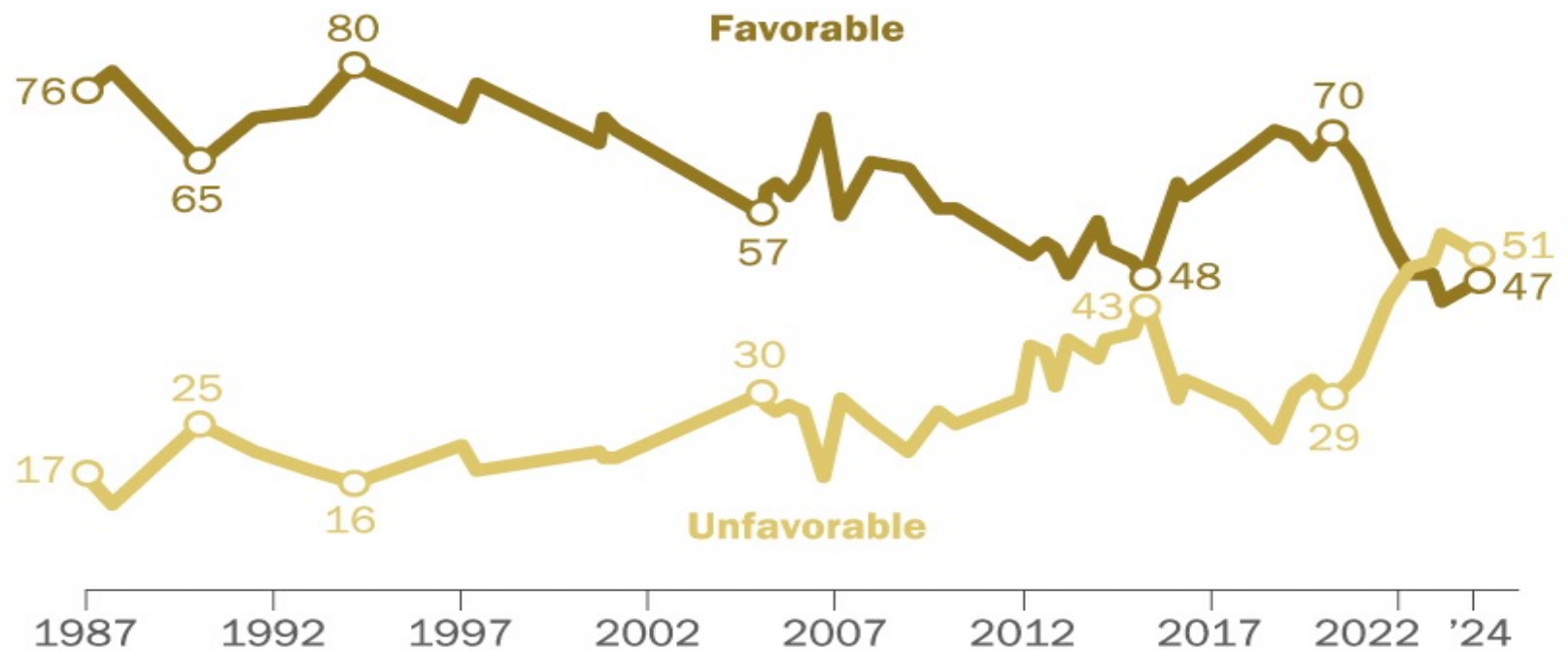
**OT 2023  
Speaking Time  
(in Minutes)  
during  
Oral  
Arguments  
by Justice**



