



# Kavanaugh Pleases the Base: The Supreme Court's 2019-2020 Term

The impact of Donald Trump's election victory in 2016 has been enormous. He and his Republican supporters have undermined core democratic principles and will answer to history for putting politics ahead of our lives during the worsening COVID crisis. History will also long remember the consequences of a Supreme Court moved inexorably to the right by Trump justices Neil Gorsuch and Brett Kavanaugh—both of whom, but especially Kavanaugh, have taken virtually every opportunity to undermine Americans' core rights and liberties. Gorsuch and Kavanaugh showed their willingness to overrule abortion rights precedent, to attack voting rights, to help President Trump evade the rule of law, to embitter the lives of immigrants, to end the nation's social safety net, to funnel state money into religious education, and to transform religious liberty protections from a shield into a sword. With very few exceptions, they are doing exactly what Trump and Senate Republicans knew they would do.

## Abortion Rights

### Trying to Close Abortion Clinics in Louisiana

In the June 2020 ruling in [\*June Medical Services v. Russo\*](#), Trump Supreme Court justices Neil Gorsuch and Brett Kavanaugh came only one vote away from having a majority to uphold a Louisiana TRAP (targeted regulation of abortion providers) law even though it was identical to one in Texas struck down as unconstitutional in 2016's *Whole Woman's Health v. Hellerstedt*. Gorsuch and Kavanaugh not only voted to negate the protections recognized in that case, they also invited anti-abortion advocates to file challenges to the *Planned Parenthood v. Casey* precedent that is crucial to protecting the constitutional right to abortion. (People For the American Way's affiliate PFAW Foundation joined an [amicus brief](#) authored by the National Women's Law Center in support of the clinics.)

Although the result was 5-4 to strike down the law, only the Court's four moderates correctly framed the case and recognized it as a clearly unconstitutional infringement on the right to abortion. Justice Stephen Breyer's plurality opinion reinforced the requirement that lower courts independently review the legislative findings given to justify an abortion-related law, and that they weigh the law's claimed benefits against the burdens it imposes on abortion access.

The fifth vote was provided by Chief Justice John Roberts, who had dissented in the 2016 case, but who now recognized it as precedent that controlled disposition of this case. His analysis started with *Casey*'s "undue burden" standard, but he made clear that was only because both parties agreed that was the proper framework, and neither had asked the Court to overrule it in this case. He repeated his belief that under *Casey*, courts have no role in weighing a restriction's costs and benefits—a judicial analysis that exposes the charade behind the phony "women's

health” rationale for limiting access to abortion. Nevertheless, the chief justice wrote that because the trial court’s factual record found that the burdens of the Louisiana law were the same as with the Texas law struck down in 2015, courts should treat the laws the same and strike down the newer one as a matter of precedent.

It is worth noting that [Roberts is frequently willing to overrule precedent he disagrees with](#). Perhaps he was not willing to do so this time because the Fifth Circuit’s reversal of the district court had been such a blatant defiance of the Supreme Court. No one should believe that abortion rights are secure from attack in the future by the chief justice.

Not surprisingly, Trump’s justices dissented. Gorsuch and Kavanaugh (along with Justice Clarence Thomas, who also wrote a separate dissent of his own) joined the dissent of Justice Samuel Alito and agreed that “*Whole Woman’s Health* should be overruled.” They conceded that *Casey* should be followed, but only until it is “reexamined,” which “Louisiana has not asked us to do.” As he has done before and as the Chief Justice did in his concurrence, Alito appeared to be inviting activists to initiate litigation that will give him and his fellow arch-conservatives an opportunity to overrule precedents they do not like. Gorsuch and Kavanaugh joined him in issuing this invitation.

In addition, each wrote their own dissent. Gorsuch wrote that the Court should have accepted Louisiana’s assertions that the TRAP law was necessary to protect health. He compared it to laws regulating colonoscopies and steroid injections. But those do not implicate constitutional rights requiring judicial protection, nor do they have a history of opponents seeking to eliminate those procedures and devising pretexts to accomplish that goal.

In Kavanaugh’s dissent, the second Trump justice wrote that additional factfinding was needed to determine the likely impact of the law. He had made the same claim when arguing that the law should be allowed to go into effect during the litigation. But his dissent then relied on ignoring the facts.

The district court judge had held a six-day trial and issued a 116-page decision entering a permanent injunction against the law, based on extensive factual findings. The court specifically found that as a result of the law, there would be only “one provider and one clinic” in the entire state that could perform abortions, as opposed to six doctors and five clinics before the law was passed. The court concluded that 70 percent of Louisiana women choosing to seek abortion care would be unable to obtain one in the state. The court also found that the hospital privileges requirement would produce no medical benefit, and would thus not further the state’s interest in reproductive health, but instead would increase delays and health risks to anyone seeking an abortion in Louisiana, as well as substantially burdening their right to reproductive choice.

