

FREEDOM FROM RELIGION *foundation*

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September 29, 2021

The Honorable Dick Durbin
Chair
Committee on the Judiciary
711 Hart Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510

Re: Court reform is the only viable solution to rectify shadow docket abuse and secure reproductive liberty

Dear Chairman Durbin and Senator Grassley:

We are submitting this testimony on behalf of the Freedom From Religion Foundation (FFRF) and our 35,000 secular members, to emphasize the need for immediate court reform in order to address the problems discussed at today's hearing. FFRF is a national nonprofit organization with members in all 50 states, D.C., and Puerto Rico. FFRF's purposes are to protect the constitutional separation between state and church, and to educate the public about nontheism.

Thank you for holding today's hearing about Texas S.B. 8 and the Supreme Court's abuse of the shadow docket. Both of these are critical issues, but they are also both symptoms of a deeper sickness on this Supreme Court. While Congress should treat these symptoms, such treatments are temporary band-aids. Without a true cure, these symptoms will recur and others will manifest.

If Congress is serious about addressing these abuses, there is only one solution: it must expand and rebalance the federal judiciary. Anything else is a temporary fix at best. The deeper malady is a federal judiciary that has already been packed with ideologues who were handpicked by shadowy interest groups for their extremist and Christian nationalist credentials, including their commitment to overturning *Roe v. Wade*.

The symptoms

The U.S. Supreme Court allowed **S.B. 8** to go into effect in open defiance of precedent and without regard to the deliberate harm caused by banning nearly all abortion care in our second most populous state. We encourage Congress to take every action possible to end this immediate crisis, including passing the Women’s Health Protection Act. But at the end of every road is a Supreme Court packed with justices chosen for their willingness to undermine and destroy reproductive rights. They will decide the validity not just of every state abortion ban,¹ but also any legislative fix this Congress adopts.

In addition to effectively overturning *Roe v. Wade* with one unsigned paragraph, the Supreme Court has disproportionately used the **shadow docket** to approve the execution of prisoners and to allow church litigants to defy life-saving executive branch measures to combat a global pandemic. Showing its favoritism for extreme “religious liberty,” the court between August 2020 and July 2021 sided with ten out of ten churches or other religious entities challenging public health guidelines amid the coronavirus pandemic.²

The shadow docket began to look like collusion between Trump justices and the Trump administration. In four years, Trump’s administration made 41 requests on the shadow docket and won 28. Only eight requests were filed in the 16 previous years spanning the two terms of both George W. Bush and Barack Obama, and they only won four. That’s a massive jump in the win rate (50% to 68%) and in the rate at which these wins are handed down (0.5/year to 7/year, a 14-fold increase).³

The recent abuse of the shadow docket has shown that five justices, including all the Trump justices, have already decided these issues. That’s why they were chosen. They’re not even pretending to weigh legal arguments or consider precedent. When it comes to Texas S.B. 8, the Supreme Court clearly signaled it is ignoring precedent.

The right to abortion access and the ability of governors to protect the public from deadly pandemics will not be the last rights the court destroys without regard for precedent or real-world harm. These are just the beginning. After gutting *Roe v. Wade*, the court will likely turn its attention to fully eviscerating the right to privacy by going after contraceptive access.⁴ It has the votes to overturn *Obergefell v. Hodges* and end marriage equality.⁵

¹ Indeed, the court is set to roll back abortion rights further in, *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), cert. granted, *Dobbs v. Jackson Women’s Health Org.*, 209L.Ed.2d 748 (U.S. May 17, 2021) (No. 19-1392).

² Lawrence Hurley and Andrew Chung, *Analysis: U.S. Supreme Court’s “shadow docket” favored religion and Trump*, Reuters (July 28, 2021), available at <https://reut.rs/3odfrYA>.

³ Steve Vladeck, *The Supreme Court’s “shadow docket” helped Trump 28 times. Biden is 0 for 1*. The Washington Post (August 26, 2021), available at <https://wapo.st/3EWk2Ek>; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv.L.Rev. 123 (2019); Hurley, Chung, Jonathan Allen, *The “shadow docket”: How the U.S. Supreme Court quietly dispatches key rulings*, Reuters (March 23, 2021), available at <https://reut.rs/3ievtxl>.

⁴ See Andrew L. Seidel, *First Roe, then contraception: unless action is taken, Supreme Court is about to strike down fundamental rights of American women*, Religion Dispatches (May 20, 2021), available at <https://bit.ly/3EYV9oM>.

⁵ See Andrew L. Seidel, *Could this Supreme Court undo marriage equality?*, Religion Dispatches (September 23, 2021), available at religiondispatches.org/could-this-supreme-court-undo-marriage-equality/.

The cure

Former President Trump's appointments now make up a third of the federal judiciary and a third of the U.S. Supreme Court. Court expansion is also the only way for Congress to correct the damage done to the U.S. Supreme Court after Senator Mitch McConnell stole two seats. He didn't orchestrate that theft because he wanted to install qualified, impartial judges who would administer the law evenhandedly—he wanted to install ideologues who would solidify conservative minority rule for a generation. The courts are already packed.

Even without the packed and unbalanced nature of those appointments, Court expansion of the lower federal judiciary is objectively long overdue, given that Congress hasn't expanded the courts of appeals since 1990, when 179 active judges served 250 million Americans. Today, with a population of 330 million Americans, there are still only 179 active judges serving on the appeals courts, and they are swamped.

The right-wing lurch of the Supreme Court must be corrected. Several strong bills have been introduced that would, together, expand the entire judiciary, including the Supreme Court, and would create ethical mandates for Supreme Court justices, which are currently sadly lacking. These include the Judiciary Act of 2021 (S. 1141), the District Courts Judgeships Act of 2021 (H.R. 4886), and the Anti-Corruption and Public Integrity Act (S. 3357).

Allowing a small group of hyperconservative extremists and theocrats to rewrite constitutional law jeopardizes the fundamental rights of every American. Court reform, expansion and rebalance is the way to restore public confidence in the judiciary, and to preserve myriad hard-fought human and civil rights.

Thank you for your important work on this issue. We strongly urge the members of the Senate Judiciary Committee to recognize the need for immediate court reform to address these crucial matters.

Very truly,



Annie Laurie Gaylor & Dan Barker

Co-Presidents

ALG/DB:rdj/als