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The Illegitimate Supreme Court's Threat To The Labor Movement:

A Case For Court Expansion

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I. Introduction

In the United States today, the labor movement is under attack at every level, the economy is rife with inequity, and democracy is at a perilous crossroads. These dire trends are all thanks in large part to a successful decades-long campaign by corporations and the wealthy to enact anti-worker, pro-corporate policies, largely through the courts and judges hand-picked by these same powerful interests. This right-wing court-packing campaign has led to Supreme Court decisions assailing workers' ability to take collective action, form strong unions, enforce their rights, and be safe on the job; and also to decisions targeting the Voting Rights Act, permitting extreme partisan and racial gerrymandering, and allowing tsunamis of dark money to flood our politics making it exponentially more difficult for regular Americans to fight back at the ballot box. These rulings have meant that corporations and the wealthy have amassed more and more money and power, while ordinary people have less and less.[1]

It is no accident that attacking workers' rights has been a major focus of this right-wing campaign. The attempts to weaken the labor movement, the inequity in our economy, and the decay of democracy are all mutually reinforcing. Historically, we know that this toxic mix can propel us down two different paths. One leads to authoritarian demagoguery. The other leads to meaningful reform that promotes government policies that close income and wealth gaps, meet the needs of those who are struggling, and re-commit people to democratic institutions that prove capable of addressing their concerns.

We are at this decision point now, just as we were before the New Deal. The threat – and temptation – of authoritarian demagoguery is real. But millions of American voters want to find another way, a path to real economic reform that will restore the middle class (and its political power) without sacrificing our democracy. These are the Americans who have voted to raise the minimum wage in so many blue- and red-state referendums, who are fueling a new wave of worker organizing, and who are making labor unions more popular than ever.

But as interest in unionizing and collective action has increased in recent years, as evidenced by successful union drives at Starbucks, Amazon, and other retail and fast food companies, powerful attacks on the labor movement have and will continue to increase in kind. And corporate attacks on worker power have gotten a boost thanks to anti-worker Supreme Court decisions, which directly affect workers' ability to join together and improve their workplace through collective action.

[1] *See* discussion in Part III below ("How we got here: Decades of right-wing court-packing").

In other words, the Supreme Court – which is supposed to be a neutral arbiter of the law – is effectively doing favors for corporations, allowing them to hoard as much wealth as possible by placing workers' rights on shakier and shakier ground. This has left an economy of haves and have-nots, in which many people work multiple jobs but still cannot provide for their families, while a few powerful corporations and extraordinarily wealthy individuals have immense power.[2]

These attacks on workers also contribute directly to the decay in our democracy. Union membership and union participation provide practical training in democratic action.[3] Workers who have never experienced the power of collective action become more isolated, and more vulnerable to cynical weaponization of racial resentment that the wealthy and powerful use to divide workers against one another.[4] Powerful interests, like the extreme conservative majority who now make up the Supreme Court, know this. And they know if they continue to attack the labor movement, it will be less able to funnel the collective power of workers to serve as a countervailing force against the power of wealthy corporations through campaign contributions, member education, get-out-the-vote efforts, and policy campaigns.

The rampant inequality in our economy is also deeply unhealthy for democracy. Corporations and a few billionaires control an increasing portion of our nation's wealth. As they pour that money into politics, elected officials become more and more beholden to them and less and less responsive to the concerns of ordinary people.[5] In turn, working people are less and less able to enact policy changes that would permit them to form unions, fight for better jobs and stronger communities, and build a fair economy.

But the news is not all bleak. There is more energy behind union organizing and strikes than there has been in years, and the percentage of workers who support unions and say they would join a union if they could is at a record high.[6] The current wave of grassroots organizing and strikes reflects workers' extraordinary frustration with the injustice of their working conditions, and their

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[2] *See* discussion in Part II below ("A strong labor movement is necessary to an equitable economy and a functioning multiracial democracy").
[3] Tova Wang, *Union Impact on Voter Participation—And How to Expand It*, Harvard Kennedy School Ash Center for Democratic Governance and Innovation, 1-2 (June 2020) ash.harvard.edu/files/ash/files/300871_hvd_ash_union_impact_v2.pdf; Sean McElwee, *How Unions Boost Democratic Participation*, American Prospect (Sept. 16, 2015), prospect.org/labor/unions-boost-democratic-participation.
[4] Ian Haney Lopez, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class (2015); Paul Frymer and Jacob M. Grumbach, Labor Unions and White Racial Politics, American Journal of Political Science Vol. 65 Issue 1, 9 (June 29, 2020), doi.org/10.1111/ajps.12537.
[5] Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elite, Interest Groups, and Average Citizens*, Cambridge University Press (Sept. 18, 2014), cambridge.org/core/journals/perspectives-on-politics/article/testing-theories-of-american-politics-elites-interest-groups-and-average-citizens/62327F513959D0A304D4893B382B992B; Andrew Prokop, *Study: Politicians listen to rich people, not you*, Vox (Jan. 28, 2015), vox.com/2014/4/18/5624310/martin-gilens-testing-theories-of-american-politics-explained.
[6] Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, Gallup (Aug. 30, 2022), news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx.

understanding that joining together with their coworkers gives them the best shot at improving their jobs and communities.

A strong labor movement is necessary to achieving both an economy that works for everyone and a successful multiracial democracy. But right now, the Supreme Court itself is standing in the way of that goal.

To allow the resurgence of a strong labor movement and the creation of a functioning multiracial democracy, the labor movement and its allies should support the Judiciary Act to add four seats to the Supreme Court.

It is understandably difficult for people who believe in "equal justice under law" to contemplate a significant change to the Court that is supposed to symbolize that ideal. But the sad truth is that the Court has become a deeply unjust and illegitimate institution. Its conservative supermajority functions as an arm of the Republican party, enacting highly partisan policies, increasingly without explanation, while ignoring ethical principles and attacking its critics. If the Court remains on its current path, it is clear that the conservative Justices will do everything they can to prevent the current rush of organizing and solidarity from leading to a strengthened labor movement. Devoting significant resources to achieving major progressive legislative changes without reforming the Court would be like cooking a gourmet meal and then leaving it outside in a thunderstorm.

This report begins, in Section II, by explaining why a strong labor movement is necessary to an equitable economy and a multiracial democracy. Section III summarizes the decades of right-wing court-packing that led to the current conservative supermajority on the Supreme Court. Section IV sets forth how the Supreme Court has attacked and weakened workers' rights, including those of non-union workers and union members in both the public and private sectors.

Section V turns to the case for Supreme Court expansion. It begins by explaining why this is the right time for action, and why without reform, the Court will almost certainly act as a roadblock to labor's revival. It then discusses the ways the Court has made reform necessary by becoming an illegitimate institution, why Reconstruction and New Deal-era history demonstrates why adding seats to the Supreme Court is both necessary and appropriate, and why arguments against Court expansion are unpersuasive. This section ends with a discussion of the other judicial reforms that are also necessary, but not sufficient to address the problem without Court expansion.

II. A strong labor movement is necessary to an equitable economy and a functioning multiracial democracy

Everyone who wants an equitable economy and a functioning multiracial democracy should be concerned about maintaining a strong labor movement.

