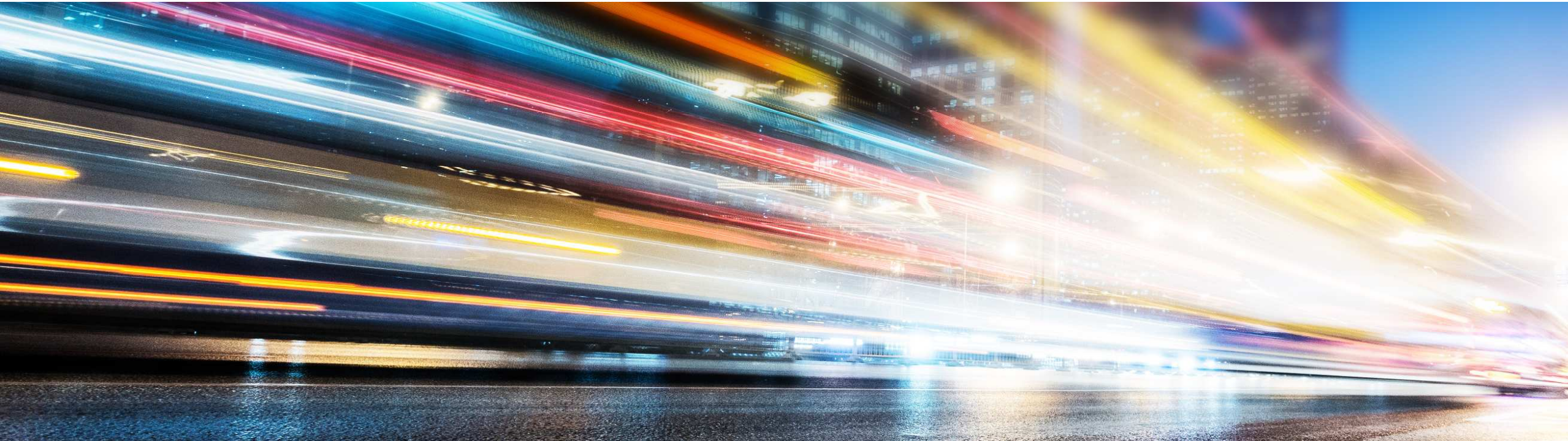
KILPATRICK TOWNSEND

Presented to: ACC Association of Corporate Counsel SOUTH/CENTRAL TEXAS

U.S. Supreme Court Update



Overview

- Overview of OT20
- Discussion of Important OT20 Cases
- Discussion of Significant Cases on the Docket in OT21
- Questions