The dissenters found this record inconvenient, so they sought to brush it away. Indeed, that is exactly [what the Trump judges on the Fifth Circuit did](#) when they overruled the district court.

Gorsuch and Kavanaugh’s positions in *June Medical* come as no surprise to anyone familiar with their records. They are doing exactly what President Trump and the Republican Senate majority put them on the Court to do.

# Voting Rights

## COVID and Voter Suppression

The Court's conservative bloc showed disdain for the right to vote during Wisconsin's primary election. The governor had sought to postpone the April 7 primary due to the sudden and unexpected threat of COVID-19, but the GOP-controlled legislature blocked him. In the days leading up to the election, enormous numbers of voters were requesting absentee ballots so they would not have to risk their lives in order to cast their vote. Ordinarily, an absentee ballot would have to be mailed by Election Day to be counted. But in this unprecedented time, tens of thousands of citizens would not even receive their requested absentee ballots in time.

Recognizing the crisis, a lower court judge ordered officials to count absentee ballots as long as they were received by April 13, an action upheld by the Seventh Circuit Court of Appeals.

But the night before the election, the Court issued a 5-4 order in the usual ideological lineup reversing the lower court. In [\*Republican National Committee v. Democratic National Committee\*](#), the far-right justices cited the general practice of not making last-minute changes to election rules because they could confuse voters. As a result of their action, any Wisconsin voter who had not yet received an absentee ballot by Election Day would have to risk contracting a fatal communicable disease if they wanted to vote.

Justice Ruth Bader Ginsburg wrote a dissent, joined by her fellow moderates, condemning the massive disenfranchisement created by the Court. If the majority was concerned about last minute changes confusing voters, then their last-minute order was all the more inappropriate. She made clear what was at stake in the case:

The majority of this Court declares that this case presents a “narrow, technical question.” That is wrong. The question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic. ... That is a matter of utmost importance—to the constitutional rights of Wisconsin's citizens, the integrity of the State's election process, and in this most extraordinary time, the health of the Nation.

Observers off the Court were even more direct. Slate's [Mark Joseph Stern](#) called it “one of the most brazen acts of voter suppression in modern history.” Rick Hasen's [Election Law Blog](#) criticized “the cavalier nature” of the majority opinion:

[It] ignores the pandemic and treats this as ordinary litigation in an ordinary time. The message it sends is that the Court cares little about the voting rights of people in the state, [especially African-American voters in Milwaukee](#) who have been facing a horrible risk related to the virus. ...

Not only does the Court's opinion show a nonchalance about the importance of voting rights in the most dire circumstances. It shows that the Court majority did not look for a way to build a bridge for a unanimous compromise opinion. The signal it sends is that we are going to have partisan warfare at the Court for the upcoming election, which is already shaping up to be one conducted under conditions of deep polarization and a pandemic. And the Court majority is not going to side with voters.

## **Trump's Tax and Business Records**

In two 7-2 rulings, the Court forcefully rejected President Trump's efforts to block subpoenas to two banks and an accounting firm to obtain financial records relating to him. He had sued the companies in his personal capacity to block them from complying. His efforts to immediately have the subpoenas nullified and keep the records forever hidden failed. But by remanding both cases for further proceedings under newly adopted standards, the Court made it very likely that Trump will be able to keep these important documents hidden until after the election. In one of the cases, Trump's justices would have made it easier for Trump to prevail on remand.

## **State Criminal Investigations**

New York state prosecutors subpoenaed Trump's accounting firm for personal and business records, investigating whether state laws were broken when Trump fixer Michael Cohen paid off women who claimed affairs with the president and then got reimbursed by the Trump Organization. Trump asserted the dangerous claim that as president, he has absolute immunity not only from state prosecutions, but even from participating in state grand jury investigations of other parties. In a 7-2 ruling in *Trump v. Vance*, the Court forcefully rejected this expansive claim. (Kavanaugh and Gorsuch concurred with the judgment only, while Thomas and Alito dissented.) Roberts opened the majority opinion (joined by the four moderates) with strong statements going to the basics of our justice system and the rule of law, and how the president does not stand apart from the country's legal justice system.

The Court also rejected Trump's alternative argument that state subpoenas of the president have to meet a higher standard to be valid. Roberts and the moderate justices made clear this had no constitutional basis. Instead, the president can argue—like any other person—that a particular subpoena is flawed under state law. He can also challenge a specific state subpoena on the grounds that it is an attempt to influence the performance of his official duties (in violation of the Constitution's Supremacy Clause), or that compliance would impede his constitutional duties, neither of which seem likely to be the case. New York justice officials will now be able to continue their efforts in the lower courts.