A. AN EQUITABLE ECONOMY

When workers can join together in unions, they are able to combat income inequality and build a vibrant middle class. This is in part because unionized workers negotiate better wages, benefits, and working conditions at their own workplaces. On average, unionized workers earn about 12% more than their non-union peers, with the union wage premium higher for workers of color and those without a college degree.[7]

Unions also have a "spillover" effect, improving pay, benefits, and working conditions among non-unionized employers in a sector or geographical area.[8] In terms of economic policy, unions and unionized workers have led the way in securing laws that benefit all working and non-wealthy people, including higher minimum wages, protections against discrimination and retaliation, and more affordable healthcare.[9]

Unions also help to shrink racial wage gaps.[10] Unionized jobs, particularly in the public sector, have been a vital pathway to the middle class for people of color, and especially for Black women. Black women disproportionately hold public sector jobs, and Black women in union jobs face smaller gender and racial wage gaps than their counterparts in non-union jobs.[11]

Unions even improve the economic mobility of future generations. The children of unionized workers earn higher wages than those whose parents are not in unions, and low-income children who grow up in areas of higher union density have higher upward economic mobility than those who grow up in areas where few workers have unions.[12]

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[7] Karla Walter and David Madland, *American Workers Need Unions: 3 Steps to Strengthen the Federal Labor Law System*, Center for American Progress Action Fund (Apr. 2, 2019), americanprogressaction.org/article/american-workers-need-unions/.
[8] Lawrence Mishel, *The enormous impact of eroded collective bargaining on wages*, Economic Policy Institute (April 8, 2021), epi.org/publication/eroded-collective-bargaining/.
[9] Walter and Madland, *supra* n. 7.
[10] Heidi Shierholz, *Working people have been thwarted in their efforts to bargain for better wages by attacks on unions* (Aug. 27, 2019), epi.org/publication/labor-day-2019-collective-bargaining/.
[11] Celine McNicholas and Janelle Jones, *Black women will be most affected by Janus*, Economic Policy Institute (Feb. 13, 2018), epi.org/publication/black-women-will-be-most-affected-by-janus/.
[12] David Madland and Alex Rowell, *Unions Help the Middle Class, No Matter the Measure*, Center for American Progress Action Fund, (June 9, 2016), at 4 americanprogressaction.org/wp-content/uploads/2016/06/BenefitsOfUnions-brief.pdf.

A strong labor movement restrains income inequality by ensuring that workers gain from the value they generate, rather than allowing the ultra-wealthy to capture a ballooning amount of wealth for themselves.[13] Countries with lower union density see a higher share of income going to the richest 10% of people, and CEOs in industries and companies without union representation are paid more than those with strong unions.[14]

In the U.S. in the last 40 years, unfortunately the relationship between a strong labor movement and an equitable economy has played out in reverse. Legal and political attacks on labor rights and worker power have led to the percentage of workers represented by unions in the United States falling precipitously during that time, from nearly 30% in 1979 to under 12% in 2019,[15] and just 7% in the private sector.[16] As union density has shrunk, income inequality has skyrocketed, with the share of income going to the top 10% increasing.[17] The middle class has withered; the share of national income going to the middle class has been falling since 1968.[18]

B. A FUNCTIONING MULTIRACIAL DEMOCRACY

Unions are one of the few types of mass-membership groups which enable working people to exercise countervailing power against the immense money and political influence of wealthy people and corporations.[19] As Nikolas Bowie put it in his article *Antidemocracy*, the labor movement and other successful people-driven movements "offer an important lesson for cultivating democracy in the present: when ordinary people use democratic methods to organize themselves, they can harness power that rivals the antidemocratic wealth and force that sustains social hierarchies."[20]

Workers in unions build and exercise countervailing power in several ways. Through participation in their unions, workers gain democratic "muscle": they become accustomed to organizing themselves and making demands on behalf of themselves and their coworkers, and to voting in union elections. These skills and habits translate to the broader political sphere; unionization

[13] Walter and Madland, *supra* n. 7.
[14] Madland and Rowell, *supra* n. 12, at 5.
[15] Heidi Shierholz, *Weakened labor movement leads to rising economic inequality*, Economic Policy Institute Working Economics Blog (Jan. 27, 2020), epi.org/blog/weakened-labor-movement-leads-to-rising-economic-inequality/.
[16] Justin McCarthy, *What Percentage of U.S. Workers are Union Members?*, Gallup (Sept. 1, 2022), news.gallup.com/poll/265958/percentage-workers-union-members.aspx#.
[17] Lawrence Mishel and Jessica Schieder, *As union membership has fallen, the top 10 percent have been getting a larger share of income*, Economic Policy Institute (May 24, 2016), epi.org/publication/as-union-membership-has-fallen-the-top-10-percent-have-been-getting-a-larger-share-of-income/.
[18] Madland and Rowell, *supra* n. 12, at 6.
[19] Kate Andrias and Benjamin Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 Yale Law Journal 546, 566-68 (2021), yalelawjournal.org/article/constructing-countervailing-power-law-and-organizing-in-an-era-of-political-inequality.
[20] Nikolas Bowie, *Antidemocracy*, 135 Harvard Law Review 160, 210 (Nov. 10, 2021), harvardlawreview.org/wp-content/uploads/2021/11/135-Harv.-L.-Rev.-160.pdf.

increases voter turnout in political elections, both among union members and in their broader communities.[21] Unions also educate their members, mobilize them to support political candidates and policies through "get out the vote" and other campaigns, and pool their money by contributing to political campaigns, in order to advance policies that benefit working people.[22]

Unions also contribute to the project of building a multiracial democracy by allowing their members to gain a sense of solidarity and shared purpose, which combats the antidemocratic efforts by the wealthy and powerful to divide working people against one another with politics of racial resentment.[23] Unions help their members recognize what Heather McGhee calls the "solidarity dividend" – that everyone gains when people work together across race, rather than viewing society as a zero-sum game in which a gain for one group means a loss for someone else.[24] Workers in unions gain the experience of working with coworkers across race, identifying their shared interests, and experiencing the possibility of success when they fight for those interests together.

For white workers, unions are a powerful inoculation against the messages of racial resentment that the right wing has used with dismaying success.[25] These messages of resentment say that the feelings of powerlessness, hopelessness, isolation, and economic anxiety that many people rationally experience in our economy are the fault of people of color, immigrants, and "elites" who are trying to take from more-deserving white people. Racial resentment messages have successfully convinced many white workers to support anti-worker candidates and policies.[26] For white workers, becoming a union member measurably reduces racial resentment.[27] White working-class union voters are also more likely to vote for Democrats than their non-union peers.[28]

Given the systematic attacks on the labor movement, runaway income inequality, and a Supreme Court-created campaign finance system that allows corporations and wealthy individuals to pour nearly unlimited amounts of money into our politics, the labor movement's countervailing power is up against significant structural forces that makes it exceedingly difficult to counter that of huge corporations and immensely wealthy individuals. It doesn't help that the Supreme Court has put

[21] Wang, *supra* n. 3; McElwee, *supra* n. 3.
[22] Andrias and Sachs, *supra* n. 19, at 566-568.
[23] Frymer and Grumbach, *supra* n. 4, at 3, 5.
[24] Heather McGhee, *The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together* (2021).
[25] Frymer and Grumbach, *supra* n. 4, at 1-2, 5, 10.
[26] Haney Lopez, *supra* n. 4.
[27] Frymer and Grumbach, *supra* n. 4, at 9.
[28] Aurelia Glass, David Madland, and Ruy Teixeria, *Unions are Critical to the Democratic Party's Electoral Successes*, CAP Action (Dec. 21, 2021), americanprogressaction.org/article/unions-critical-democratic-partys-electoral-success/.

their very powerful thumb on the scale in favor of corporations, either. This is a dark situation for American workers and American democracy.

III. How we got here: Decades of right-wing court-packing

Despite increased interest in union membership, union density is still currently at a historic low, runaway income inequality is decimating the middle class, and our system of government is increasingly devolving into minority rule. This situation is attributable in significant part to a concerted decades-long campaign by wealthy people and powerful corporate interests to enact pro-corporate, anti-worker policies, including through the federal courts. This story has been told in detail in other places; it is only summarized here.[29]

In response to the devastation of the Depression in the 1930s, including intense worker unrest, President Roosevelt enacted New Deal policies which expanded workers' rights and instituted legal protections for them to join together in unions to exercise collective power. The New Deal provided a scaffolding which workers could use to build their collective power, unleashing historic levels of organizing and unionization.

