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Session Title: ***The Supreme Court: A[nother] Critical Juncture?***

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Introduction

Today's presentation is titled "*The Supreme Court: A[nother] Critical Juncture*?", and that title, with the brackets and the question mark, are designed to convey two dueling realities: first, we seem to be at a very significant moment in the trajectory and history of the Court, with many important issues before it and controversies swirling around it; and second, that is an observation that could have been made about the Court at almost any moment in time for many, many years. It is in the nature of the Supreme Court that it will always be important and controversial.

The presentation will focus in particular on those high-profile issues that do seem to make this moment "another critical juncture" for the Court. Specifically, there will be a brief recap of last Term, an analysis of the so-called "shadow docket" of the Supreme Court, and the media's and public's current spotlight on that institution. The presentation will end with a discussion of the Second Amendment case, the abortion cases on the docket, the affirmative action case that potentially will be decided this Term, the Boston Marathon Bomber case and one capital punishment case involving religious freedom.

2020 Term

We begin with a high-level overview of the 2020 Term, the first Term on which Justice Amy Coney Barrett sat as a member of the Court, and the first in 27 years in which Justice Ruth Bader Ginsburg did not.

From October 2020 through June 2021, the Court decided 67 merits cases, Of those**,** 43% were unanimous, and 64% were near-unanimous, which means no more than 2 dissenting Justices. And, not all or even most of the remainder were divided along ideological lines. Only about 15% involved a division in which all of the Republican-appointed Justices were on one side and all of the Democratic-appointed Justices on the other.

Now you might assume that the seemingly small 15% number masks an underlying reality in which the cases that were decided by supermajorities were the ones that the general public doesn't care about, dealing, say, with the details of some obscure estoppel doctrine in patent law, which is a real case that the Court did decide last Term, and that the big headline-grabbing cases were the ones on which the Court split ideologically and issued far-reaching majority decisions.

But that is not what happened last Term. Some of the most controversial, highly-charged cases were decided narrowly and cautiously, by lopsided majorities.

For example, the most closely watched case of the Term was *California v. Texas*, a case in which Texas challenged the constitutionality of the Affordable Care Act. Although the Act had twice previously been upheld, Texas argued, and a lower court agreed, that subsequent amendments to the Act rendered it newly

unconstitutional. And when Justice Barrett had her confirmation hearings, the signature attack on her nomination by the Democratic members of the Senate Judiciary Committee was that the Court was perhaps one vote away from striking down the Affordable Care Act, and she might supply that vote.

But nothing like that happened. Justice Breyer wrote a narrow majority opinion for seven Justices, including his newest colleague Justice Barrett, holding that it was unnecessary to reach the constitutional issues because Texas lacked standing to bring this challenge.

Only two Justices – Justices Alito and Gorsuch – dissented, criticizing the Court for the "lengths" to which it went, they said, to "defend the Affordable Care Act against all threats." Some will agree and some will disagree with that characterization, but everyone would have to concede that the most widely-anticipated decision of the Term turned out to be insignificant; it made no change in the status quo.

Perhaps the next most closely-watched case was *Fulton v. City of Philadelphia*. Philadelphia had for several decades contracted with Catholic Social Services, a social services agency of the Catholic Church, to be one of the private charitable organizations that work with the City to help place children in foster families. The lawsuit was filed after Philadelphia terminated the relationship because Catholic Social Services, as a consequence of its religious beliefs, would not refer same-sex couples for foster parenting.

This case implicates what has been an extremely challenging subject for the Court, which is whether and to what extent the constitutional guarantee of religious freedom requires exceptions to generally applicable non-discrimination requirements when those requirements conflict with sincerely-held religious beliefs. And many were expecting a potentially broad holding on that issue. But instead the Chief Justice wrote for six Justices that Philadelphia had acted unconstitutionally in excluding the Catholic organization from its program, but its reasoning rested on a very specific provision (section 3.21) of the particular contract between the City and the Catholic organization.

And although it would be reasonable to assume that when there is a 6-3 decision of the Court holding that the City could not enforce its non-discrimination requirement because of religious liberty concerns, it means there was an ideological split on the Court between the Republican-appointed Justices and the Democratic-appointed ones, that is not the case. Justices Breyer, Sotomayor, and Kagan joined the Chief Justice's opinion, along with Justices Kavanaugh and Barrett, leaving Justices Thomas, Alito and Gorsuch to dissent on the ground that the opinion was too narrow. They derided the opinion as one that "might as well have been written on the dissolving paper sold in magic shops" because it was premised on a particular, and likely short-lived, contract provision. And, in a 77-page dissent, they proposed the kind of broad reexamination of the governing doctrine that some had thought a majority of the Court was going to endorse.