Their task would be harder if Trump's justices had carried the day. Justice Kavanaugh wrote a separate concurrence, joined by Gorsuch, arguing for a much harder standard that would help Trump. In particular, they argued that the president and his records should be immune from a state grand jury subpoena unless the state can show a “demonstrated, specific need” for the information.

The two dissenters went even further. Justice Thomas argued that the subpoena of the president's records should not be enforced if he can show that his duties require his full time and attention. And Justice Alito wrote an angry dissent arguing that New York had not only failed to justify its need for the material, but also did not show that it cannot wait until after the president leaves office.

## **Congressional Subpoenas**

Three congressional committees had subpoenaed Trump's accounting firm in order to determine the need for and contours of future legislation on foreign interference, taxes, and money

laundering. (The subpoena powers of Congress in an impeachment inquiry were not at issue in this case.) Trump argued that congressional subpoenas of a president's private records for legislative purposes are presumptively invalid unless the committees can show they are "demonstrably critical" to legislation. In [Trump v. Mazars](#), the Court rejected this extreme view in a 7-2 opinion written by the chief justice (and joined by all but the dissenting Thomas and Alito).

But citing the separation of powers, the Court also ruled that there needs to be more than simply a valid legislative purpose to warrant congressional subpoenas of a president's personal documents. The justices remanded the case back to the lower court to analyze the subpoenas under new standards:

1. Congress cannot subpoena the president's personal documents unless it cannot reasonably get other sources for the information it needs in light of its particular legislative objective.
2. The subpoena cannot be broader than reasonably necessary to support Congress's legislative objective.
3. Courts should be attentive to the nature of the evidence offered by Congress to connect the subpoena to a valid legislative purpose. The evidence should be more detailed and substantial if the legislation concerns the presidency.
4. Courts should assess the burdens potentially imposed on the president.

In his dissent, Justice Alito wrote that the subpoenas in this case are invalid even under the majority's standards. Justice Thomas would go further, writing that Congress can never subpoena the president's private papers, except as part of an impeachment inquiry.

Although the Court's decision allows Trump to continue blocking Congress from seeing his records, likely until after the election, it is a defeat for his claims of untrammelled power.

## **Immigrants' and Non-Citizens' Lives**

Time and again throughout the term, Gorsuch and Kavanaugh reliably voted in ways that embittered the lives of immigrants. In most cases, their hard-right positions carried the day and made a narrow 5-4 decision possible. In addition to the cases discussed below, they also made it easier to deport permanent legal residents who may have committed minor crimes many years ago ([Barton v. Barr](#)) and allowed states to enforce restrictive immigration employment eligibility policies even though federal law preempts them from doing so ([Kansas v. Garcia](#)).

The major exception was in the DACA case, when the chief justice joined the four moderates in a 5-4 victory for DREAMers, putting Gorsuch and Kavanaugh in the minority.

### **DACA and DREAMers**

To the surprise of no one who was familiar with their records, Trump's two Supreme Court justices voted against the DREAMers in the DACA case [Department of Homeland Security v. Regents of the University of California](#). Had their dissents in this 5-4 case carried the day, it

would have been a dark day for DREAMers and for the rule of law. Fortunately, [as with the census case last year](#), the Trump administration's deceptions to the Court were so blatant that even the Chief Justice joined the four moderates in rejecting its arguments.

One of the most high-profile ways the administration turned President Trump and former Attorney General Jeff Sessions's anti-immigrant animus into law was by trying to rescind President Obama's highly successful Deferred Action for Childhood Arrivals program (DACA). The only substantive reason they gave was their mistaken assertion that it was an unlawful program, with no meaningful analysis of the type required by the Administrative Procedure Act.

Several months after announcing the rescission, after losing legal challenges in the lower courts, the Department of Homeland Security (DHS) issued a memorandum providing new explanations to support the decision it had made earlier. Under the rule of law, agencies cannot simply make up new policy rationales during litigation. As it had in the census citizenship question case—which also targeted immigrants—the administration was essentially engaging in fraud before the courts. And as before, that did not seem to bother either Gorsuch or Kavanaugh, even though the Court rejected the effort by a 5-4 margin.

Kavanaugh wrote a separate dissent accepting the deception as legitimate. Gorsuch (along with Justice Alito) joined Justice Thomas's dissent arguing that DACA not only violated congressional statutes, but also the Constitution. If they had their way, the program would have ended—and roundups of innocent immigrants could have begun—that very day.