Almost immediately, businessmen (all men at this point) began to organize against the New Deal, attacking its worker protections and beginnings of a social safety net as a threat to their profits and the supremacy of the free market.[30] Shortly after the end of World War II, these businessmen won a significant victory over organized labor when Congress passed the Taft-Hartley Act, which amended the National Labor Relations Act to impose new restrictions on workers and their unions.[31] Over the next several decades they built a network of think tanks, lobbying groups, and politically active business organizations, including the American Enterprise Institute, the National Association of Manufacturers, the Chamber of Commerce, and the Business Roundtable.[32] These groups and their funders and leaders mounted and supported the presidential campaigns of the virulently anti-union Barry Goldwater and later the more jovially anti-union Ronald Reagan, and attacks on the Occupational Safety and Health Administration, welfare programs, Social Security, and generally government regulations, unions, and taxes.[33]

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[29] Sheldon Whitehouse, *The Scheme: How the Right Wing Used Dark Money to Capture the Supreme Court* (Oct. 18, 2022); Kim Phillips-Fein, *Invisible Hands: The Businessmen's Crusade Against the New Deal* (2010); Alliance for Justice, *Justice for Sale: Shortchanging the Public Interest for Private Gain* (1993), docdroid.net/2gY4UFK/justice-for-sale-afj-1993-pdf; John Fabian Witt, *How the Republican Party Took Over the Supreme Court*, The New Republic (April 7, 2020), https://newrepublic.com/article/156855/republican-party-took-supreme-court; Julian E. Zeizer, *How Conservatives Won the Battle Over the Courts*, The Atlantic (July 7, 2018), theatlantic.com/ideas/archive/2018/07/how-conservatives-won-the-battle-over-the-courts/564533/.
[30] Kim Phillips-Fein, *supra* n. 29, at 8-13.
[31] *Id.* at 31-32.
[32] *Id.* at 60-67, 190-206.
[33] *Id. passim*.

Corporate leaders built this movement primarily to serve their economic self interests, but they also weaponized racism to achieve their ends. The movement's leaders used, and continue to use, sometimes coded and sometimes overt racist messaging to tell white people that people of color pose a threat to them, and that the government and unions care more about undeserving people of color than deserving white people.[34] An early example of this type of "dog whistle" is the successful Republican "Southern strategy," which shifted Southern white voters from the Democratic to the Republican party starting in the 1960s by appealing to and encouraging racist grievances against the civil rights movement and integration.[35] Another from the 1980s is Ronald Reagan's invocation of a "welfare queen" who, he said, committed extensive fraud to become wealthy on government benefits, to support his case for lowering taxes, cutting safety net programs, and encouraging distrust in government and racial resentment.[36]

Leaders of the business-backed political movement recognized more than 50 years ago that the courts could be a promising tool for achieving their policy aims. The 1971 Powell Memo, which Lewis Powell wrote for the Chamber of Commerce before he became a Supreme Court Justice, summarized the case and vision for the overall direction of the broad right-wing project. Powell argued that the movement should not neglect the courts, arguing that "with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic, and political change."

As the Powell Memo envisioned, over the past 50 years corporations and the wealthy have built a sprawling conservative legal and political movement which focuses heavily on transforming the courts. Today that movement encompasses a network of right-wing organizations, including the Federalist Society, the invigorated Chamber of Commerce, and think tanks and litigation groups like the Freedom Foundation and the State Policy Network. Funded by corporations and right-wing foundations, this network focuses on turning the federal courts into tools to enact pro-corporate, anti-worker policies. The Federalist Society has led the way in constructing a pipeline for pro-corporate lawyers to become federal judges.[37]

Just since 2016, this right-wing court-packing network has spent tens of millions of dollars and trampled democratic norms to create an anti-worker supermajority on the Supreme Court. In 2016 Senate Republicans denied President Obama the ability to fill the Supreme Court vacancy left

[34] Haney Lopez, *supra* n. 4.
[35] *Id.*, Chapter 1.
[36] Gene Demby, *The Truth Behind the Lies of the Original 'Welfare Queen,'* NPR Code Switch (Dec. 20, 2013), npr.org/sections/codeswitch/2013/12/20/255819681/the-truth-behind-the-lies-of-the-original-welfare-queen.
[37] Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, The New Yorker (April 10, 2017), newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court; Robert O'Harrow Jr. and Shawn Boburg, *A conservative activist's behind-the-scenes campaign to remake the nation's courts*, Washington Post (May 21, 2019), washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/.

when Antonin Scalia died 9 months before a Presidential election. This effectively decreased the Court's size from 9 to 8 for more than a year, until they confirmed Donald Trump's nominee, Neil Gorsuch. In 2018, Senate Republicans confirmed Brett Kavanaugh despite strong evidence that he had committed sexual assault, and without a full investigation into those accusations. In 2020, they confirmed Amy Coney Barrett to fill Ruth Bader Ginsburg's seat just days before Election Day and after millions of votes had already been cast, in defiance of the alleged precedent they had purported to follow just four years earlier.

The confirmations of Justices Gorsuch, Kavanaugh and Barrett gave the Court a potentially decades-long 6-3 Republican supermajority. They also make it a very counter-majoritarian institution. All three of Donald Trump's Supreme Court appointees were nominated by a president who lost the popular vote and were confirmed by a group of Senators who represent less than half of the country.[38] And the Federalist Society and elected Republicans picked all three Justices because, among other things, they all had records of being willing to rewrite or ignore laws to rule against workers.[39]

The Democratic party and liberal thinkers have failed to sufficiently counter these trends, and often continued to treat the Court as a nonpartisan institution insulated from manipulation from bad faith actors with political motivations, despite mounting evidence to the contrary. Liberals and Democratic elected officials have historically embraced "neoliberalism," the idea that markets and competition are the best way to structure society, and that views people primarily as consumers rather than citizens.[40]

The result is a politics in which elected officials of both parties are responsive to the policy preferences of corporations and the wealthy but not those of regular, non-wealthy people.[41] It is also one in which both the majority of federal judges nominated by both Democratic and Republican presidents have backgrounds representing powerful institutions – corporations or the state as prosecutors – rather than workers, consumers, or other regular people.[42]

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[38] Ian Millhiser, *How an anti-democratic Constitution gave America Amy Coney Barrett*, Vox (Oct. 26, 2020), vox.com/2020/10/26/21534358/supreme-court-amy-coney-barrett-constitution-anti-democratic-electoral-college-senate.
[39] Jenny Hunter, *Economic Justice, Judges, and the Law*, Alliance for Justice, 68-72 (Aug. 3, 2022), afj.org/document/economic-justice-judges-and-the-law/.
[40] Samuel Aber, *Neoliberalism: an LPE Reading List and Introduction*, Law and Political Economy Project (August 10, 2022), lpeproject.org/wp-content/uploads/2020/07/Neoliberalism-Primer.pdf; Lily Geismer, *Democrats and neoliberalism*, Vox (June 11, 2019), vox.com/polyarchy/2019/6/11/18660240/democrats-neoliberalism.
[41] Gilens and Page, *supra* n. 5; Prokop, *supra* n. 5.
[42] Joanna Shepherd, *Jobs, Judges, and Justice*, Demand Justice, 2-6 (Feb. 2021), demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf.

IV. Workers' rights are in shambles, thanks in large part to the Supreme Court

Discussion of the historically low union density in the United States sometimes attributes the phenomenon to abstract forces like globalization, automation, and the decline in manufacturing jobs. But a decrease in the number of jobs in historically more unionized sectors like manufacturing would not logically lead to a decline in the number of unionized workers if workers in other sectors, like service and retail, were able to readily form unions. A 2020 report by the Economic Policy Institute found that less than one-fifth of the decline in unionization in the 1970s was due to globalization, automation, and the erosion of manufacturing jobs. The much more salient factors were that a dramatically smaller percentage of workers who tried to unionize were successful at winning a union election and obtaining a first contract, due in large part to increases in anti-union behavior by employers, permitted or abetted by American labor law.[43]

In other words, the primary reason the number of workers in unions in the United States is at a historic low of 12% while the majority of workers say they would like to join a union is because our labor laws are broken. This is both because of the weakness and patchwork nature of the laws themselves, and because the Supreme Court has interpreted them in favor of employers and against the interests of workers at every opportunity.