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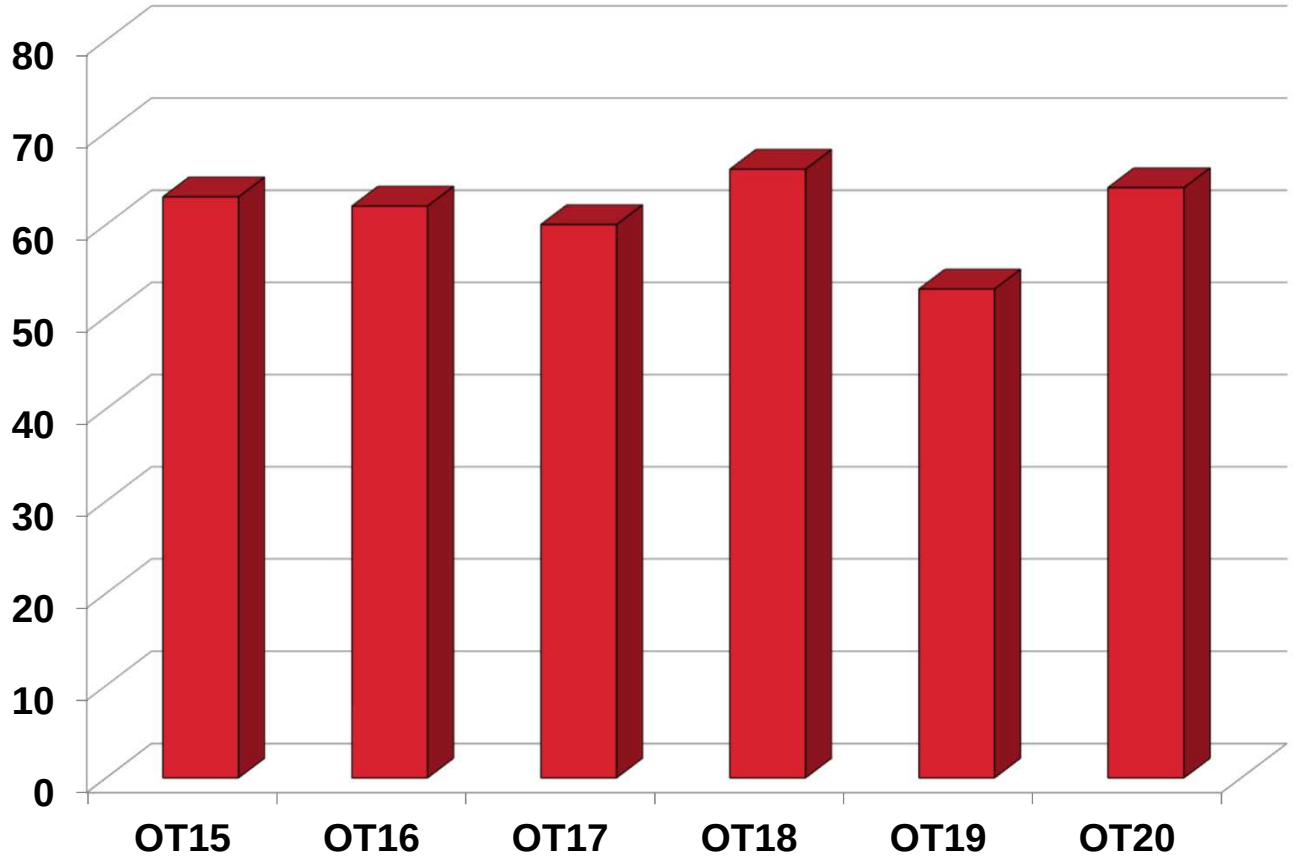
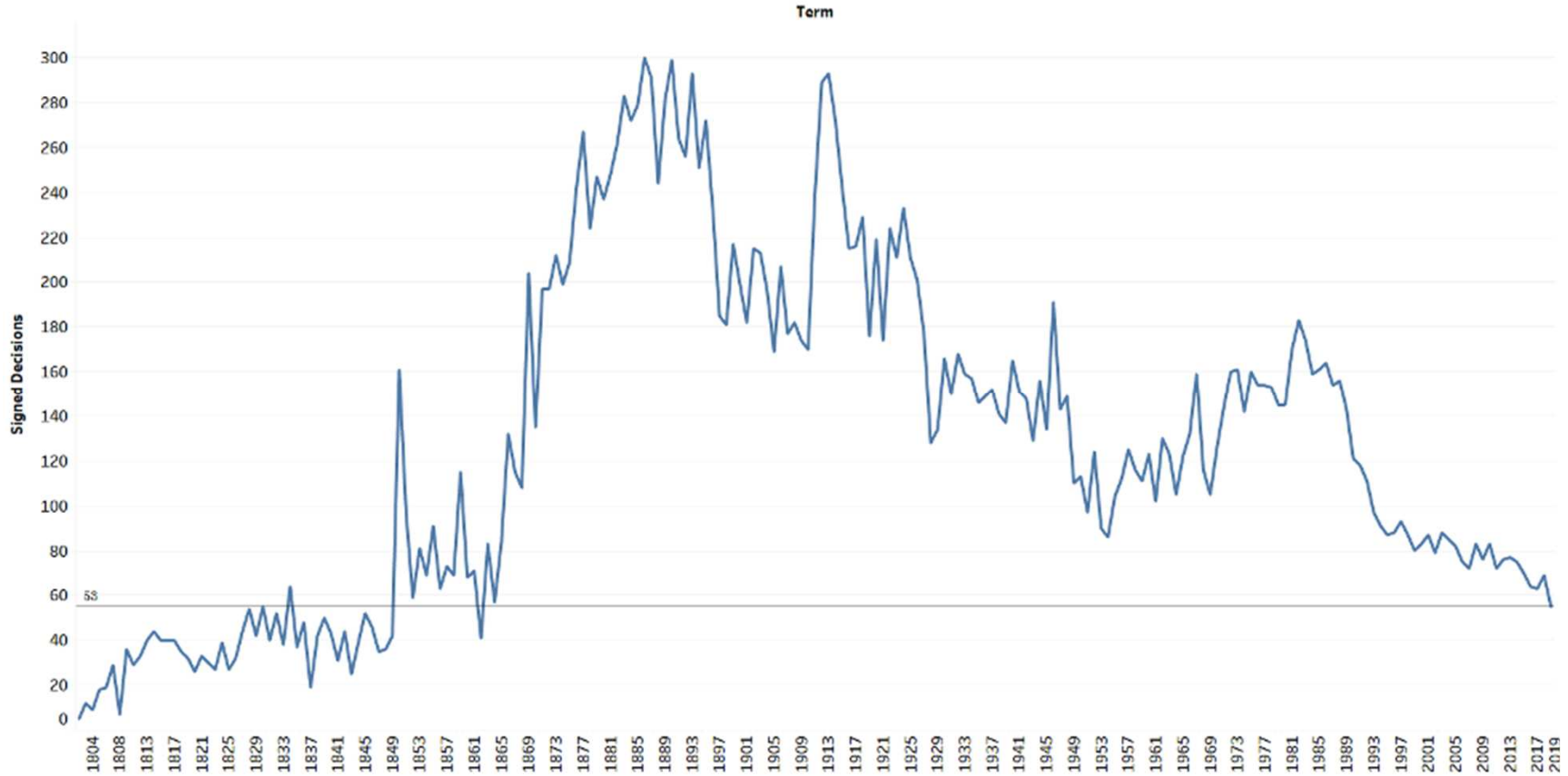
Overview of OT20