Now none of this is to say that nothing of interest happened last Term, or that the new members of the Court are not shaping its trajectory in some important ways. The discussion so far has focused on the "merits cases" – the cases in which the Court orders full briefing, hears oral argument, and issues full-length opinions. There is a different part of the Court's docket, what some of its critics call the "shadow docket." Many of those cases were decided in ways that were quite controversial.

The Shadow Docket

In the past few years, there's been increasing interest in the court's so-called "shadow docket."

The phrase refers to substantive orders that are issued without any argument and often with only limited briefing. The orders often have little or no rationale for the outcome, and sometimes they do not even indicate how many or which justices voted for the result.

The term "shadow docket" was coined in a law review article published in 2015, when there was actually very little interest in the topic. But in the wake of the Trump administration's aggressive (and often successful) litigation tactics, interest in the shadow docket spiked and it became a subject of public discussion:

> There was a congressional hearing last February on the subject;
>
> Justice Kagan used the phrase last August in a dissent that criticized the Court for allowing Texas's new abortion restrictions to go into effect; and
>
> Justice Alito criticized use of the phrase—and critics of the shadow docket itself—in a highly publicized speech in September.

To be clear, the practice of issuing substantive decisions without plenary review is hardly new. But various factors have combined to make the "shadow docket" much more notable, consequential, and controversial lately.

First, there was an explosive growth in the number of rulings handed down without argument and full briefing.

Overall, during the 4-year Trump administration, the Solicitor General filed 41 applications for emergency relief. By contrast, the Solicitor General filed only 8 such applications during the 16-years of the George W. Bush and Obama administrations.

On top of that, there were emergency applications filed by private parties challenging pandemic-related measures, such as the CDC's ban on mortgage evictions and occupancy limits for religious services.

Second, the rulings have come in politically charged areas. I mentioned the COVID restrictions. There were also orders in cases involving the Trump travel ban, the death penalty, the dispute over construction of the Southern border wall, and, most recently, abortion.

And there was a pronounced ideological tilt in the Court's willingness to overturn lower court orders:

> The Court sided with the Trump Administration 2/3's of the time, which prompted dissents in 3/4's of the cases.
>
> The Court lifted stays of executions that lower courts had entered; allowed the diversion of federal monies to allow the construction of the Southern border wall; and overturned COVID restrictions.
>
> On the flip-side, the Court declined to stop Texas's controversial abortion law from taking effect.

That last decision prompted Justice Kagan's criticism of the shadow docket rulings as unreasoned, inconsistent, and impossible to defend.

Third, the shadow docket rulings are controversial because of the extent to which the Court has been willing to opine on significant constitutional issues at the very outset of litigation. In May 2020, with Justice Ginsburg still on the Court, a 5-4 majority declined to enjoin a California executive order that responded to the outbreak of the pandemic by limiting attendance at places of worship to 25% of building capacity or a maximum of 100 people.

The Chief Justice provided the fifth vote. In essence, he said that, in the face of a public health crisis, the courts should defer to elected officials.

Six months later, though, with Justice Barrett replacing Justice Ginsburg, the Court struck down 10- and 25-person restrictions that New York imposed on houses of worship in certain "zones" where COVID was more prevalent.

The majority said that because New York was imposing stricter limits on religious groups than secular businesses, the restrictions were subject to strict scrutiny, and the State had failed to show a compelling justification for the different treatment.

The decision generated a considerable amount of controversy among the justices.

Justice Gorsuch wrote a concurrence in which he heavily criticized the Chief Justice's concurrence in South Bay and accused the dissenters of essentially ignoring the Constitution in a time of crisis.

The Chief Justice defended his prior concurrence, then went out of his way to defend the liberal dissenters from Justice Gorsuch's criticism, stating that they

were not cutting the Constitution loose during a crisis, as Justice Gorsuch colorfully described, but instead simply viewed the matter differently.

And Justice Sotomayor's dissent explained the basis for that different view:

> "Medical experts said COVID was easily spread when large groups gathered, spoke, and sang in close proximity for extended periods. Unlike religious services, 'bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time.'"

Justice Kavanaugh also wrote a concurrence that was much more conciliatory than Justice Gorsuch's. He stressed that the Court's orders were not final decisions on the merits, merely temporary rulings.

But if we fast forward to April 2021, the Court enjoined another set of California restrictions in another emergency ruling and, in doing so, it cited its prior supposedly non-final decisions as having established basic legal principles, most notably that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the free exercise clause, whenever they treat any comparable secular activity more favorably than religious exercise."