A. AMERICAN LABOR LAWS ARE BROKEN

Numerous workers in the United States have no legal right to form a union. This includes many public sector employees, many family child care providers, most farmworkers and domestic workers, and "gig" workers and other employees who are misclassified as independent contractors.

Some of these exclusions perpetuate the racist legacy of slavery. During the New Deal era, lawmakers excluded agricultural and domestic workers from the National Labor Relations Act, the Fair Labor Standards Act, and other important worker-protective legislation so that Black workers who were concentrated in those fields would not receive the protections being extended to most white private-sector workers.[44]

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[43] Laurence Mishel, Lynn Rhinehart, and Land Windham, *Explaining the erosion of private-sector unions*, Economic Policy Institute (Nov. 18, 2020), epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion/.

[44] Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, Ohio State Law Journal, Vol. 72, No. 1 (2011), https://kb.osu.edu/bitstream/handle/1811/71439/OSLJ_V72N1_0095.pdf; Testimony of Rebecca Dixon, *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act*, Hearing before the U.S. House of Representatives Education and Labor Committee, Workforce Protections Subcommittee (May 3, 2021), https://democrats-edworkforce.house.gov/imo/media/doc/DixonRebeccaTestimony050321.pdf.

Other workers lack organizing rights because of lawmakers' more recent efforts to limit the strength of the labor movement. Beginning in the 2010s, multiple Republican-dominated legislatures in states including Wisconsin, Ohio, Indiana, Michigan, and Iowa enacted laws to decimate the rights of public employees to unionize.[45] This wave of legislation targeted the strongest remaining segment of the labor movement – as private sector union density continued its slide, public sector employees had just begun to represent the majority of unionized workers in the United States in 2009.[46]

Other workers cannot unionize, or cannot bargain with the corporation that actually has the power to determine the terms of their employment, because of successful corporate strategies to deprive them of labor rights. Workers may be misclassified as independent contractors, or they may technically be employed by a temp agency, subcontractor, or franchisor, while another company higher up the food chain holds the real power to grant them better pay, benefits, and working conditions.

For workers who ostensibly have a legal right to organize, that right is often a mirage because employers use a variety of anti-union tactics, legal and illegal, to thwart their efforts. Employers fire workers who are involved in union organizing campaigns,[47] threaten to or actually close down plants or locations, and subject workers to intimidating, mandatory anti-union presentations.[48] They do so with impunity because labor law permits many of these abusive actions.

Even when employers use anti-union tactics that are illegal, the consequences for violating the law are laughably small. Sometimes the only "punishment" for an employer is to post a sign saying they will not violate the law in the future. Even when financial penalties are levied, they are typically limited just to back pay for impacted employees, a cost so small that employers will

[45] Emma Garcia and Eunice Han, *The impact of changes in public-sector bargaining laws on districts' spending on teacher compensation*, Economic Policy Institute (April 29, 2021), epi.org/publication/the-impact-of-changes-in-public-sector-bargaining-laws-on-districts-spending-on-teacher-compensation/; Shelby Fleig and Robin Opsahl, *In a victory for Republicans, Iowa Supreme Court upholds 2017 law limiting public-worker unions' rights*, Des Moines Register (May 17, 2019), desmoinesregister.com/story/news/crime-and-courts/2019/05/17/collective-bargaining-iowa-legislature-afscme-61-kim-reynolds-supreme-court-unions/3705134002/.

[46] Steven Greenhouse, *Most U.S. Union Members Are Working for the Government, New Data Shows*, New York Times (Jan. 22, 2010), nytimes.com/2010/01/23/business/23labor.html.

[47] *Id.*

[48] Gordon Lafer and Lola Loustaunau, *Fear at Work: An inside account of how employers threaten, intimidate, and harass workers to stop them from exercising their right to collective bargaining*, Economic Policy Institute (July 23, 2020), epi.org/publication/fear-at-work-how-employers-scare-workers-out-of-unionizing/; Steven Greenhouse, *Starbucks' Aggressive Union-Busting Is a New Model for American Corporations*, Slate (Nov. 3, 2022), epi.org/publication/fear-at-work-how-employers-scare-workers-out-of-unionizing/.

simply write it off as the cost of doing business.[49] This helps to explain why more than 40% of employers are charged with violating federal labor laws during union election campaigns.[50]

When workers do beat the odds and form unions, their employers often refuse to bargain in good faith. Most newly-unionized workers do not have a finalized contract with their employer a year after their organizing win, with the average first contract taking 465 days to finalize.[51] This not only prevents workers from seeing the benefits of their collective action, but provides ample time for aggressive union busting from employers hoping to lower morale or even decertify the union.

It doesn't have to be this way. With modernized labor laws and a Supreme Court that is not hostile to collective power, unionizing could become much more achievable for workers, and the benefits that flow from that membership would benefit not just workers but our democracy as a whole.

B. THE SUPREME COURT HAS SIGNIFICANTLY WEAKENED WORKERS' RIGHTS

The Supreme Court has contributed significantly to the current broken state of American labor law. The Court has misinterpreted the Constitution, ignored precedent, and overturned or effectively rewritten laws and regulations to enact anti-worker policies. It has aimed these attacks at both non-union and unionized workers: it has decimated the rights of non-unionized workers to organize, act collectively, be free from discrimination, and be safe at work. It has weakened public-sector unions, now the largest segment of the U.S. labor movement. And in the current term it seems poised to undermine private sector workers' right to strike.

These Court decisions have disproportionately affected workers of color, who disproportionately hold the unionized public-sector jobs that have historically served as pathways to the middle class, and which recent Supreme Court decisions have targeted.[52]

The Court's rulings against workers are part of a larger pattern in which it consistently rules against ordinary peoples' constitutional and civil rights. The Court has done so by eliminating the right to abortion and reproductive healthcare, allowing money to flood politics, preventing federal agencies from working to avert climate disaster, allowing an armory of guns and deadly weapons

[49] Lynn Rhinehart and Celine McNicholas, *Shortchanged – weak anti-retaliation provisions in the National Labor Relations Act cost workers billions*, Economic Policy Institute (Apr. 22, 2021), epi.org/publication/shortchanged-weak-anti-retaliation-provisions-in-the-national-labor-relations-act-cost-workers-billions/.
[50] Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer, and Lola Loustaunau, *Unlawful: U.S. Employers are charged with violating federal law in 41.5% of all union election campaigns*, Economic Policy Institute (Dec. 11, 2019), epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/.
[51] Robert Combs, *Analysis: Now It Takes 465 Days to Sign a Union's First Contract*, Bloomberg Law (Aug. 2, 2022), news.bloomberglaw.com/bloomberg-law-analysis/analysis-now-it-takes-465-days-to-sign-a-unions-first-contract.

[52] Sarah David Heydemann and Emily Martin, *Why Women Should Care About the Janus v. AFSCME Supreme Court Case*, National Women's Law Center (Feb. 26, 2018), nwlc.org/why-women-should-care-about-janus-v-afscme/.

into our schools, workplaces, and streets, gutting the Voting Rights Act, and permitting voter suppression and extreme gerrymandering. Attacks on workers' rights fit neatly into the broader, cynical project of the right wing to increase the profits, power, and freedom of wealthy people and corporations at the expense of ordinary peoples' collective power and well-being.