Workload

Opinions After Oral Argument by Term



Workload in Historical Context

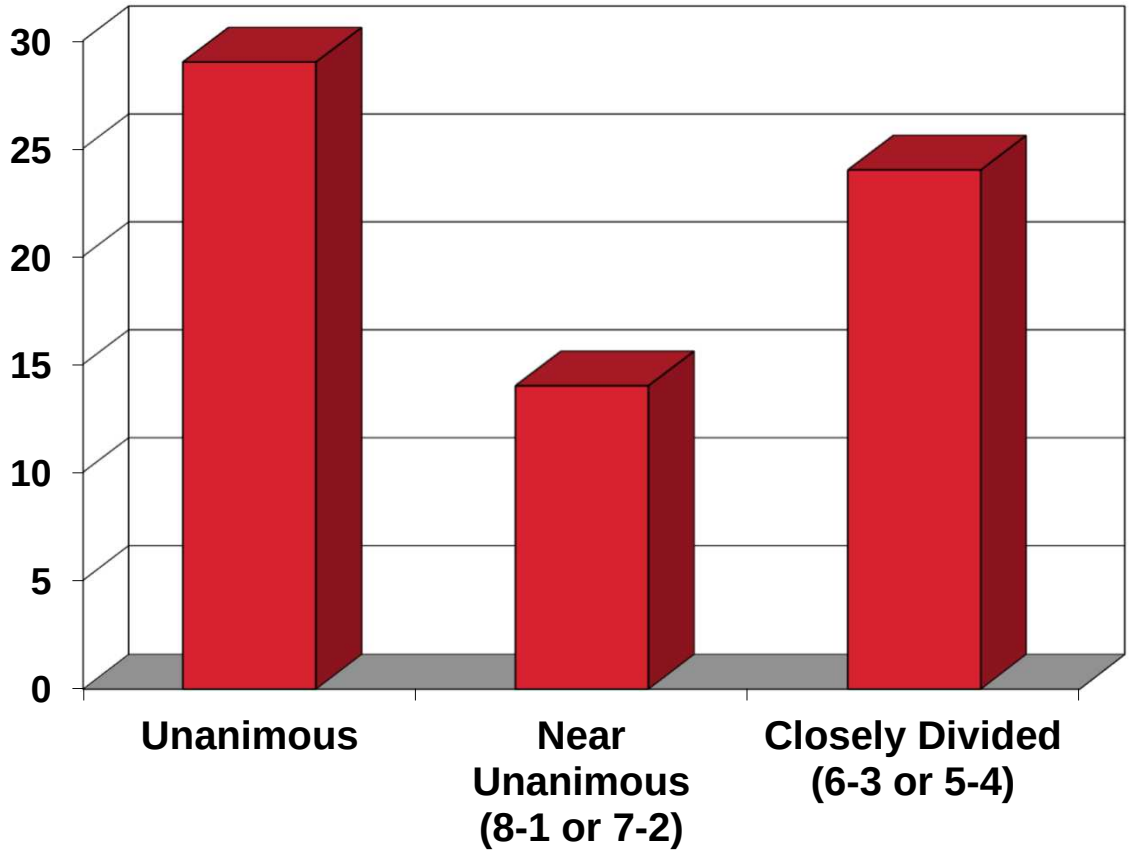


Source: Scotusblog.com

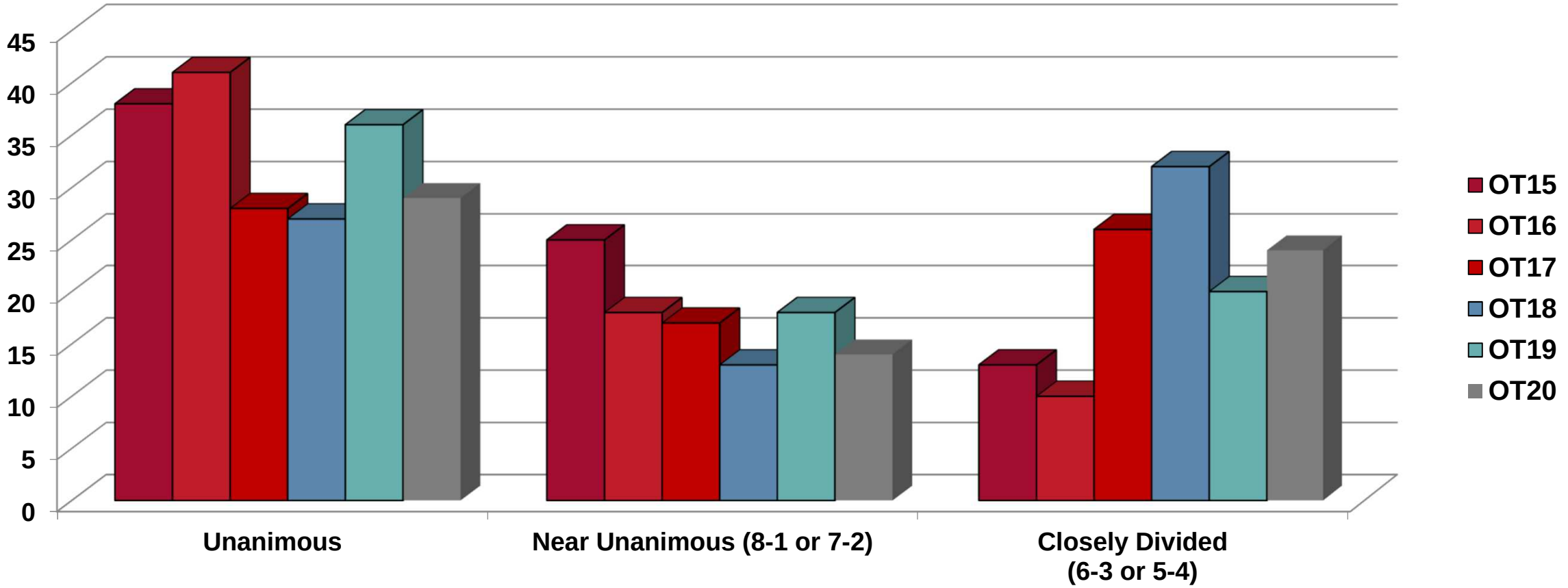
Reversal Rate

- Overall reversal rate: 80 percent
- Outliers:
  - Ninth Circuit: Reversed in 15 out of 16 cases (94 percent)
  - Sixth Circuit: Reversed in 5 out of 5 cases (100 percent)
  - D.C. Circuit: Reversed in 4 out of 4 cases (100 percent)

A Divided Court?



A Divided Court?