Unfortunately, the Supreme Court's decision gives the Trump administration another chance to end DACA, as long as it follows the Administrative Procedure Act and devises an adequate administrative record. So the threat of deportation continues for the nation's approximately [700,000 DREAMers](#). That includes [tens of thousands of Black DACA recipients](#), whose lives are regularly at risk at the hands of the police and who still have deportation at the hands of the Trump administration as another omnipresent malevolent force to confront on a daily basis.

## **Violence by Border Agents**

Kavanaugh and Gorsuch's votes made possible a 5-4 ruling in [Hernandez v. Mesa](#) against the family of a boy who was killed by a border agent. In an opinion written by Justice Alito and joined by the other hard-right conservatives, the Court ruled that the parents of Sergio Adrián Hernández Güereca cannot sue border patrol officer Jesus Mesa for killing their 15-year-old son.

Sergio and his friends, all Mexican citizens, were playing a game near the border that involved running from the Mexican side of the border, touching the border barbed-wire fence (which is within U.S. territory), then running back across the border into Mexico. At one point, Agent Mesa detained one of the friends, and Sergio returned to the Mexican side and watched the agent and his friend. Mesa, still on the U.S. side of the fence, then pointed his gun toward Sergio and fired twice, killing him.

His parents sued Mesa, alleging that the agent had violated their son's Fourth and Fifth Amendment rights. In a 1971 case called *Bivens*, the Supreme Court held that even when Congress has not created a right to sue, some constitutional violations are so severe that a right to



sue for damages can nevertheless be implied. Such a remedy is an important deterrent to unconstitutional actions by government officials, especially when (as here) no other legal remedy is available.

But over the years, the increasingly conservative Court has refused to apply *Bivens*, characterizing their policy as declining to “extend” the case’s holding to “new contexts.” And in this case, the Court ruled that *Bivens* should not apply to the “new context” of a cross-border shooting.

Justice Ginsburg wrote a dissenting opinion, joined by the other three moderates. She explained that this was hardly a new context: *Bivens* has been used to allow lawsuits when lethal force is unjustifiably used against someone posing no threat. Mesa was on U.S. territory when he fired the shot. Where the boy happened to be when the bullet hit him should not matter at all, since the purpose of *Bivens* is to deter government officials from violating people’s rights. Without *Bivens*, the family had no other way to hold the person who shot their son accountable.

Accountability may become even more difficult in the future: Gorsuch joined a concurring opinion urging the Court to abandon *Bivens* altogether. Although that issue was not before the Court in this case, the conservatives could decide to tee it up. And if the next justices are appointed by Donald Trump, this important precedent could be abandoned forever.

### **The Immigrant Wealth Test (“Public Charge Rule”)**

In two cases this term, the conservative 5-4 majority enabled the Trump administration to put its flawed immigration wealth test rule into effect in ways that prompted an accusation of bias from Justice Sonia Sotomayor.

The administration adopted a new definition of “public charge” to deny immigrants permanent residence status if they received even one form of public assistance – Medicaid, food stamps or other [social safety net](#) programs – for more than 12 months in a three-year period. Under the new rule, the receipt of two forms of public assistance in one month would actually count as two months of benefits. In response to a number of lawsuits arguing the wealth test violated federal immigration laws, several district courts blocked its enforcement.

The administration asked the justices to reverse the lower courts and allow it to enforce the policy while the cases were being litigated. Although such enforcement could harm enormous numbers of visa applicants, and even though the administration gave no evidence of national security or foreign relations justification for the change, the five conservative justices granted the administration’s request for an emergency stay. The order in [Department of Homeland Security v. New York](#) had no explanation, but Justice Gorsuch (joined by Justice Thomas) wrote a concurrence criticizing district courts for granting nationwide injunctions of federal policies.

But in a subsequent case, the conservative majority demonstrated a concern not for nationwide injunctions but for supporting whatever extraordinary action the administration sought. In particular, less than a month after *DHS v. New York*, the Court had a case involving a district court injunction of the wealth test that applied to only one state (Illinois). The Seventh Circuit was only a few days away from hearing oral arguments to consider the administration’s appeal of

that ruling. Nevertheless, the administration urged the Supreme Court to bypass the normal appeals process and immediately grant another emergency stay. They found a receptive audience in the same 5-4 majority in [\*Wolf v. Cook County\*](#), who issued the stay without explanation.

Justice Sotomayor write a powerful dissent, demonstrating that this was part of a larger and ominous pattern:

Claiming one emergency after another, the Government has recently sought stays in an unprecedented number of cases, demanding immediate attention and consuming limited Court resources in each. And with each successive application, of course, its cries of urgency ring increasingly hollow. ...

[T]his Court is partly to blame for the breakdown in the appellate process. That is because the Court ... has been all too quick to grant the Government's reflexive requests.