The development of this kind of body of substantive law through emergency rulings is extraordinary. Whether such practices will continue beyond the exigencies of a pandemic and the aggressive conduct of the Trump Administration remains to be seen. The Court's decision to grant certiorari before judgment in the Texas abortion case (that will be discussed more later) and to hold argument and render its decision in less than a month suggests the Court may be moving away from using the emergency docket for deciding some important cases. What is still clear is that our current polarized political situation will present the Court with difficult decisions whether to decide fundamental issues of constitutional law with the benefit of full briefing and argument or not.

Public Spotlight On The Court

At this point it is worth stepping back and take a look at the Court's role in our political system as it has become the focus of recent attention.

Probably everyone reading this is a lawyer and for that reason, this is an audience that is particularly attuned to the Supreme Court - what's on its docket and how its decisions may affect businesses, organizations, individual rights and clients. But for the most part, the Court and the cases it hears are a background issue for the U.S. public. It is no exaggeration to say, however, that over the past five years, the Court has moved from the background into the harsh spotlight of public awareness and debate.

And while many of the Court's rulings that were controversial when issued have undergone a transformation – from angry rejection, to acceptance, to praise –

consider *Brown v. Board of Education*, desegregating public schools and *Loving v. Virginia*, ending the ban on interracial marriage – the Court's recent rulings on significant issues have become instead the subject of persistent public attention and, from some quarters, anger. And worse still from the Court's point of view - they have come to be seen by increasing percentages of the public as the embodiment of the politics of one party or another. To those who believe that the Court's very legitimacy depends on a perception that it is not a political institution, and that the Justices are not the tools of the Presidents and parties who nominate them, this is a dangerous moment. How did we get here and why does this moment seem different?

The context that provides the fertile ground for the current institutional challenge for the Court is, of course, the bitter and deep partisan divide in the Nation. The country is roughly evenly divided between the major parties, and rightly or wrongly, each party believes the other to be increasingly under the control of its extreme wing. Each also perceives the other as fundamentally dangerous to the well-being of the country and its people, and there is little appetite for compromise or practical solutions. Whereas for many years nominations to the Supreme Court were seen as somewhat apart from politics, that understanding no longer exists.

Some would identify the starting point of that change with the rejection of Judge Bork's nomination in the 1980's, but surely the Republican Senate's decision not to give Judge Merrick Garland a committee hearing and a vote at the end of the Obama administration – to allow President Trump to fill that seat – jumpstarted the current controversies. The Republican Senate's decision to exercise its power to prevent Merrick Garland's confirmation was justified in pro-democracy terms – an election is coming and the new President should fill the seat. But when iconic Justice Ruth Bader Ginsburg died right before the 2020 election, the Republican Senate used its majority to confirm Justice Amy Coney Barrett. This, in turn, enraged many in the Democratic Party and pushed them toward two conclusions: the composition of the Supreme Court is critical to the political agenda of each party; and the Republican party's use of its majority to confirm Justices selected by President Trump has called the non-partisan nature of the Court's decision making into question. To this combustible mix, add the current Term's docket – Abortion, Gun Rights, Religion, potentially Affirmative Action. The Court is in an intense spotlight.

What are some of the concrete consequences of this situation?

During his Presidential campaign, now President Biden received pressure to commit to packing the Court - increasing its membership – to respond to the confirmation of Justice Barrett. It seemed clear to observers that he did not embrace that idea, but he sought to respond to that pressure by committing to establish a Presidential Commission on the Supreme Court to explore the idea of adding justices to the Court. The Commission also considered term limits for Justices along with assurances that each President would have a chance to

nominate and confirm one or two Justices. It was unclear to many whether these proposals would solve the problem of perception created by the Garland/Barrett processes or would simply confirm that the Supreme Court is a purely political institution. The release of the Commission work papers which seemed critical of court packing and supportive of term limits resulted in angry responses from members of Congress who support adding members to the Court. At the same time, two conservative members of the Commission resigned without explanation. There is no potential for compromise, it seems, on Court reform. Congressional hearings preceded and followed these events, with some members deeply critical of the Court and its conduct as well as of the nomination process. Notably the Biden Commission's final draft report made no recommendations – one gets the sense that the stove was simply too hot to touch!

In addition, the criticism has spread to the background and credentials of members of the Court and of all federal judges; one important new part of the dialogue about the composition of the courts is the argument that judges must be diverse and come from diverse educational and career backgrounds - not all drawn from the same elite schools and large law firm career paths. Moreover, the Court's use of the "shadow docket" (just discussed previously) has also been the subject of hearings and criticisms. This is a whirlwind of activity and attention circling the Court – and it will only intensify with the decisions it must make this Term, ensuring that the future of the Supreme Court will be a 2024 election issue.