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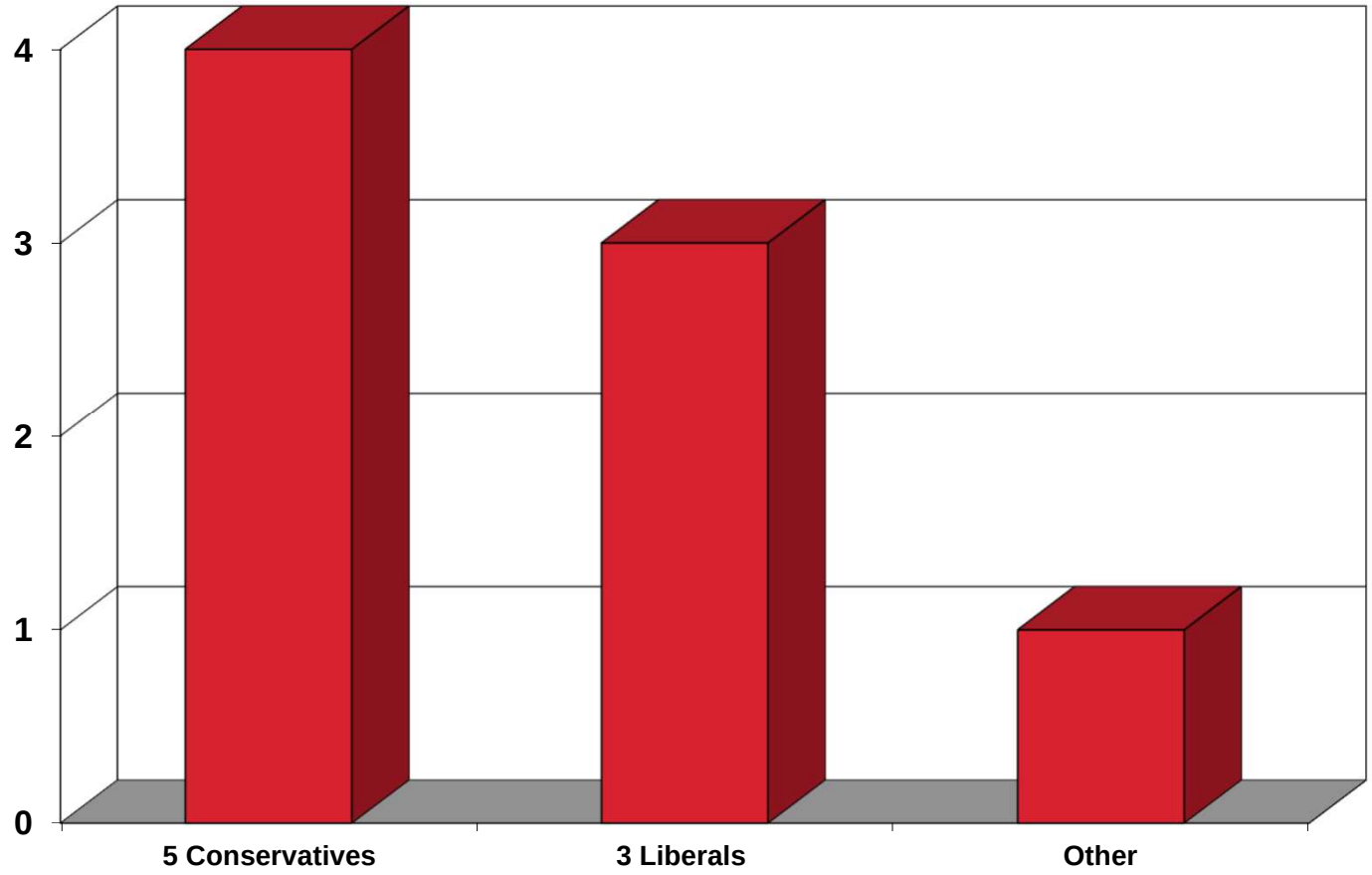