Justice Sotomayor pointedly noted that this has "benefited one litigant over all others" (i.e., Trump) and contrasted it with the Court's willingness to deny requested stays of executions, with the truly irreparable harm of death:

I fear that this disparity in treatment erodes the fair and balanced decisionmaking process that this Court must strive to protect.

## **Ending the Social Safety Net / Repealing the New Deal**

### **Ending the Independence of Independent Agencies**

In [\*Seila Law v. Consumer Financial Protection Bureau\*](#) (CFPB), the conservative 5-4 majority struck down a provision in the 2010 Dodd-Frank law protecting the director of the CFPB from being fired except for cause. Congress has long structured independent agencies that way to insulate them from political pressure and allow them to better protect people's health, safety, and financial security. This ruling advanced two of the far right's long-term goals: dismantling the nation's social safety net and disabling the federal government's ability to impose reasonable limits on corporations.

The majority opinion, authored by Chief Justice Roberts, stated that as a general rule, the president has the constitutional authority to "remove those who assist him in carrying out his duties." But nearly a century ago, the Supreme Court recognized the constitutionality of independent agencies, and Congress has created a number of them, such as the Federal Trade Commission, the Federal Reserve Board, the National Labor Relations Board, the Social Security Administration, and the Federal Housing Finance Agency.

So the conservatives focused on the fact that the CFPB has a single director, while precedent upholding independent agencies happened to involve ones with multiple directors. The Court has also upheld such protections from firing for the single official who runs the Office of the Independent Counsel. Roberts distinguished that as applying to a so-called "inferior" officer who lacks independent policymaking power.



After coming up with these selective differences, the Court used them to characterize the idea of upholding the CFPB not as an example of following precedent, but of “extending” it—which they said would unconstitutionally infringe on the “general rule” that the president must have the power to remove officials.

Justice Elena Kagan’s dissent (joined by the other three moderates) sharply criticized this approach to the case:

The majority’s general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them.

So the agency Congress created to be insulated from political pressure has been transformed. The president now has the authority to fire its director, and presumably has similar power over other independent agencies with single heads, like the Social Security Administration. Left unanswered is whether prior actions by the CFPB will be enforceable. And the future of all independent agencies is at risk from the reasoning used by the Court.

[Sen. Elizabeth Warren](#), who helped create the CFPB, criticized the ruling as “hand[ing] over more power to Wall Street’s army of lawyers and lobbyists to push out a director who fights for the American people.”

## **Redefining Religious Liberty to Enable Discrimination**

The 2019-2020 term saw the far-right justices advance the movement’s efforts to weaken the wall between church and state and to transform religious liberty protections from a shield to protect people into a sword to harm others.

### **Denying Contraception Health Care Coverage to Employees**

Those seeking to access the contraception health care they have a right to under the Affordable Care Act suffered a major setback at the hands of the Roberts Court in [Little Sisters of the Poor v. Pennsylvania](#). The Court upheld the Trump administration’s authority to issue expansive exemptions for certain employers, severely weakening the law’s guarantee of access to contraception without out-of-pocket expenses. Although the vote was 7-2, two of the seven justices (Kagan and Breyer) concurred only in the result. Justice Thomas’s majority opinion only had the support of the five ultra-conservatives. (People For the American Way’s affiliate PFAW Foundation joined an [amicus brief](#) in support of Pennsylvania authored by Americans United for the Separation of Church and State and the Anti-Defamation League.)

In 2017, the Trump administration greatly expanded the Obama administration’s religious exemption to include any employer with religious objections, including for-profit and publicly traded companies. It also exempted employers with “moral objections,” including nonprofits and for-profit companies that are not publicly traded.

The Court upheld the agency’s statutory authority under the Affordable Care Act to issue the regulations. Because it decided the case on that basis, the majority opinion stated that there was no need to address whether the religious exemptions were required under the Religious Freedom

Restoration Act, but then proceeded to suggest they were. In a concurrence, Justice Alito (joined by Justice Gorsuch) expressed his opinion that RFRA did indeed require them.

Justice Kagan (joined by Justice Breyer) wrote a separate concurrence, agreeing only with the result but not the reasoning. She wrote that the ACA was ambiguous as to whether the administration had the authority to determine who would be exempt from the requirement. Therefore, she deferred to the agency that issued the rules and wrote that it was reasonable for it to conclude that it had that authority.

However, Kagan explained that employees and reproductive health proponents have strong arguments in future court proceedings that the rules are unlawful because they are “arbitrary and capricious” under the Administrative Procedure Act. She set out in detail arguments on how the Trump administration failed to use “reasoned decisionmaking” when adopting the regulations.