What has all this meant for the Court and its members? These developments clearly seem to have diminished public approval of the Court, whether fairly or not. According to Gallup polls, there has been a precipitous decline in the Court's "job approval" from 58% in 2019 – very high for a branch of government –and certainly higher than President or Congress generally enjoy– to 40% in September 2021. The drumbeat of negativity is damaging, of course, but it seems fair to say that the more the Court is perceived as political, the lower its public approval is. It is noteworthy that the Court was perceived as increasingly conservative but had not suffered this kind of declining approval until the Garland/Barrett confirmation battles. The death of Justice Ginsburg, which was perceived as moving the center of the Court to the right, may also have been a factor. The public has had an idealized vision of justice and the Court for many years, and it has been challenged by this overt and raw injection of politics into the selection process and the perceived loss of a moderate middle.

The justices have shown awareness that the Court may be at a pivotal moment. During the summer recess, four justices uncharacteristically made public remarks asserting that the Court is not a political institution and does not decide cases politically. Justice Alito strongly questioned the motives of the press in so characterizing the Court - perhaps the best defense is a good offense because the press too faces challenges for its politicization. These very efforts to diffuse the perception that the Court is political seem to have resulted in even more attention on the Court and its links to politics. Justice Barrett made her remarks at the McConnell Center, which critics highlighted. And the coverage largely noted

how unusual it was for the Justices to make such statements, and that it signaled that the crisis in public perception of the Court is real.

The justices may be aware of the crisis and yet have differing reactions to it. Justice Breyer has expressed concern, while Justices Alito and Thomas clearly believe that the responsibility for the Court's current challenges lies in the hands of others - who are seeking to damage the Court's reputation and standing for their own political purposes.

And so that brings us to the current Term. The most difficult, divisive issues are on the docket and the Court is at a moment of heightened attention and a potential crisis of public confidence.

Second Amendment

There is no more "difficult, divisive issue" than the constitutionality of gun control.

The Court in November heard argument in *New York State Rifle and Pistol Association v. Bruen*, in which it will decide whether New York's gun control laws are constitutional. Those laws prohibit the concealed carrying of handguns without a license.

The question is whether that regulatory scheme is permissible under the Second Amendment For a long time, it had not been definitively decided whether the first clause of the Amendment limits the scope of the right to the context of a State militia, or whether instead "the right of the people" to keep and bear arms is more broadly an individual right that can also be exercised outside of the military context.

The Supreme Court settled that issue in 2008, in *District of Columbia v. Heller*. It held that the Second Amendment right is an individual one that does not depend on service in a militia. And it said in that case that Washington DC's gun control law, which effectively prohibited anyone other than the police from having a handgun in their home, was unconstitutional.

But the Court also included some language limiting the reach of its holding. It expressly said the right was "not unlimited," and "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

DC's statute was the most restrictive in the nation – effectively, an absolute prohibition that reached into the home. But the Court gave some narrower examples of laws that would be presumptively lawful – for example, laws prohibiting felons and the mentally ill from possessing handguns or prohibiting them from being carried in sensitive places like schools and government buildings – and said this list of permissible regulations was not exhaustive.

Most observers expected that *Heller* would be the first in a series of cases fleshing out how far States could and could not go in regulating this right. But here is where the Second Amendment got interesting – or perhaps more accurately, here is where the issues got uninteresting. Aside from one case that did not address the substance of the Second Amendment, the Court went more than a decade without deciding another Second Amendment case. Lower courts were largely upholding state gun control laws; gun rights advocates were filing petitions for certiorari asking the Court to reverse those rulings; and the Court was consistently denying those petitions and thus saying nothing more about the meaning of the Second Amendment. There were clearly some Justices who wanted the Court to get involved; Justice Thomas, for example, dissenting from one of the many decisions to deny review, wrote: "If a lower court treated another right so cavalierly," he had "little doubt that the Court would intervene." But the Second Amendment, he said, was "a disfavored right in this Court."

Some observers speculated that there were other Justices besides Justice Thomas who were also interested in hearing these cases and who believed the lower courts were being too permissive in upholding gun control laws, but were reluctant to put the case on the merits docket because they were doubtful or uncertain that there would be five votes on the Court for their position. No one not on the Court can know for sure, because the Court never explains why it denies review. But very soon after Justice Barrett took the seat previously held by Justice Ginsburg, the Court granted review on the New York case it heard in November.

Now *Heller* dealt with the right to "keep" arms – to possess them inside one's home. The current case deals with the right to "bear" arms – meaning to carry them outside the home.