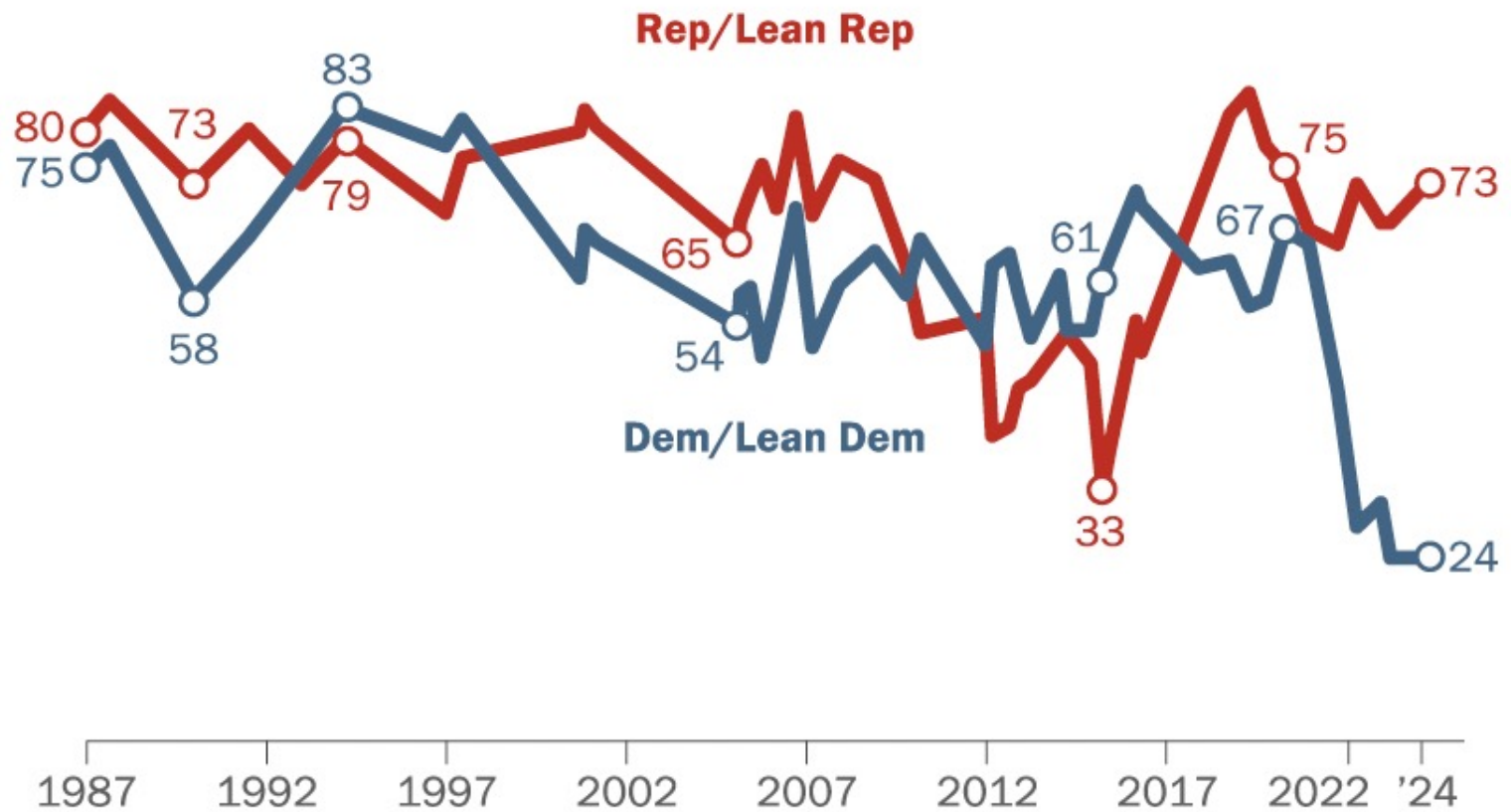
# Public Image of SCOTUS 1987→2024

## Favorable views of Supreme Court edge up from 2023 but are still close to historic low

*% who say they have a(n) \_\_\_ opinion of the Supreme Court*



*% who say they have a **favorable** opinion of the Supreme Court*



Source: <https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/>

# Update on the Supreme Court Ethics Scandal

- ▶ **Ginni Thomas Funding:** The *Post* reported in March that a group Ginni Thomas formed in 2019 had **raised nearly \$600,000 from anonymous donors funneled through a right-wing think tank that filed an amicus brief** at the Supreme Court during the same time. Ethics experts said Clarence Thomas should have recused himself from that case if his wife was paid by the group.
- ▶ **Financial Disclosures:** Thomas has made a series of other “errors and omissions” on financial disclosure reports, which the *Washington Post* reported includes reporting **real estate income for decades** from a company that shut down in 2006. He has in the past had to amend his financial disclosures multiple times, including after **failing to report his wife’s income** in the 2000s.
- ▶ **Sen. Ron Wyden:** new bill to add six Supreme Court justices and require tax return disclosure.
- ▶ **Sen. Sheldon Whitehouse: S.359 - Supreme Court Ethics, Recusal, and Transparency Act of 2023**
- ▶ **Sen. Murphy: S.325 - Supreme Court Ethics Act**
- ▶ **President Biden:** Term limits and binding ethics rules.

# Choosing Not to Decide: Requiring **Standing** for a Party in a Suit

- ▶ **Standing:** In law, **standing** or *locus standi* is a condition that a party seeking a legal remedy must show they have, by demonstrating to the court, sufficient connection to and harm from the law or action challenged to support that party's participation in the case.
- ▶ The party is **directly subject to an adverse effect** by the statute or action in question; a party must have something to lose. The party has standing because they will be directly harmed by the conditions for which they are asking the court for relief.
- ▶ The party is not directly harmed but asks for relief because the **harm involved has some reasonable relation to their situation**, and the continued existence of the harm may affect others who might not be able to ask a court for relief.
- ▶ A person cannot bring a suit challenging the constitutionality of a law unless they **can demonstrate that they are or will "imminently" be harmed by the law.**