Justice Ginsburg dissented, joined by Justice Sotomayor. She sharply criticized the majority for letting religious protections be used as a sword rather than a shield:

In accommodating claims of religious freedom, this Court has [in the past] taken a balanced approach, one that does not allow the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs. ... Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree.

Ginsburg also focused on the harm done to the roughly 70,500-126,400 employees who will lose their legal right to contraception coverage under the Trump plan if upheld on the merits, frustrating the intent of Congress when it passed the Affordable Care Act.

### **Abuse of the Ministerial Exception to Fire Non-Ministerial Employees**

The Roberts Court gave the far right more power to exempt themselves from anti-discrimination laws in *Our Lady of Guadalupe School v. Morrissey-Berru*. Under the First Amendment, houses of worship and the entities they operate (such as religious schools) have a right to select their own ecclesiastical officials. This creates a constitutionally-based “ministerial exception” that prevents courts from hearing a narrow band of cases alleging illegal employment discrimination. But in recent years, conservatives have sought to vastly expand the exception to let them fire a staggering variety of employees without regard to nondiscrimination laws.

In this case (and a companion one), two lay teachers allege they were fired by private Catholic schools, one because she was too old (Our Lady of Guadalupe School) and the other because she had cancer (St. James School). When they sued for illegal age and disability discrimination, the schools claimed they were exempt from the law because the teachers fell under the ministerial exception. The teachers countered that not only did they teach primarily secular subjects, they also did not have substantial religious titles or training. In fact, the schools did not even require the teachers to be Catholic. But according to the schools, the teachers’ few religious duties made them “ministers.” (People For the American Way’s affiliate PFAW Foundation joined an [amicus brief](#) authored by the National Women’s Law Center and the Leadership Conference for Civil and Human Rights in support of the teachers.)

In a 2012 case called *Hosanna-Tabor*, the Court determined that whether an employee came under the ministerial exception was based on a careful analysis of the specific factors of a particular case. But in *Our Lady of Guadalupe*, the Court abandoned that approach, minimizing the importance of all the facts indicating the teachers did not serve an important religious role. Instead, the 7-2 majority opinion authored by Justice Alito relied very heavily on the churches' claim to the contrary. Justice Thomas (joined by Justice Gorsuch) wrote a concurring opinion stating that judges should actually be prohibited from looking past a school's good-faith assertion on that matter, but the majority opinion did not go that far. Nevertheless, Justice Sotomayor observed in her dissent (joined by Justice Ginsburg) that Alito's approach "collapses *Hosanna-Tabor*'s careful analysis into a single consideration."

The Court's ruling opens the door to significant abuse, with religious school teachers at risk of losing the protections of federal anti-discrimination laws as long as their employer claims they have an important religious role. That leaves the teachers vulnerable to being demoted or fired because of their race, national origin, age, disability, or sex. The dissent noted that the expansion of the ministerial exception also risks the rights of non-teachers:

[C]ountless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions [may be] subject to discrimination for reasons completely irrelevant to their employers' religious tenets.

## **Mandatory Government Support for Religious Schools**

As expected both by supporters and opponents of his confirmation, Justice Kavanaugh provided the fifth vote needed to vastly expand 2017's [\*Trinity Lutheran\*](#) case and severely weaken federal and state constitutional protections against government funding of religion. Montana had a program that gave a 100 percent tax credit for donations to an entity that gave scholarships for qualifying private schools. Since the Montana constitution prohibits state financing of sectarian schools, they were not considered "qualifying schools" under the program. Some parents challenged the exclusion, and the Montana Supreme Court—interpreting its own state law—struck down the tax credit program in its entirety. But in a 5-4 ruling in [\*Espinoza v. Montana Dept. of Revenue\*](#), the Supreme Court addressed the program that no longer existed and adopted the Religious Right's frame that it was a discriminatory and unconstitutional mistreatment of religion. (Our affiliate People For the American Way Foundation joined an [\*amicus\*](#) brief authored by Americans United for Separation of Church and State and the ACLU supporting Montana).

In *Trinity Lutheran*, the Court had ruled that excluding churches from a state grant program to fund playground resurfacing was an unconstitutional exclusion based on the organization's religious "status." The playground in that case was not going to be used for religious activity or instruction, and it would be open to the public during non-school hours. In contrast, the grants in Montana would be used to fund religious education. Nevertheless, the chief justice's majority opinion characterized the state's differential treatment as based solely on "status" and therefore indistinguishable from a playground used for non-religious purposes.

In their dissents, Justices Ginsburg and Sotomayor (joined by Justice Kagan) noted that because the Montana Supreme Court had struck down the entire program, there was no distinction between religious and non-religious schools. As Sotomayor stated, “the tax benefits no longer exist for anyone in the State.”