How does New York's law work? New York categorically prohibits the "open carry" of handguns. And it prohibits the concealed carry of handguns if a person does not have a license. To get a license, an applicant has to demonstrate "proper cause," which NY courts have said has to be something specific to that applicant. So if someone says, "I work a night shift and have to park each night in a deserted and dangerous parking lot and want to carry a concealed handgun there," that might be specific enough. But if someone just said I live in a high-crime area, that would be insufficient.

The briefs focus most extensively on history, and when I say history, I mean history. They go back to the medieval 1328 Statute of Northampton in England and extensively debate how it and many other British, colonial, antebellum, and post-bellum statutes, common law principles, and cases treated the public carrying of arms. The Statute of Northampton's language is archaic – it forbade people "nor to go nor ride armed by night nor by day, in fairs, markets," and so on "upon pain to forfeit their armor to the King, and their bodies to prison at the King's pleasure." And the recordkeeping on how these laws and decrees were implemented is spotty because this was some centuries before Lexis and Westlaw. But the history is important because the Court has made clear that the Second

Amendment was meant to incorporate into the Constitution a pre-existing right, and the Court needs to figure out what the contours of that pre-existing right were. And the opposing sides have very different positions, as you can imagine, about what that history shows.

But in addition to long-ago history, the back-and-forth in this case also reflects some more modern sensibilities and concerns about the practical impact of possible rulings.

For example, an excerpt from an amicus brief filed by the Legal Aid and Public Defender organizations in Bronx and Brooklyn, says the NY laws were enacted at the turn of the century to "criminalize gun ownership by racial and ethnic minorities." They say it's easy for retired police officers to get these licenses, but not so much public defenders' clients, and that "virtually all" whom "New York prosecutes" under this regime "are Black and Hispanic." That's not a concern that those who promulgated the Statute of Northampton in 1328 would have focused on.

And on the other side of the case, supporting New York, is an amicus brief filed by former Judge Michael Luttig and others, that raises another, very modern issue. This brief points out that Washington DC has some pretty strict concealed carry laws that would likely fall under the challengers' theory; that in advance of January 6, DC officials publicly announced that they would arrest people who came to DC unlawfully armed; and that a lot of demonstrators who came to DC that day later said they had left their handguns at home to avoid arrest. The brief asks how much worse January 6 would have been if more of the protestors were armed, and suggests that DC's law "may well have prevented a massacre that day."

It is often difficult to predict a result from an oral argument, but if I had to bet on one side based on the argument in this case, I would wager that the Court will hold NY's regime unconstitutional. A majority of the Court seemed to feel that it is inconsistent with the notion that "bearing arms" is a fundamental, constitutional right to hold that the exercise of that right can be subjected to a broad and discretionary licensing scheme in which an applicant has to demonstrate a special particularized need for self-defense. If that assessment is correct, what people will be looking for is whether the Court writes broadly or narrowly – for example, whether New York in effect is invited to come back with a less sweeping way of regulating guns that would be constitutionally permissible, and what such a law might look like. We will know by the end of June.

Abortion On The Docket

From one hot-button issue to another, the Court has also agreed to hear two abortion cases this year. One case out of Mississippi is expected to determine the fate of *Roe*. The other, which has already been decided, involves a novel Texas law that I'm going to start with.

The Texas Abortion Case. As you may know, the Texas law bans abortion if the physician detects a fetal heartbeat, which usually occurs during the 6th week of pregnancy, before most women realize that they are pregnant. It also prohibits actions that aid or abet such abortions, which could include such actions as helping someone schedule an abortion.

It then prohibits enforcement of these prohibitions by state officials, and instead authorizes enforcement through civil actions brought by private parties. These private parties don't have to suffer any damages or harm, but they can recover a bounty of at least $10,000, and they can sue in any of Texas's 254 counties. So, for example, someone who aids and abets an abortion in Houston could be sued in El Paso, approximately 750 miles away.

And the procedures in state court are wildly lopsided. A defendant cannot get declaratory relief –so he or she cannot have the law declared unconstitutional. By contrast, if the defendant wins, that victory has no preclusive or precedential effect –so the provider can be sued repeatedly for the same abortion. And when plaintiffs win, the defendants and their attorneys are liable for attorneys' fees, which obviously makes it hard for defendants to obtain defense counsel. Finally, providers cannot assert that the law is unconstitutional because it imposes undue burdens on patients, which is the theory recognized in federal cases that allow providers to challenge abortion restrictions.