## **Example 1:** the **Mifepristone** Suit *FDA et al. v. Alliance for Hippocratic Medicine et al.*

- Mifepristone was approved by the FDA as an **abortion drug** in 2000.
- In 2016 and 2021, some FDA imposed **restrictions on its use were eased** (weeks of pregnancy, manner of prescription, etc.).
- Four pro-life medical associations and several individual doctors sued, asking a Fed. Dist. Ct. to issue a **preliminary injunction to rescind its approval** or the later regulatory easing.
- The **District Court agrees**, essentially ordering the drug off the market.
- The **5<sup>th</sup> Circuit (notably) agrees** that the plaintiffs have standing, doesn't think the initial challenge will succeed (relevant to the fact that this concerns a preliminary injunction), but thinks the 2016 and 2021 regulatory easing challenges will succeed.



## **Example 1:** the **Mifepristone** Suit *FDA et al. v. Alliance for Hippocratic Medicine et al.*

- The Supreme Court takes this case as an **appeal of the 5<sup>th</sup> Circuit decision** to uphold in part the preliminary injunction with regulatory easing in 2016 and 2021.
- As an initial matter, they must first determine if the parties have **standing**, pointing out that:
  - Article III of the Constitution limits jurisdiction of the Federal Courts to actual Cases and Controversies
  - Federal courts are not an open forum for citizens to press general complaints about the government
  - To obtain a judicial determination of what the law is, a plaintiff must have a personal stake in the matter.

## **Example 1:** the **Mifepristone Suit** *FDA et al. v. Alliance for Hippocratic Medicine et al.*

- ▶ The **plaintiff must establish:**
  - An injury to the plaintiff
  - That the injury likely was caused or will be caused by the defendant, and
  - That the injury can be redressed by the requested relief.
- ▶ The **two key questions** thus are:
  - Is there **an injury** in fact, and
  - Is there **causation**?
- ▶ The point here is to screen out plaintiffs that have only a general legal, moral, ideological or policy objection.

## Example 1: the Mifepristone Suit

### *FDA et al. v. Alliance for Hippocratic Medicine et al.*

- ▶ Plaintiffs here are pro-life, oppose elective abortion, and have sincere legal, moral, ideological and policy objections to mifepristone being prescribed and used by **others**. But they don't prescribe or use the drug and are thus **seeking to challenge FDA regulation of others**.
- ▶ The plaintiff Doctors make a number of **arguments about how they are injured**, which the Court shoots down in turn:
  - ▶ The FDA's relaxed regulation may cause '**conscience injuries**' to individual doctors. But Federal conscience laws protect doctors from being required to perform abortions or provide other treatment that violates their consciences.
  - ▶ The relaxed regulation may cause **downstream economic injuries**, e.g. having to treat mifepristone complications, risk of liability suits, potential increased insurance costs. But the causal link here is too speculative, attenuated or lacks support in the record.

## **Example 1:** the **Mifepristone** Suit *FDA et al. v. Alliance for Hippocratic Medicine et al.*

- The medical associations argue that they are injured because they **will have to spend time energy and money to fight** the relaxed regulations.
- The **Court responds** deftly:
  - “But **an organization** that has not suffered a concrete injury caused by a defendant’s action **cannot spend its way into standing** simply by expending money to gather information and advocate against the defendant’s action.”
  - This opinion was **written by Justice Kavanaugh** and was a **unanimous decision** of the Court.



## **Example 2:** social media content regulation *Murthy, Surg. Gen., et al., v. Missouri et al.*

- ▶ Under long-standing content moderation policies, **social-media platforms have variously suppressed certain categories of speech**, including speech judged false or misleading:
  - Covid information
  - 2020 election information
- ▶ Federal officials, including Surgeon General Murthy and the CDC, called on these platforms **to address vaccine misinformation**
- ▶ The FBI and other agencies communicated with the platforms about **election misinformation in advance of the 2020 and 2022 federal elections.**



## **Example 2:** social media content regulation *Murthy, Surg. Gen., et al., v. Missouri et al.*

- ▶ **Two states and five individual social media users sued** dozens of Exec. Branch officials and agencies, alleging that the Government pressured the platforms to  **censor their speech**  in violation of the First Amendment.
- ▶ The **Federal District Court** issued an injunction **and the 5<sup>th</sup> Circuit** (again!) held that the plaintiffs had **standing** to sue for injunctive relief.
- ▶ The 5<sup>th</sup> Circuit *further* held that by Federal officials ‘coercing’ or ‘significantly encouraging’ the platforms’ decisions, **those decisions were transformed into state action** (why does this matter?).
- ▶ The Supreme Court initially reviews the issue of standing before reaching the merits, i.e. the issue of the alleged coercion and encouragement constituting, in effect, state action.