1. Attacks on non-union or not-yet-union workers' rights to organize, act collectively, form unions, and be safe at work

The Supreme Court has decimated the rights of workers who are not in unions – that is, most workers – to organize, form unions, and otherwise work together to improve their working conditions. The discussion below focuses on four areas in which the court has done this: expanding Takings Clause jurisprudence to hinder union organizing on private property; misinterpreting the Federal Arbitration Act to bar workers from bringing collective lawsuits or arbitration cases; weaponizing the First Amendment to allow employers to violate workers' rights based on the employer's religious beliefs; and undermining the ability of federal agencies to keep workers safe at work, especially during the pandemic.

a. Rewriting property law to prevent union organizing on private property

In its 2021 decision in *Cedar Point Nursery v. Hassid*, the Supreme Court made it harder for agricultural workers in California to meet with union organizers to learn about their rights to form a union.[53] The decision reshaped more than a century of property law. It will make it easier for business owners in all industries to prevent union organizers from speaking to their workers, and to challenge regulations of all sorts, including those intended to protect public health and prevent discrimination.

Cedar Point involved the California Agricultural Labor Relations Act, a state law that grants union organizers the right to temporary, limited access to farmland to speak with farmworkers about their rights to organize and form unions — for no more than 3 hours per day, 120 days per year, before work or during breaks. The law was a major victory of Cesar Chavez's groundbreaking organizing of farmworkers in the 1960s and 1970s.

As a relevant aside, the reason the United Farmworkers had to push for state-level legislation protecting farmworkers' rights to organize in the first place is because of the racist exclusion of farmworkers and domestic workers from federal labor law.[54]

[53] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).
[54] Perea, *supra* n. 44.

The demographics of farmworkers have changed in the last several decades; farmworkers in California are now overwhelmingly immigrants. But the workers' poverty and exploitation has remained a constant.

The 6-3 majority in *Cedar Point* held that the right of access for union organizers violated the Constitution. The majority opinion rested on the idea that a property owner's "right to exclude" is so fundamental to the ownership of property that when the government interferes with it by permitting other people to enter the property, the Constitution's Takings Clause requires that the property owner be compensated.

Although the majority claimed that it was simply applying existing law, in fact its ruling is a dramatic expansion of takings law. Most legal protections for workers, including labor laws and antidiscrimination laws, literally interfere with an employer's "right to exclude" workers the employer wants to fire or, for instance, prevent from speaking to coworkers after work.[55] Thus, in addition to allowing agricultural employers to hamper or prevent union organizers from speaking to their employees, *Cedar Point* will likely make it easier for other employers to bar or punish union organizers for entering their property. It may also allow companies to challenge antidiscrimination laws that require them to serve customers whose sexuality or gender identity, religion, race or other characteristics the business owner may not like; or to bar or complicate access for government agents who need to inspect businesses for compliance with health or safety regulations.

Litigants have already begun to use *Cedar Point*'s broad "right to exclude" to attack other worker-protective laws. In *Glacier Northwest v. International Brotherhood of Teamsters Local Union No. 174*, which is before the Court in its current term, the employer is arguing that interpreting the NLRA to allow unions to strike when that strike results in the spoliation or damage of perishable products, as has been the law for decades, would put the NLRA on a "collision course" with the Takings Clause."[56]

b. Allowing employers to violate workers' rights based on claimed religious beliefs

The Supreme Court has used the First Amendment to grant ever-increasing latitude to people and organizations who claim their religious beliefs permit them to trample on other peoples' rights. One strand of this campaign can be seen in cases in which the Court has given religious employers an effective exemption from worker-protective laws.

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[55] Nikolas Bowie, *Antidemocracy*, 135 Harvard Law Review 160, 162 (Nov. 10, 2021), harvardlawreview.org/wp-content/uploads/2021/11/135-Harv.-L.-Rev.-160.pdf.
[56] *Glacier Northwest, Inc. v. Int'l B'hd of Teamsters Local Union No. 174*, Brief for Petitioner at 2 (Nov. 1, 2022), supremecourt.gov/DocketPDF/21/21-1449/244536/20221101152235433_21-1449%20-%20Brief%20for%20Petitioner.pdf.

Several decades ago, the Court created an exception to the NLRA for teachers at private religious elementary schools, leaving them without the right to form a union. *NLRB v. Catholic Bishop* (1979) was a "constitutional avoidance" ruling: on the dubious theory that allowing Catholic school teachers to form unions and bargain *might* present First Amendment problems, the Court came up with an entirely implausible reading of the NLRA to exclude them from its coverage.[57] In the years since, with the Supreme Court's blessing, the lower courts and the National Labor Relations Board have expanded that exemption to bar workers from organizing at colleges and universities with some religious history or character, even if the schools don't cite any actual conflict between their religious beliefs and union organizing.[58]

More recently, in 2014 the Court allowed employers to refuse to provide contraceptive coverage to employees based on the employer's religious beliefs. In *Hobby Lobby v. Burwell*, the Court held for the first time that a for-profit company could have religious beliefs and the right to religious freedom under the Religious Freedom Restoration Act.[59] It was also the first time the Court held that one person's (or corporation's) religious freedom included the right to violate the rights of others.[60] The regulation at issue in *Hobby Lobby* was one adopted under the Affordable Care Act to ensure that employer-provided health care coverage included coverage for contraception, but the Court's reasoning will allow other private employers to deny their workers a variety of health and other benefits to which they are legally entitled.

In *Our Lady of Guadalupe School v. Morrissey-Berru* (2020), the Court continued its pattern of allowing employers to disregard their workers' rights because of the employer's religious affiliation.[61] The courts had long recognized a "ministerial exemption" to antidiscrimination laws to allow religious institutions like churches to freely hire and fire ministers. However, in *Our Lady of Guadalupe* the Court greatly expanded the ministerial exemption, allowing employers to apply it to employees who the employer said served some religious function, even if they were not ministers or anything similar. The employees in the case were teachers at Catholic elementary schools who taught primarily secular subjects, had little religious training, and were not even required to be Catholic.

Taken together, these cases mean that even for-profit employers may strip their employees of numerous protections Congress gave to all workers by claiming that following the law would violate their religious beliefs.

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[57] *NLRB v. Catholic Bishop,* 440 U.S. 490 (1979).
[58] Ross Slaughter, *The NLRB's unjustified expansion of Catholic Bishop is a threat to all employees at religious institutions,* OnLabor (May 24, 2021), onlabor.org/the-nlrbs-unjustified-expansion-of-catholic-bishop-is-a-threat-to-all-employees-at-religious-institutions/.
[59] *Hobby Lobby v. Burwell*, 573 U.S. 682 (2014).
[60] The Editorial Board, *Limiting Rights: Imposing Religion on Workers,* New York Times (Jun 30, 2014), nytimes.com/2014/07/01/opinion/the-supreme-court-imposing-religion-on-workers.html.
[61] *Our Lady of Guadalupe School v. Morrissey-Berru,* 140 S. Ct. 2049 (2020).

c. Permitting forced arbitration to bar non-unionized workers from taking collective action

The Court continued its project of constraining non-union workers' ability to work together to improve their working conditions in its recent decisions about forced arbitration, *Epic Systems v. Lewis* (2018)[62] and *Lamps Plus v. Varela* (2019).[63]

The Court has long engaged in a bad-faith reading of a 1925 law called the Federal Arbitration Act (FAA) to permit employers to force their employees, as a condition of their employment, to submit to forced arbitration agreements. These "agreements," which employees have no real choice but to consent to, bar employees from suing their employers in court. Instead they require that disputes be resolved through private arbitration regimes that are expensive; biased in favor of corporate repeat players; confidential, so workers can't build on others' successes or identify repeat wrongdoing; and which often bar employees from bringing collective cases, even through group arbitration.