The purpose of the law is to make the risks of providing an abortion so severe that no one will ever violate the law in order to precipitate a suit where the law can be challenged. And it has had exactly that effect –after it became law, abortions in Texas stopped.

But the law is also ingeniously –and intentionally– designed to preclude any pre-enforcement challenges in federal court to its legality. To understand this, a little refresher on federal courts is in order.

Injunctions are an *in personam* remedy: courts do not enjoin laws; they enjoin people. Under the Eleventh Amendment, states cannot be sued against their will by private citizens in federal courts.

> In *Ex Parte Young*, the Court created an exception to avoid a situation a lot like this one. The Court concluded that federal courts may enjoin state officials responsible for enforcing an unconstitutional state law. But it went on to say that "an injunction against a state court would be a violation of the whole scheme of our government."

So given these rules, who can a physician seeking to challenge the Texas law sue?

Texas says nobody.

No state executive officials enforce the law, so they cannot be sued. *Ex Parte Young*, expressly excluded state court judges or the clerks of state courts who

might accept complaints filed by private citizens as permissible defendants. Instead, the State says someone has to violate the law, go through the state process, incur the financial penalties and then seek review from a final state court decision in the U.S. Supreme Court.

The briefing, oral argument and decision in the Texas case were incredibly compressed. The Court granted certiorari on October 22, heard argument after full briefing on November 1 and decided the case on December 10. The outcome was a mixed bag. The Court did not decide the "big" abortion question, leaving *Roe* and *Casey* for another day. The majority by Justice Gorsuch held that the dicta in *Ex Parte Young* that state judges and state clerks of court cannot be sued is good law. Thus, the easiest solution to the problem of how to obtain an effective remedy against Texas's law was taken off the table. The majority, however, did say that *Ex Parte Young* allows lawsuits to be brought against members of the State's medical board that has power to enforce portions of the abortion law against physicians. This provides at least a mechanism for allowing a limited challenge against the Texas law to proceed in federal court.

The majority noted in passing that several lawsuits were proceeding against the Texas statute in Texas state court and that the plaintiffs in some of that litigation had prevailed in early decisions. Thus, the Court treated the dispute before it much more in terms of the power of federal courts than it did the constitutionality of the Texas statute. But at the end of the day the Court did not halt the overall enforcement of the Texas law. So the victory for the plaintiffs is relatively hollow, which is reflected in the dissents by the Chief Justice and Justice Sotomayor.

What the Court in the Texas case failed to decide, it almost certainly will in the Mississippi case, where the State makes a full frontal assault on *Roe* and on the Court's 1992 decision in *Planned Parenthood v. Casey*, where the Court reaffirmed *Roe*.

The Mississippi Abortion Statute. The State and its 75 amici argue that *Roe* and *Casey* should be overruled, first, because they were egregiously wrong when decided.

They argue there is no textual basis in the Constitution for a right to abortion, that there is no deeply rooted historical tradition of such a right. Many states outlawed abortion when the 14th Amendment was adopted.

Second, the State says *Roe* and *Casey* are unworkable. *Casey* held that pre-viability regulations cannot impose an "undue burden" on the right to obtain an abortion, but Mississippi says there's no principled way to decide whether a burden is "undue."

Third, they say that *Roe* and *Casey* have inflicted severe real world damage.

> The decisions undermine democratic self-governance, by removing the policy questions surrounding abortion from the political process. They

> have caused and inflamed decisions within the country that haven't abated after five decades and are only intensifying. And they have undermined the public's perception of the court's legitimacy, by injecting it into politically heated debates.

Fourth, the State says legal and factual progress has overtaken and eroded the premises of the decisions.

> It says that modern laws addressing pregnancy discrimination, requiring family leave, and assisting with child care mean that unwanted pregnancies no longer lead to the kinds of problems identified in *Roe*, such as loss of jobs or educational opportunities, or poverty.
>
> It says contraceptives are now more effective and less expensive.
>
> And it says that medical advances show that a fetus has taken on "the human form in all relevant respects by 12 weeks and is sensitive to pain earlier than previously understood."

Fifth, the State says that *Roe* and *Casey* have not given rise to any legitimate reliance interests.

> They say the public has long been on notice about how fractured the court is over abortion and how divided the country has been about the issue.
>
> Mississippi says that women do not have unwanted pregnancies in reliance on the availability of legal abortion.

If the Court does not overrule *Roe* and *Casey*, Mississippi offers some fallback positions. First, it argues that the Court should abandon viability as the barrier to prohibitions on abortions. Most of the reasons it gives are the same ones for overturning *Roe*, and the State does not really explain how getting rid of viability differs from overturning *Roe.*

Second, it says the Court should hold that the law satisfies any standard of review, including strict scrutiny "and leave for another day what standard applies in the absence of the viability rule."