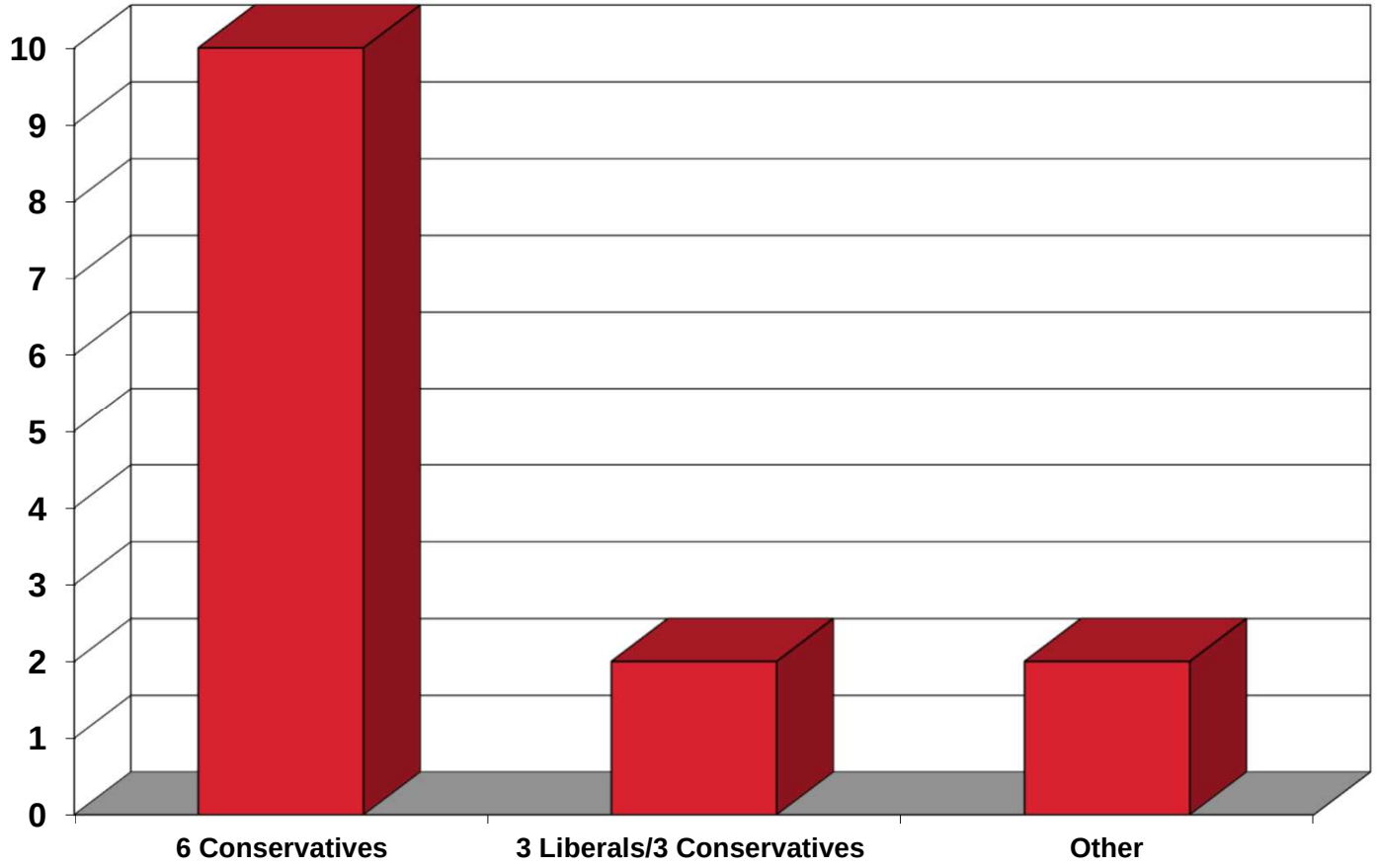
How Conservative Is the Supreme Court?