## **Example 2:** social media content regulation *Murthy, Surg. Gen., et al., v. Missouri et al.*

- ▶ The Supreme Court again addresses what is necessary for a party to have standing:
  - The plaintiff must have a **concrete, particularized, actual or imminent injury that is both fairly traceable to the challenged action and redressable by a favorable ruling.**
- ▶ **Justice Barrett**, writing for the Court, first notes that the plaintiffs' standing theories rely on the social media platforms' actions, but **the platforms are not a party to the suit.** Rather, they want to shut down Government officials from pressuring or encouraging the platforms to suppress protected speech.





## **Example 2:** social media content regulation *Murthy, Surg. Gen., et al., v. Missouri et al.*

➤ **Barrett** points out:

- It is a bedrock principle that a federal court cannot redress injury that results from the independent **action of a third party not before the court.**
- As **plaintiffs** seek forward-looking injunctive relief, they **have to be facing a real and immediate threat** of repeated injury.
- As such, the plaintiffs have to show a substantial risk that in the near future, at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one Government defendant.



## **Example 2:** social media content regulation *Murthy, Surg. Gen., et al., v. Missouri et al.*

- Barrett further notes that:
  - The platforms had **independent incentives to moderate content** and often exercised their own judgment.
  - The plaintiffs failed to link their past social-media restrictions and the defendants' communications with the platforms. There was a **lack of evidence of timing** with respect to Government statements, who those statements were made to, and the platforms' actions, so the past harm can't be traced to the Government statements.
  - **Without evidence of continued pressure** by the Government, the platforms remain free to enforce, or not, their policies; evidence in fact indicates that they have continued to do so even as the Government has wound down its pandemic response measures.



## **Example 2:** social media content regulation *Murthy, Surg. Gen., et al., v. Missouri et al.*

- ▶ Barrett lastly addresses the plaintiffs '**right to listen**' theory of standing:
  - Plaintiffs argue that the First Amendment protects their interest in reading and engaging with the content of other speakers on social media.
  - This theory is '**startingly broad**' as Barrett says, as it would grant all social media users the right to sue over someone else's censorship. The Court has identified a right to receive information and ideas, but **only recognizes a cognizable injury where the listener has a concrete and specific connection to the Speaker.**



## **Example 2:** social media content regulation *Murthy, Surg. Gen., et al., v. Missouri et al.*

- So the Court finds that the **plaintiffs do not have standing** to sue the Government.
- This was a 6-3 decision, and **Justice Alito wrote a lengthy dissent joined by Thomas and Gorsuch:**
  - “For months in 2021 and 2022, a coterie of officials at the highest levels of the **Federal Government continuously harried and implicitly threatened Facebook with potentially crippling consequences** if it did not comply with their wishes about the suppression of certain COVID-19-related speech. Not surprisingly,” Alito concluded, “Facebook repeatedly yielded.”
  - Alito thought this sufficient to **establish both ‘past and threatened future injuries.’**



## **Example 3:** when the Court *really* wants to avoid an issue: *Acheson Hotels v. Laufer*

- This case came to the Court **solely on the issue of standing**.
- **Deborah Laufer is a Florida resident who uses a wheelchair.** Laufer describes herself as an ADA "tester"; she browses the internet for hotels which she believes do not provide a sufficient description of ADA compliance. When she finds such a hotel, she sues, seeking an injunction and attorney's fees. **Since 2018, she has sued over six hundred hotels.**
- She sued Acheson Hotels, who moved to dismiss for lack of standing, as Laufer had no actual intent to stay there, and thus no injury. **District Court agreed, but the 5<sup>th</sup> Circuit reversed.**
- Before the Supreme Court could hear the case, Laufer voluntarily dismissed her pending suits and argued that her case is **moot**.
- The Supreme Court (Justice Barrett) agreed; **unanimous**.
- **Note, the 'tester' does not receive compensation, but the lawyers get paid.**

# Preview of Cases for Week 2

- ▶ **GERRYMANDERING:** *Alexander v. South Carolina State Conference of the NAACP* - Racial v. political gerrymandering
- ▶ **TAKING ON THE ADMINISTRATIVE STATE:**
  - *Securities and Exchange Commission v. Jarkesy* - The 7<sup>th</sup> Amendment right to a jury trial at the agency level.
  - *Consumer Financial Protection Bureau (CFPB) v. Community Financial Services Association of America, Limited (CFSA)*- Agency funding mechanism and independence
- ▶ **GUN RIGHTS:**
  - *United States v. Rahimi* – Gun rights of domestic abusers
  - *Garland v. Cargill* – Bump stock ban
- ▶ **TRUMP CASES:**
  - *Trump v. United States* – Presidential immunity
  - *Trump v. Anderson* – Trump's Ballot Eligibility in Colorado

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