Third, it says the Court should reject the viability rule, and conclude that its law does not impose an undue burden because the only clinic in Mississippi provides abortions only up to week 16, so the 15-week prohibition would only affect about 5% of abortions in Mississippi.

The clinic's response is to argue that *stare decisis* applies with double force here, because the court already declined to overrule *Roe* 29 years ago in *Casey*, and *Casey* considered and rejected all of the arguments that the state is making now.

The clinic says the concept of "liberty" in the 14th Amendment has long been understood to protect rights to bodily integrity and personal autonomy in matters of family, medical care and faith, and the right to decide to end a pregnancy flows from the same rights.

The clinic challenges the historical practice argument, noting that if that were the test, *Brown v. Board of Education* was wrongly decided, because the Congress that adopted the 14th Amendment segregated the District of Columbia schools.

It says that the viability rule is entirely workable. The age of viability has not changed, but even if it were to move up, that would just change when the state's interest in protecting fetal life comes into play.

The clinic says that the science concerning fetal development actually cuts the other way: no major medical group accepts the claim that a fetus can experience pain prior to viability, because experiencing pain requires a functioning cerebral cortex, which does not develop until the 24th week.

And the clinic says that what would really threaten the Court's legitimacy is a reversal of *Roe*, because that would indicate that the Court's view of the constitution simply depends on its membership, not immutable principles.

So what is going to happen?

Based on the oral argument, the case will be closely divided and the opinions are likely to be very emotional. Probably the most striking statement during the oral argument came from Justice Sotomayor when she asked the lawyer for Mississippi if the Court were to overrule *Roe* and *Casey*:

"Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?"

It is not surprising that Justices Breyer, Sotomayor and Kagan believe Mississippi's law is unconstitutional and that neither *Roe* nor *Casey* should be overruled. Justice Thomas focused on the absence of a textual right to an abortion, which suggests he will continue to vote to overrule *Roe*. Justices Alito and Gorsuch certainly did not ask any questions that suggest their views have changed that *Roe* was wrong when decided and that may be enough to overrule it.

The two relatively new comers – Justice Kavanaugh and Justice Barrett – focused on somewhat different theories. Kavanaugh focused on why in the absence of something in the Constitution that is either pro- or anti-abortion, the Court should not remain neutral and allow the issue to be fought in the political arena. That of course would mean the end of *Roe*. Barrett focused on adoption procedures as having significantly decreased the impact of an unwanted pregnancy on women. Although adoption obviously has been available since before *Roe*, her questions suggested that adoption these days could alter the real-world effects of pregnancy. Again, that would suggest a reason to revisit *Roe* and *Casey*.

The Chief Justice struggled with the viability concept and why that was the line to draw. Why not just give a woman a reasonable amount of time within which to have an abortion and let the State prohibit the procedure after that point in the pregnancy.

It is extremely hard to predict the precise outcome of the case based on the argument. It seems likely the Mississippi statute generally will be upheld and there will be some kind of limitation imposed on the abortion right. What is much less clear is how far the Court will go in eliminating abortions altogether and thereby risk the "stench" that Justice Sotomayor so graphically described.

Affirmative Action, Boston Bomber And Religion

If the combination of guns and abortion were not strong enough, the Court is poised to add affirmative action, specifically race-conscious admissions to the docket. And the Court already has decided to add the Boston Marathon bomber's capital sentence and cases involving religion in the execution chamber to this Term's combustible cocktail. In the interest of space and time, these will be treated briefly.

First, the Harvard admissions case. The Fourteenth Amendment's equal protection clause prohibits state-sponsored racial classifications unless that classification is narrowly tailored to serve a compelling government interest – the familiar test for strict scrutiny. In 2003, in *Grutter v. Bollinger*, the Supreme Court held that the University of Michigan Law School's use of racial preferences as part of the admissions process satisfied strict scrutiny – specifically the Court affirmed that public institutions of higher education could consider race as one factor in a holistic process to achieve a diverse student body. In the Court's earlier decision prohibiting quotas *University of California v. Bakke,* the Court had touted Harvard's admissions process as employing a narrowly tailored, permissible use of race.

But Harvard is now the defendant in the latest affirmative action case to reach the Court. A nonprofit group that opposes affirmative action – Students for Fair Admission – asks the justices to overrule *Grutter* and find that Harvard's race conscious policy is not narrowly tailored – that it penalizes Asian Americans while favoring other groups. It was supported by 19 amicus briefs. The lawsuit is funded by the same individual who funded a previous challenge to the University of Texas's admission policy. The lawsuit also faults Harvard for failing to use race neutral alternatives that would also yield a diverse student body. After a three-week trial, the district court upheld Harvard's process and the First Circuit affirmed.