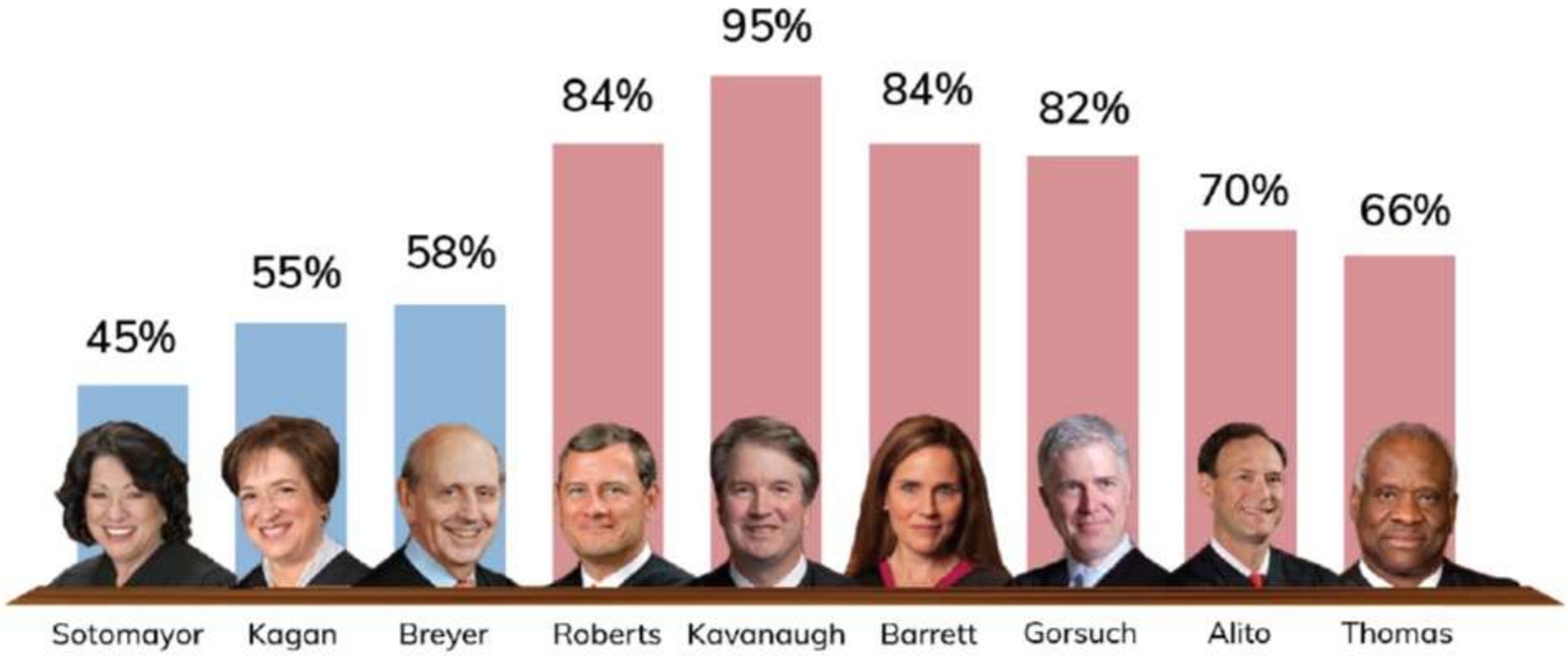
5-4 Case Alignments



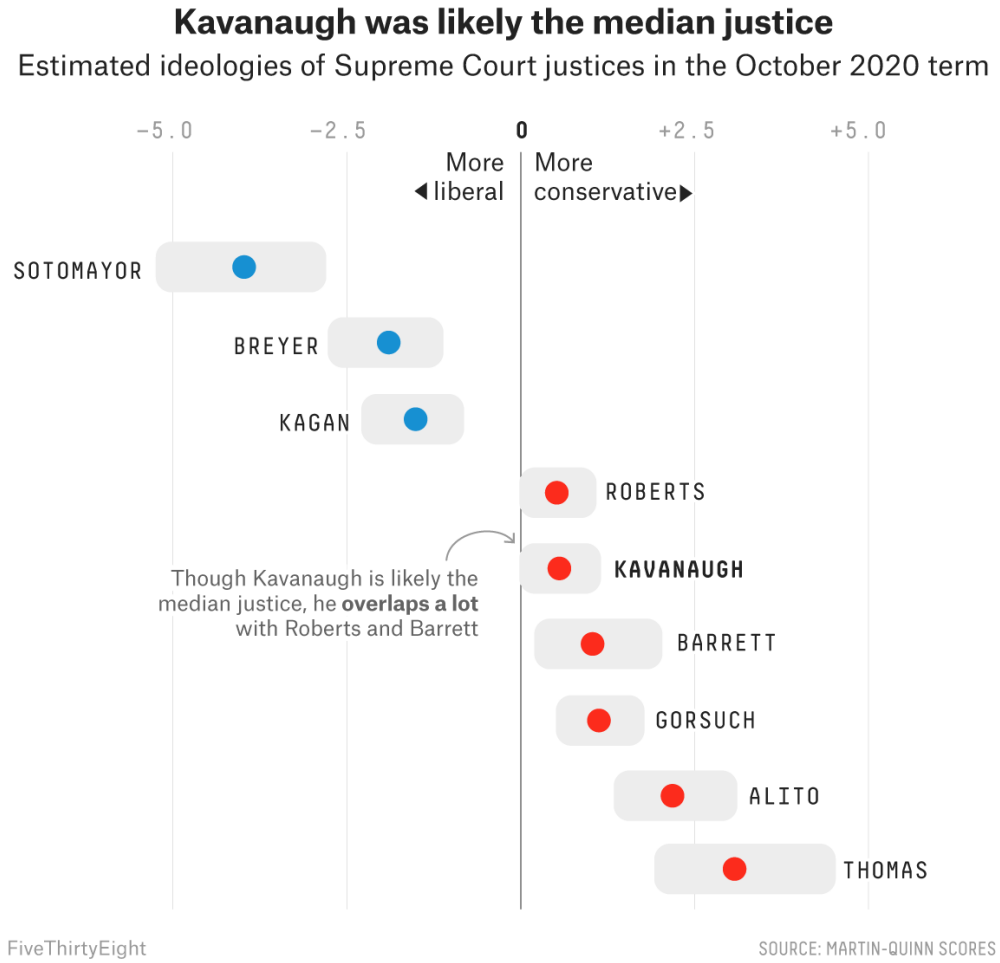
The Emergence of the Six-Justice Majority: 6-3 Cases