In addition, as Justice Breyer pointed out in a dissenting opinion, this was not a case about status but about how the funds would be used: to finance religious education. He noted that Supreme Court precedent recognizes a state’s right to condition education grants to not be used for religious education, since “taxpayer-supported religious indoctrination poses a threat to individual liberty.”

Justice Gorsuch also wrote that he saw this as addressing how funds would be used, not simply status. But unlike Breyer, he wrote this in a concurring opinion that condemned such protections against taxpayer-supported religious indoctrination as attacks on religious liberty, likening them to a law banning Catholics from attending mass.

Although Roberts’ majority opinion did not go that far, his sleight-of-hand with “status” nevertheless does substantial damage to the wall of separation. In states with similar tax-credit programs, people will be forced to pay to indoctrinate other people’s children in faiths that may very well be hostile to their own beliefs. The Espinoza opinion also undermines provisions in a majority of state constitutions that prohibit state funding of religious schools. And it will doubtless encourage new voucher schemes to funnel taxpayer money into churches’ coffers.

### **Special Rights For Churches to Ignore COVID Safety**

With COVID-19, some on the far right have attacked public health precautions as attacks on religious liberty. One such challenge arose in California, where a church sought an injunction against an executive order by Gov. Gavin Newsom. The Court rejected the effort, but only by a 5-4 vote, with the chief justice joining the four moderates. Trump’s two justices were among the four who would have granted a church special preference to not follow statewide health protections despite the health risks in [\*South Bay United Pentecostal Church v. Newsom\*](#).

Newsom’s order allowed churches to continue holding public worship services, but with strict attendance caps to prevent spread of the coronavirus. In so doing, it treated churches like other places with large crowds who stay in one place for a long time such as movie theaters and concerts, which had similar or even stricter safety requirements. But a Los Angeles church claimed this was anti-religious discrimination because it was stricter than conditions placed upon businesses such as grocery stores. The church claimed a right to bypass the COVID-19 safety order and conduct worship services with hundreds of people in attendance. The Supreme Court rejected the claim.

Kavanaugh (joined by Thomas and Gorsuch) wrote a dissent in what should have been a routine denial, which prompted a sharp rebuke from Roberts. Kavanaugh claimed it was “indisputably clear” that the health precautions violated the First Amendment, an assessment Roberts derided as “quite improbable.” The chief justice noted that there was a clear reason churches had stricter restrictions than some other activities: The places with less strict health restrictions under the

order were ones where people don't congregate in large groups or stay in close proximity for extended periods.

But the addition of just one more Trump justice could put Kavanaugh and Gorsuch in the majority. They would empower the use of religion as a sword not only to deny other people their legal rights, but even to put other people's lives and long-term health at grave risk.

## **LGBTQ+ Rights**

### **Job Discrimination**

In [\*Bostock v. Clayton County\*](#), the Supreme Court recognized that federal law protects LGBTQ+ people from job discrimination. Specifically, it held that Title VII's prohibition against sex discrimination includes the specific examples of bias based on gender identity and sexual orientation.

The case divided the two Trump justices, with Gorsuch (joined by Roberts, Ginsburg, Breyer, Sotomayor, and Kagan) writing for the 6-3 majority and Kavanaugh dissenting with fellow ultra-rightists Thomas and Alito. This long overdue acknowledgement of what the law says was an important victory for working people and equality proponents and could be used to extend equal rights in other spheres of American life.

The majority based their opinion on a plain reading of the text. Title VII prohibits employers from discriminating because of sex. As the majority opinion stated:

An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

This is not the first time that this law has been interpreted to mean exactly what it says, even in specific ways that the Congress that passed it may not have intended. For instance, although Title VII was passed in 1964, it was not until 1986 that the Supreme Court ruled that sexual harassment constitutes sex discrimination under the law. And while the law's initial purpose may have been to protect *women's* rights, courts have long recognized that the text of Title VII unambiguously protects *men*, as well.

Discrimination against LGBTQ+ people is a way of targeting individuals who are not acting, feeling, or self-identifying in ways that are considered culturally "correct" for their sex. Nevertheless, the dissenters did not consider that sex discrimination. Justice Alito (joined by Thomas) wrote an angry dissent condemning the majority opinion as "brazen" and "preposterous" because Congress in the deeply transphobic and homophobic 1960s did not have gender identity or sexual orientation in mind.

Writing for himself only, Kavanaugh wrote that "our role as judges is to interpret and follow the law as written, regardless of whether we like the result." Nevertheless, despite writing that, he would have ruled that it is not sex discrimination to fire someone because their sex is not what

the employer believes it should be, or because they are the “wrong” sex to be married to their spouse.