The Court allowed these forced arbitration provisions in employment contracts despite the fact that the FAA by its own terms does not cover employment contracts for workers engaged in interstate commerce, which is most workers. In fact, when Congress was debating the FAA in 1925, the law's architects reassured other lawmakers that "It is not intended this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are."[64]

In 2001 the Court rewrote that broad protection for employment contracts, turning it into a very narrow one which only applies to contracts for transportation workers.[65]

In *Epic Systems v. Lewis*, several groups of employees argued that forced arbitration agreements which bar collective actions violate another law, the NLRA. The NLRA gives workers the right to engage in "concerted activities" for "mutual aid and protection" – to work together in a variety of ways to improve their working conditions. This broad protection for collective action by workers applies to all workers, not just those represented by unions. The plaintiffs in *Epic Systems* contended that their employers had underpaid them and their coworkers, and argued that the NLRA's protection for concerted activity meant they must be permitted to bring class action lawsuits or arbitrations challenging that wage theft.

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[62] *EPIC Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).
[63] *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).
[64] Deepak Gupta, *Symposium: For decades, court has built "an edifice of its own creation" in arbitration cases — it's time to tear it down and rebuild*, SCOTUSBlog (May 24, 2018), scotusblog.com/2018/05/symposium-for-decades-court-has-built-an-edifice-of-its-own-creation-in-arbitration-cases-its-time-to-tear-it-down-and-rebuild/.
[65] *Circuit City v. Adams*, 532 U.S. 105 (2001).

But the Court agreed with their employers that workers with claims for wage theft, discrimination, or other collective harms were limited to bringing only individual arbitration claims under their forced arbitration agreements. In so doing, the Court ignored the plain language of not just the FAA but also the NLRA, ruling that its protection for "concerted activities" for "mutual aid and protection" did not cover class action lawsuits or class arbitrations.

The next year, in *Lamps Plus v. Varela* (2019), the Court doubled down on *Epic Systems*, holding that even workers whose forced arbitration agreements don't explicitly bar class claims can still only bring individual arbitration cases.

Forced arbitration does not just make it harder for workers to vindicate their rights; in most cases it entirely blocks them from doing so. Individual arbitration between a single worker and a much more powerful employer is designed to be biased in favor of the employer and too costly to be worthwhile for the worker to pursue. The result is that employers are able to force their employees into agreements which isolate them and strip them of their rights, leaving employers free to discriminate against or steal wages from their employees with little fear that they will ever face consequences.

The impact of these decisions cannot be overstated: they have effectively nullified the ability of the huge majority of American workers to join together with coworkers to vindicate their rights. A 2017 study found that more than half of non-union private-sector workers, or 60 million people, were bound by forced arbitration agreements at work.[66] These 60 million people are now blocked from bringing class action cases in court or even class arbitrations if they and their coworkers face widespread violations of their workplace rights. By 2024, that is projected to be true for over 80% of non-union private-sector workers.[67]

d. Attacking regulations that protect workers and others from COVID-19 and other threats

During the COVID-19 pandemic, the Court issued numerous brief, unsigned decisions invalidating regulations and other government actions intended to protect workers and others from COVID-19. These decisions will also leave workers at higher risk of other types of workplace injury. Several of these decisions were based on the so-called "major questions doctrine," which the Court recently invented to justify striking down regulations it disfavors even when they are permitted by the text

[66] Alexander J.S. Colvin, *The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers*, Economic Policy Institute (April 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.
[67] Kate Hamaji, Rachel Deutsch, Elizabeth Nicolas, Celine McNicholas, Heidi Shierholz, and Margaret Poydock, *Unchecked corporate power: Forced arbitration, the enforcement crisis, and how workers are fighting back*, Center for Popular Democracy and Economic Policy Institute, at 1, 10 (May 2019), epi.org/publication/unchecked-corporate-power/.

of the laws adopted by Congress. This doctrine is of very recent vintage – the phrase had never been used in a majority Supreme Court opinion until 2022.[68]

In *National Federation of Independent Businesses v. Department of Labor* (2022), the Court used the major questions doctrine to invalidate workplace safety rules intended to protect workers from COVID.[69] It struck down the Occupational Safety and Health Administration's "vaccine or test" rule, which would have required larger employers to ensure their workers were either vaccinated against COVID or regularly tested for the virus.

Occupational health and safety laws give OSHA broad authority to adopt emergency workplace safety rules to protect workers from grave occupational hazards. But the Court reasoned that COVID-19 was not an "occupational" hazard because workers could also contract the illness outside of work – even though many workers did and continue to get sick and die at work, and even though OSHA regulates many hazards, like fires, which are also dangerous to people who are not at work.

Similarly, in another COVID-19 case, *Alabama Association of Realtors v. Department of Health and Human Services*, the Court terminated a moratorium on evictions that the Centers for Disease Control and Prevention (CDC) had adopted to stop the spread of the pandemic.[70] Again, the Court cited the major questions doctrine to justify striking down the CDC's action despite the fact that Congress gave the CDC broad authority to protect public health during a pandemic.

In another case early in the pandemic, the Court used the First Amendment's Free Exercise clause to strike down a state Executive Order intended to protect people from COVID-19 by restricting the number of people who could gather indoors. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court held that New York could not enforce occupancy limits on a church and a synagogue because other "essential" businesses, like grocery stores, did not have occupancy limits.[71]

While not all of these cases stem from employment, the implications of these decisions for workers and others is grave. OSHA estimated that the "vaccine or test" rule the Court invalidated in *NFIB v. OSHA* would have saved over 6,500 lives in just six months.[72] The Court's decision in *Alabama Association of Realtors* was estimated to leave between 6 and 17 million people at greater risk of eviction, and thus at greater risk of contracting COVID-19.[73]

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[68] *West Virginia v. EPA*, 597 U.S. ___ No. 20-1530, at *70 (2022) (Kagan, J., dissenting) (noting that the majority opinion "announces the arrival of the major questions doctrine").
[69] *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor,* 142 S. Ct. 661 (2022) (per curiam).
[70] *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021) (per curiam).
[71] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam).
[72] *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor,* 142 S. Ct. at 666.
[73] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

2. Weaponizing the first amendment to hamper public sector workers' ability to build strong unions

In 2018 the Court issued its decision in *Janus v. AFSCME*, overturning 40 years of precedent to make it harder for public-sector workers to form strong unions to fight for better wages and working conditions.[74] The Court created a First Amendment right for union-represented public sector workers to benefit from their union's representation without paying anything, overturning decades of precedent. The decision was intended to undermine union power in its last area of strength and may continue to weaken them for years to come.

The *Janus* decision was the culmination of Justice Alito's nearly decade-long assault on public-sector unions. Before *Janus*, Alito authored a series of opinions invalidating other aspects of public sector union finances and overtly inviting litigants to bring additional cases, laying the groundwork to eventually overturn one of the Court's own decades-old precedents.[75] In *Knox v. Service Employees International Union* (2012)[76] and *Harris v. Quinn* (2014),[77] Justice Alito took shots at the Court's 1977 decision *Abood v. Detroit Board of Education*, which upheld fair-share fee arrangements for workers who were represented by the union and received union benefits but were not full members. These are systems under which all workers represented by a union contribute to the costs of collective bargaining and administering the agreement that covers them. Justice Alito attacked *Abood* in these cases even though doing so was not necessary to their resolution. In doing so he essentially encouraged the network of right-wing nonprofit law firms that exist to sue unions to continue bringing cases attacking *Abood*, setting the stage for the decision in *Janus*.[78]

In the years since the *Janus* decision, public sector unions have done the resource-intensive work of signing up more represented workers as dues-paying members in order to maintain membership levels and financial stability. As a result, they have not yet seen the precipitous drops in membership that some feared.[79] However, the need to focus so intently on membership recruitment necessarily means that unions have fewer resources to devote to fighting for better working conditions or organizing new workplaces. Union dues are a classic collective action problem. As Mancur Olson and other economists have long understood, rational, self-interested workers will decline to pay union dues even if they benefit from and support the union, because in