Percentage in the Majority (non-unanimous cases)



Ideologies of the Justices



Justices Who Agree the Most Often

1. Roberts-Kavanaugh: 94 percent
2. Breyer-Kagan: 93 percent
3. Breyer-Sotomayor: 93 percent
4. Barrett-Gorsuch: 91 percent
5. Barrett-Kavanaugh: 91 percent

Justices Who Agree the Least Often

1. Alito-Sotomayor: 53 percent
2. Thomas-Sotomayor: 55 percent
3. Alito-Kagan: 58 percent
4. Sotomayor-Barrett: 58 percent
5. Sotomayor-Gorsuch: 58 percent

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Notable Cases of the 2020 Term

Appointments Clause

Arthrex Inc. v. Smith & Nephew Inc.

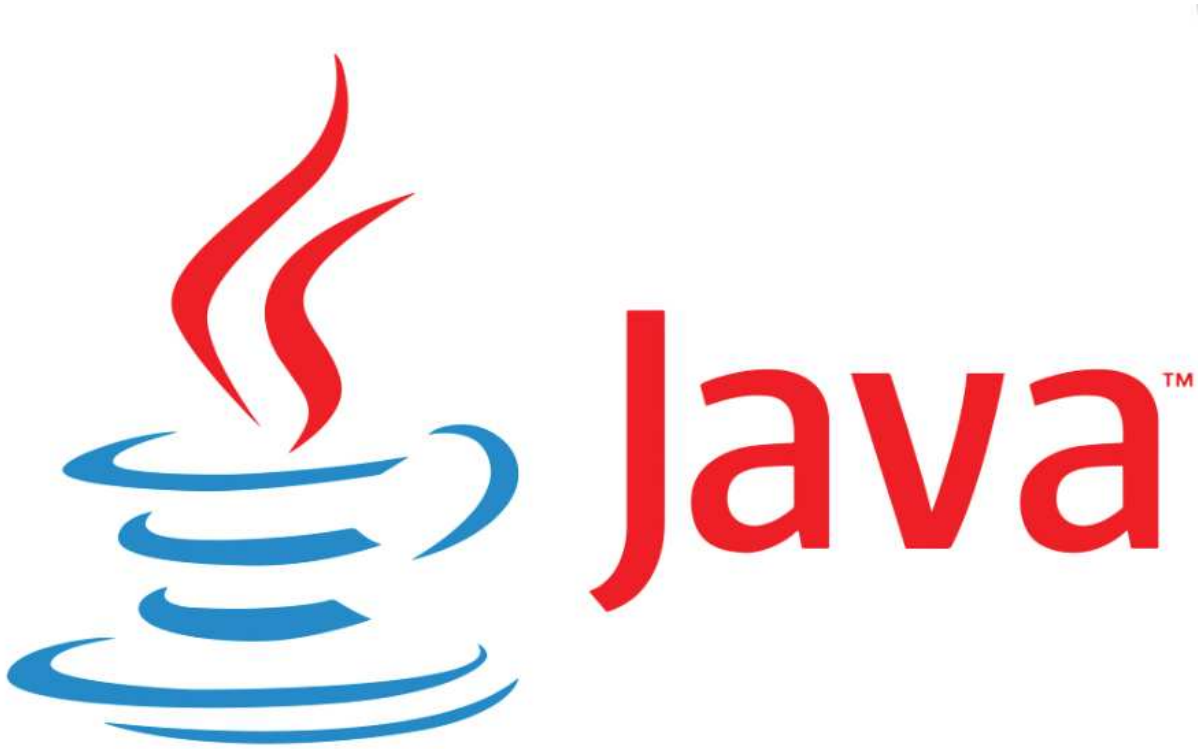
Appointments Clause

Arthrex Inc. v. Smith & Nephew Inc.

- The Appointments Clause requires “principal officers” to be appointed by the President and confirmed by the Senate. But PTAB APJs are appointed by the Secretary of Commerce and can be fired only for cause.
- The Federal Circuit held that APJs are principal officers, not inferior officers: their work is not reviewed and approved by a presidential appointee; they are supervised by the director of the PTO; they cannot be removed without cause.
- The Court, per Roberts, held 5-4 that the appointment violated the Appointments Clause. APJs are not inferior officers because they are not supervised. But the Court stated that allowing the Director of the PTO to override PTAB decisions cured the defect.
- Thomas, Breyer, Sotomayor and Kagan dissented.

Copyright

Google LLC v. Oracle America Inc.



Copyright

Google LLC v. Oracle America Inc.