The Supreme Court’s recognition that anti-LGBTQ+ discrimination is a form of sex discrimination represents a significant advance in equality, and not only in the area of employment law. As Alito mentioned in his dissent, more than 100 federal statutes prohibit discrimination because of sex, including Title IX. *Bostock*’s reasoning should direct lower courts interpreting those laws. And when the far right uses distorted claims of religious liberty to exempt themselves from anti-discrimination laws—a matter Gorsuch raised and stated was for a future case, not this one—courts have a large body of precedents stressing the government’s compelling interest in eliminating sex discrimination.

## **Racial Equity**

### **Excluding Black-Owned Businesses**

In [\*Comcast v. National Association of African American-Owned Media\*](#) (NAAAOM), all nine members of the Court interpreted a key Reconstruction-era civil rights law in a way that makes it harder for victims of racial discrimination in business to prove their case. At the same time—perhaps as a deal to get the four moderates’ support—the majority chose not to rule on a question that could have made certain types of racial discrimination legal under that law. The opinion was unanimous with the exception of one footnote, which Justice Ginsburg did not join.

A company owned by an African American businessman sought a deal with Comcast to carry his network’s cable channels, but no agreement was ever reached. Comcast claimed it declined a deal strictly for legitimate business reasons. But NAAAOM alleged that racism at least played a role, and they sued Comcast for damages under a Reconstruction-era law called Section 1981. That statute states that all people have “the same right ... to make and enforce contracts ... as is enjoyed by white people.” The Court ruled that it is not enough to argue that the defendant considered race in its decision-making. Instead, a plaintiff has to meet the harder standard of proving they would have gotten the contract *but for* their race. This “but-for” standard makes it harder to hold companies accountable for race-based decisions not to do business with someone.

The Court rejected an interpretation of the law taking into consideration its broad remedial purpose: Congress acted to eradicate the “badges and incidents” of slavery. NAAAOM cited sobering data indicating that those badges remain: African Americans make up nearly 13 percent of the United States population, but hold less than three percent of the nation’s total wealth; African American-owned firms account for only 0.4 percent of the gross receipts in the entire U.S. economy.

However, the majority opinion did not go as far as it could have, as Justice Ginsburg noted in a concurrence. Comcast had argued that Section 1981 only applies to the final decision whether to make a contract, and therefore does not cover discriminatory treatment of Black-owned companies in the process leading up to the final decision. She pointed out the consequence of that approach:



Under Comcast’s view, §1981 countenances racial discrimination so long as it occurs in advance of the final contract-formation decision. Thus, a lender would not violate §1981 by requiring prospective borrowers to provide one reference letter if they are white and five if they are black. Nor would an employer violate §1981 by reimbursing expenses for white interviewees but requiring black applicants to pay their own way.

As Ginsburg explained, an equal right to make contracts would be an “empty promise” under such an interpretation. However, the other eight justices chose not to take up that question.

## **Environment**

### **Indirect Industrial Discharges Into the Ocean**

[\*County of Maui, Hawaii v. Hawai’i Wildlife Fund\*](#) could have done severe damage to the Clean Water Act, but that was avoided in an ideologically diverse 6-3 majority opinion written by Justice Breyer (joined by Roberts, Ginsburg, Sotomayor, Kagan, and Kavanaugh). The case involved a county-owned wastewater treatment plant that discharges three to five million gallons of treated sewage daily into the groundwater beneath the facility. Many of the pollutants find their way to the nearby Pacific Ocean, but the county did not get a permit from the EPA. The Hawai’i Wildlife Fund and several other environmental organizations sued, arguing that the county was violating the Clean Water Act (CWA) prohibition against “any addition of any pollutant to navigable waters from any point source” without a permit.

The Court rejected the county’s contention that its plant cannot be considered a “point source” for the ocean pollution because it is not placing the treated sewage there directly. The Court saw this as inconsistent with the law:

We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act.

But the majority also rejected the Ninth Circuit’s conclusion that a permit is required as long as pollutants are “fairly traceable” from the point source to the water, seeing that as more expansive than contemplated by the CWA. Instead, the Court ruled that the Act requires a permit for “the functional equivalent of a direct discharge” from the source, and it remanded the case back to the lower courts to analyze it under that standard.

Justices Thomas, Alito, and Gorsuch dissented and would have held that no permit was necessary, a reinterpretation of the law that would have opened the door to significant environmental abuse by corporate polluters.

## **Conclusion**

Despite the positive results in the DACA and LGBTQ+ anti-discrimination cases, the Supreme Court term that just ended was generally one that advanced many of the far right’s long-term goals. It showed that having Neil Gorsuch and Brett Kavanaugh on the Court endangers our rights and our health. This November, Americans have a chance to hold accountable the president and senators who knowingly handed them that power.