[74] *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).
[75] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).
[76] *Knox v. Serv. Employees Int'l Union*, 567 U.S. 298 (2012).
[77] *Harris v. Quinn*, 573 U.S. 616 (2014).
[78] Jenny Hunter, *A Brief History of Sam Alito Hating Public-Sector Unions*, Balls and Strikes (Sept. 21, 2021), ballsandstrikes.org/scotus/a-brief-history-of-sam-alito-hating-unions/.
[79] Ian Kullgren and Aaron Kessler, *Unions Fend Off Membership Exodus in 2 Years Since Janus Ruling*, Bloomberg Law (June 26, 2020), news.bloomberglaw.com/daily-labor-report/unions-fend-off-membership-exodus-in-2-years-since-janus-ruling.

the short term they will get the same benefits whether they pay or not. Over time, free-riding becomes contagious: as more self-interested types free ride, others who follow the crowd will follow, and eventually even the most committed will be tempted to do the same.[80] And anti-union organizations are trying to speed this process along by launching campaigns to encourage union members to drop their membership. Groups like the Freedom Foundation, which are part of the same right-wing corporate-funded network that brings anti-worker lawsuits like *Janus*, have launched campaigns using door-knocking, TV and radio ads, mailings and social media to push union members to stop paying dues.[81] As a result of all this, the decision's long-term impact on union density on the public sector will not be known for many years.

What is clear is that because public sector workers are disproportionately women and people of color, especially Black women, *Janus* will have an outsized negative impact on them.[82]

3. Ignoring statutory language and precedent to attack unionized private sector workers' right to strike

In January 2023, the Supreme Court heard oral arguments in *Glacier Northwest Inc. v. International Brotherhood of Teamsters Local Union No. 174*, a case in which it seems the conservative justices are poised to deliver a severe attack on unionized workers' collective power. The case is about whether employers can file costly lawsuits against unions for the kind of economic harm that frequently results from strikes. The Court could severely weaken unionized private sector workers' right to strike.

Strikes, in which workers collectively withhold their labor, are the most important tool workers have to exert pressure on their employers, who otherwise hold vastly more bargaining power. Even when workers do *not* strike, it is the threat or possibility of a strike that often drives employers to make a fair deal at the bargaining table. It is for that reason that the NLRA protects workers' right to strike.

To safeguard the strike and other worker protections guaranteed by the NLRA, the Supreme Court long ago held that state and local courts and other government entities cannot hear cases or enforce laws touching on conduct that is either arguably protected or arguably prohibited by the

[80] *Janus v. AFSCME*, Brief *Amicus Curiae* Economists and Professors of Law and Economics in Support of Respondents, at 9-10, 18-19 (Jan. 18, 2018), onlabor.org/wp-content/uploads/2018/01/20180118155219419_16-146620bsac20Economists20and20Professors20of20Law20and20Economics.pdf.
[81] Chris Brooks, *How Corporations Plan to Use* Janus *to Turn Workers Against Their Own Unions*, In These Times (July 2, 2018), inthesetimes.com/features/janus_opt-out_campaign_state_policy_network_union_busting.html.
[82] McNicholas and Jones, *supra* n. 11.

NLRA. Preemption means that such cases should be heard only before the National Labor Relations Board.

Taken together, the NLRA's protection of the right to strike and NLRA preemption have long meant that workers and their unions cannot be sued, prosecuted, or otherwise punished in state court for striking. There are exceptions: if striking workers engage in violence, vandalism, or intentional destruction of employer property, such as by smashing equipment, that conduct is outside the bounds of federal labor law. But that exception is narrow.

Glacier Northwest involves a Washington state cement company's state-court lawsuit against its workers' union for damages allegedly resulting from a strike. Glacier's employees went on strike after their collective bargaining agreement with their employer expired. When the strike began, the workers who drove cement trucks left their trucks running so the cement in them wouldn't dry out and damage the trucks. The company had to dispose of the cement since it did not have drivers to deliver it; it had not made plans for backup workers in case of a work disruption. So the company lost some perishable product (the cement) – but that's it. The workers did not damage or destroy equipment or engage in any violence or vandalism.

The company's lawsuit seeks damages based on the loss of the cement. Washington state courts dismissed the suit, correctly recognizing that it was clearly preempted by the NLRA under long-established precedent. Unfortunately, the fact that this Supreme Court, with its record of ruling for corporations against the interests of workers, agreed to hear the case strongly indicates that it is inclined to rule for the company.

A ruling allowing Glacier's state-court lawsuit to proceed could have devastating impacts on the rights of all workers to strike. If the union in this case can be sued over the company's loss of its cement, then presumably other unions and workers can be sued over the loss of perishable products like crops or food during strikes or walkouts. Other companies might sue for lost business or other financial harms far removed from the kind of violence or intentional destruction contemplated under current caselaw. This could make striking very financially risky for workers and their unions, weakening one of their strongest tools and stripping workers of even more power.

V. Court expansion is needed to prevent an illegitimate Supreme Court from destroying the labor movement and democracy

The labor movement and its allies should support the Judiciary Act of 2021, which would add four seats to the Supreme Court. Expanding the Court is necessary and justified as a correction to the

illegitimate, counter-majoritarian, antidemocratic Court. It may be the only way to prevent the Court from doing additional harm to millions of people and causing further damage to the labor movement, the economy, and democracy.

A. NOW IS THE TIME FOR ACTION

The time to expand the Supreme Court is now. The seeds for a stronger labor movement and democracy are at hand, but their ability to grow and thrive is at risk from the Supreme Court.

In recent years the U.S. has seen waves of organizing, unionization, and strikes. The Fight for $15 and a Union movement, which began ten years ago, has raised wages, decreased the racial wealth gap, and led to increased unionization in industries outside the fast food industry.[83] The Red for Ed movement that began with teachers' strikes in multiple states in 2018 raised teacher pay and strengthened teachers' and educators' unions. It also highlighted "bargaining for the common good," the long-established but not well-known practice of workers using their bargaining power to fight for improved services for the people and communities they serve, in addition to improved working conditions for themselves.[84]

High-profile union drives at Amazon, Starbucks, Chipotle, REI, and media and nonprofit organizations, and strikes at John Deere, Kellogg, the University of California, and Alabama coal mines have drawn further attention to the energy behind labor organizing.[85] The pandemic-related "Great Resignation" and tight labor market all speak to peoples' dissatisfaction with their jobs and working conditions and willingness to upend their lives to make changes. Accordingly, public approval of unions and interest in joining a union are at historic highs.[86]

The conditions for a resurgent labor movement are also present in the Biden administration's enactment of a series of laws which aim to create next generation green, climate-oriented industries in the United States. These could be the basis for the good union jobs of the future. The Inflation Reduction Act, the Bipartisan Infrastructure Law, the CHIPS and Science Act, and the American Rescue Plan contain major investments in future-focused infrastructure and

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[83] Yannet Lathrop, Matthew D. Wilson, & T. William Lester, *Ten-Year Legacy of the Fight for $15 and a Union Movement: Reducing the Racial Wealth Gap and Generating Tens of Billions in Additional Economic Activity*, National Employment Law Project (Nov. 29, 2022), nelp.org/publication/10-year-legacy-fight-for-15-union-movement/.

[84] Eric Blanc, *The Red for Ed Movement, Two Years In*, New Labor Forum (Oct. 2020), newlaborforum.cuny.edu/2020/10/03/the-red-for-ed-movement-two-years-in/; Joseph McCartin and Merrie Najimy, *The Origins and Urgency of Bargaining for the Common Good*, Forge Organizing (March 31, 2020), forgeorganizing.org/article/origins-and-urgency-bargaining-common-good.