- Google copied 11,500 lines of Java code from the application programming interface for its Android phone.
- A jury held that this copying represented fair use, but the Federal Circuit reversed.
- The Court, per Justice Breyer (6-2), held that Google's copying of the API, which included only those lines of code necessary for programmers to work in a new and transformative way, was a fair use.
- Thomas, joined by Alito, dissented, finding that computer code could be copyrighted and Google's actions were not fair use.

Fourth Amendment

Torres v. Madrid

Fourth Amendment

Torres v. Madrid

- Policer offers fired shots at Torres in an effort to prevent her from fleeing. She was injured but escaped. She then sued the officers, claiming that their actions constituted an unreasonable seizure, even though she was not apprehended.
- The Court, per Roberts, held 5-3, that the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.
- Gorsuch, joined by Thomas and Alito, dissented.

Antitrust Law

NCAA v. Alston

Antitrust Law

NCAA v. Alston

- The NCAA limits the education-related benefits that member colleges can offer student-athletes. The NCAA contends that these restrictions preserve the "character and quality" of college athletics. But the 9th Circuit found that only some of the NCAA's restrictions maintain the distinction between college and professional sports.
- The Court, per Gorsuch, held 9-0 that the NCAA violated the antitrust laws. The NCAA is not exempt from the antitrust laws and it can use less restrictive means to preserve competition.
- Kavanaugh suggested a broader violation by the NCAA.

First Amendment

Mahanoy Area School District v. B.L.

First Amendment

The first image B. L. posted showed B. L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything." App. 20. The sec-

First Amendment

Mahanoy Area School District v. B.L.

- School district suspended B.L. from the cheerleading team because of posting that text on Snapchat off campus, outside of school hours.
- The Court, per Breyer, held 8-1 that the suspension violated the 1st Amendment. Schools can regulate some off-campus speech, but not as readily as on-campus speech.
- Here, the speech was off campus, not targeted at the school, using her cellphone, to a private circle of friends. The speech did not cause sufficient disruption at school to justify regulation.
- Thomas dissented.

Personal Jurisdiction

Ford v. Montana Eighth Judicial District Court

Personal Jurisdiction

Ford v. Montana Eighth Judicial District Court

- Plaintiff was injured in an accident in Montana. Ford designed the car in Michigan, manufactured it in Kentucky, and initially sold it in Washington. Ford argued that because the action was unrelated to its contacts with Montana, the court lacked personal jurisdiction.
- The Court, per Kagan, held 8-0 that Montana's courts had personal jurisdiction over Ford. Ford purposefully availed itself of the privilege of conducting business in Montana. Even though the lawsuit did not "arise out of" Ford's actions there, it "related to" those actions.

Religious Discrimination

Fulton v. Philadelphia

Religious Discrimination

Fulton v. Philadelphia

- Philadelphia blocked referrals to Catholic Social Services—a foster care placement agency—because it refused to place foster children with gay couples. The Third Circuit rejected the claim, holding that the policy was neutral and generally applicable.
- The Court, per Roberts, held 9-0 that the city policy violated the Free Exercise Clause. The policy burdened CSS's religious exercise through policies that are not neutral and generally applicable: there was a system of individual exemptions.
- The City does not have a compelling interest in denying an exemption to CSS.

Affordable Care Act

California v. Texas

Affordable Care Act

- ***California v. Texas***

- The Court previously upheld the “individual mandate” because the penalty was a tax. But Congress subsequently set the penalty at zero, and Texas argues that it is no longer a tax and is unconstitutional. Texas also argues that it is not severable from the rest of the ACA, so the entire statute is unconstitutional.
- The Court, per Breyer, held 7-2 that the plaintiffs lack standing. The individual plaintiffs suffer no harm caused by unenforceable language about the mandate. Texas also failed to show pocketbook injuries traceable to unlawful government conduct: there is no evidence it will incur increased costs.

First Amendment—Campaign Finance

Americans for Prosperity Foundation v. Bontana

First Amendment—Campaign Finance

Americans for Prosperity Foundation v. Bontana

- California requires charities to report to the state AG the names and addresses of their major donors nationwide. Two charities claim that this requirement violates their right to free association by discouraging donations. The Ninth Circuit upheld the requirement.
- The Court, per Roberts, invalidated the requirement 6-3. A dramatic mismatch exists between the disclosure regime and the AG's interests. The enormous amount of information collected is not an integral part of California's fraud detection efforts.

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Preview of the 2021 Term

United States v. Tsarnaev

(1) Whether the 1st Circuit erred in concluding that Tsarnaev's capital sentences must be vacated on the ground that the district court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard or seen about Tsarnaev's case; and

(2) whether the district court committed reversible error at the penalty phase of Tsarnaev's trial by excluding evidence that Tsarnaev's older brother was allegedly involved in different crimes two years before the offenses for which Tsarnaev was convicted.

New York State Rifle & Pistol Association Inc. v. Corlett

Whether the state of New York's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.

Dobbs v. Jackson Women's Health Organization

Whether all pre-viability prohibitions on elective abortions are unconstitutional.

Becerra v. Mayor and City Council of Baltimore

(1) Whether the Department of Health and Human Services' rule, which prohibits Title X projects from providing referrals for abortion as a method of family planning, falls within the agency's statutory authority; and

(2) whether the rule is the product of reasoned decision making.

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Questions?

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