After some delay, the Court called for the views of the Solicitor General in June; those views have been slow in coming but the United States in December urged the Court not to hear the case. The Chief Justice may not be eager to add another controversial and difficult issue in a Term already chock full of politically

explosive cases, but there may well be four justices interested in deciding the fate of affirmative action.

Second, the Court also took two capital punishment cases – the first is primarily of interest because it involves the capital sentence of the surviving Boston marathon bomber rather than because of the legal issues it presents. The second presents an issue that lies at the intersection of the execution process and religion – issues increasingly presented to this Court as capital defense practitioners look for areas where the Court might be open to challenges to death sentences.

The Boston marathon bomber case was argued in October. The First Circuit had vacated the defendant Tsarnaev's conviction and death sentence on two grounds: First, that the district court did not ask each prospective juror to account for the pretrial publicity he or she saw about the case and second, the district court did not allow the jury to hear evidence that Tsarnaev's older brother was involved in other crimes motivated by jihad two years before. The government's request for review made no pretense that the case met the Court's usual criteria for cert – there was no conflict among the courts of appeals, no conflict with a Supreme Court case, etc. Instead, the argument was the context and the profound effect on the victims of a retrying the penalty phase of one of the most important terror prosecutions in recent years.

Obviously, when the Court granted cert here, the sense was that it granted to reverse the First Circuit. That assumption was confirmed at oral argument. Most of the argument focused on whether the district court was wrong to exclude Tsarnaev's older brother's alleged 2011 murders – with his counsel facing a lot of skeptical questioning about whether that evidence was reliable or helpful in supporting the defense theory – that Tsarnaev was led astray by his older brother. The interesting legal question seems to be how loose the rules of evidence are in the penalty phase of a death case – does anything go really? What is the threshold for reliability, especially when all participants in the alleged 2011 murders were dead? Justice Kagan's questions suggested that more evidence should be admitted and let the jury decide whether the evidence proved mitigating circumstances and thus weighed against death. Justice Barrett at the end asked the question on everyone's mind: What is the Government doing? It has suspended executions after all. The Government responded that the capital sentence was a sound verdict that should be upheld.

The second capital case has attracted attention not because of the underlying crime but because the case lies at the intersection of religious practice and capital punishment. It also arises out of the Court's shadow docket – a rare capital case on the shadow docket that has moved onto the Court's general docket for full briefing and oral argument. In the past two years, the shadow docket has seen a number of emergency applications involving spiritual advisers at executions.

In this case, Ramirez, who was sentenced to death for the murder of a convenience store clerk, seeks to have his Baptist minister lay his hands on

Ramirez's body and pray out loud as Ramirez is executed. Texas refused and Ramirez sought a stay of his execution, which was denied by all courts until it reached the US Supreme Court which granted the stay.

The Supreme Court's treatment of stays in this area has been seen as somewhat inconsistent with the Court staying executions involving requests for Buddhist and Christian spiritual advisors and denying the stay request of a Muslim inmate. However, because the cases were not merits cases, the Court did not fully explain any possible distinctions. Texas has a complex history of regulating spiritual advisers in the execution chambers but, after a number of years of allowing such advisers in the Chamber and some questions about decisions made to allow some but not all advisers, Texas decided to impose a complete ban on spiritual advisers in the execution chamber.

Petitioner Ramirez challenged that ban as a violation of his rights under the Religious Land Use and Institutionalized Persons Act. The question under that Act is whether the complete ban is a substantial burden on Ramirez's religious beliefs, and, if so, whether it is justified by important state interests. The United States' brief includes a lengthy discussion of spiritual advisers in execution chambers over the years – a surprisingly robust history with no incident of disruption or loss of dignity and with appropriate protection of the state's interest, e.g., in the privacy of the individuals conducting the execution. Texas argues that the Supreme Court should not micromanage executions, but the Court is likely to find a substantial burden on religion and to remand to give Texas a chance to make a factual showing that disruption or some other significant effect on a compelling state interest is likely.

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At a critical moment in its history where it is under persistent public scrutiny, the Court is considering cases raising the most controversial, divisive legal issues in the nation where outcomes are closely associated with partisan political positions. We are all increasingly aware of the strength and fragility of our constitutional system after the events of last January. I believe the Court is fully conscious of the challenges it faces over the course of this Term – and that it understands the consequences that decisions it makes in individual cases may have for the long term health of this centrally important institution of our constitutional government.