[85] Taylor Johnston, *The U.S. Labor Movement is Popular, Prominent and Also Shrinking*, New York Times, (Jan. 25, 2022), nytimes.com/interactive/2022/01/25/business/unions-amazon-starbucks.html; *University of California workers end strike after approving contracts*, NPR (Dec. 24, 2022), npr.org/2022/12/24/1145415255/university-of-california-end-strike-approve-contract; Stephan Bisaha, Wailin Wong, Dylan Sloan, Viet Le, and Kate Concannon, *The never-ending strike*, NPR The Indicator from Planet Money (Jan. 5, 2023), npr.org/2023/01/05/1147120215/the-never-ending-strike.

[86] McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, *supra* n. 6.

manufacturing, including improving America's water systems, roads, and bridges, and building broadband, wind farms, solar panel arrays, semiconductor and battery manufacturing, and electric vehicles and charging stations.[87] The Administration is backing efforts to ensure that these programs lead to well-paid union jobs and that a diverse group of American workers are trained and hired for those jobs.[88]

Several legislative proposals at the federal and state levels also hold promise for the reinvigoration of the labor movement. While laws alone cannot create a strong labor movement, they can grant workers the legal right to form unions, remove roadblocks to their ability to do so, and help translate organizing victories into collective bargaining agreements.

- The Protecting the Right to Organize (PRO) Act would fix the broken NLRA by imposing real penalties on employers who violate their workers' rights; allowing workers to override state "right to work for less" laws that weaken unions; strengthening workers' rights to strike, boycott, and take other workplace actions; fighting misclassification of employees as independent contractors; preventing employers from interfering in union elections; and facilitating newly-formed unions reaching their first contract.[89]
- The Public Service Freedom to Negotiate Act would recognize the rights of public employees in every state to form unions by setting a minimum standard for public sector collective bargaining rights.[90]
- The Forced Arbitration Injustice Repeal (FAIR) Act would prohibit companies from forcing employees and consumers to sign forced arbitration agreements that block them from going to court and that push all disputes into unfair, individual arbitration systems.[91]

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[87] *Transcript: Ezra Klein Interviews Felicia Wong*, Ezra Klein Show, New York Times (Sept. 16, 2022), nytimes.com/2022/09/16/podcasts/ezra-klein-interviews-felicia-wong.html.

[88] *FACT SHEET: President Biden Celebrates New Commitments toward Equitable Workforce Development for Infrastructure Jobs*, White House (Nov. 2, 2022), whitehouse.gov/briefing-room/statements-releases/2022/11/02/fact-sheet-president-biden-celebrates-new-commitments-toward-equitable-workforce-development-for-infrastructure-jobs/. However, because the laws do not include union-neutrality and other pro-union provisions that the Administration initially supported, the extent to which they result in good union jobs will depend on a host of factors, including the regulations and other details of how federal agencies and state and local governments implement them, and whether workers who want to unionize and bargain for better wages are able to do so without facing intense employer anti-union campaigns. Lee Harris, *Industrial Policy Without Industrial Unions*, The American Prospect (Sept. 28, 2022), prospect.org/labor/industrial-policy-without-industrial-unions/.

[89] *Protecting the Right to Organize Act Fact Sheet*, House Committee on Education and Labor (Feb. 26, 2023), https://democrats-edworkforce.house.gov/imo/media/doc/richard_l_trumka_protecting_the_right_to_organize_act_hr20factsheet1.pdf.

[90] Celine McNicholas and Margaret Poydock, *The* Public Service Freedom to Negotiate Act *provides public-sector workers the right to join in union and collectively bargain*, Economic Policy Institute (June 26, 2019), epi.org/blog/the-public-service-freedom-to-negotiate-act-provides-public-sector-workers-the-right-to-join-in-union-and-collectively-bargain/.

[91] *Chairman Nadler Statement for the Markup of H.R. 963, the FAIR Act of 2022* (March 17, 2022), nadler.house.gov/news/documentsingle.aspx?DocumentID=394815.

- The Domestic Workers Bill of Rights would recognize domestic workers' rights to workplace protections like overtime pay, meal and rest breaks, paid sick leave, health and safety information, and protection against discrimination and harassment. It would also address the unique challenges of domestic work by requiring written agreements and fair scheduling, creating a standards board, and preventing retaliation.[92] Versions of this federal bill have been introduced and passed in several states.

Other legislative and regulatory changes are needed at the state and federal levels to ensure that all workers, including "gig" workers, those who work for franchised or subcontracted or otherwise "fissured" workplaces, home health aides and family child care providers, and agricultural workers have meaningful rights to join together with their fellow workers to form unions.

B. THE COURT'S RIGHT-WING SUPERMAJORITY WILL CONTINUE TO POSE A THREAT TO THE LABOR MOVEMENT UNLESS THE COURT IS REFORMED

The Supreme Court's record makes clear that, if it is not reformed, its far-right supermajority will continue to consistently rule against working people and for powerful corporations. They will also continue to decimate the right to vote and the foundations of our democracy, access to reproductive care, and protections for LGBTQ people.

The Court majority will also continue to prevent the people, through their elected representatives, from fixing the damage it has done. If the labor movement and its allies succeeded in enacting the PRO Act and other vital laws to strengthen workers' power but do not reform the Court, that legislation will be at significant risk of being overturned.

The current Court majority's anti-worker jurisprudence constitutes a new *Lochner* era.[93] Named after a 1905 case in which the Supreme Court struck down a law limiting workers in bakeries to a 10-hour work day and a 60-hour work week, the term refers to the decades in the early 20th century when the Court invalidated numerous pro-worker laws. Among those were laws setting minimum wages, restricting child labor, and preventing employers from blackballing union members. The Court at the time said all these laws violated individual workers' rights to enter into contracts, no matter how little choice the workers had about agreeing to the contracts or how dangerous, unhealthy, or abusive the working conditions dictated by those contracts were.

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[92] *Summary of the National Domestic Workers Bill of Rights*, National Domestic Workers Alliance (2021), domesticworkers.org/wp-content/uploads/2021/07/Domestic-Workers-Bill-of-Rights-2021-summary-July-2021.pdf.

[93] Charlotte Garden, *Epic Systems v. Lewis: The Return of Freedom of Contract in Work Law?*, ACS Blog (Nov. 27, 2018), acslaw.org/analysis/acs-supreme-court-review/epic-systems-v-lewis-the-return-of-freedom-of-contract-in-work-law/; Catherine Fisk, *Symposium: A ruling for plaintiffs would revive Lochner*, Scotusblog (Dec. 19, 2017), scotusblog.com/2017/12/symposium-ruling-plaintiffs-revive-lochner/; Mark Joseph Stern, *A New Lochner Era*, Slate (June 29, 2018), slate.com/news-and-politics/2018/06/the-lochner-era-is-set-for-a-comeback-at-the-supreme-court.html.

While the *Lochner* Court decided these cases based on a single legal theory, freedom of contract, today's Court majority has taken a more ad hoc, legally questionable approach, citing or inventing a wide variety of legal doctrines to justify its decisions decimating workers' rights. These include its freshly-invented "major questions doctrine," its recent "right to exclude" version of the Takings Clause; the First Amendment, used as a weapon both to weaken public sector unions and to allow employers to disregard employees' rights; and the freedom of contract theory from *Lochner* itself.

1. Invalidating health and safety regulations under the "major questions doctrine"

The Court majority will continue to use its recently-invented "major questions doctrine" to invalidate health and safety and other pro-worker policies the majority of Justices don't agree with, and generally to weaken independent agencies like the NLRB and OSHA. For instance, if the world faces future pandemics, as it is likely to do, the Court majority has already made clear that it will strike down emergency actions to protect workers from disease and death. The right-wing Justices could also use the freewheeling doctrine to invalidate regulations intended to protect workers' rights, for instance, the Department of Labor's proposed rule on employee misclassification, or the NLRB's proposed rule on the joint employer standard.[94]

2. The takings clause as a weapon against worker-protective laws

Cedar Point Nursery, the case holding that limited union organizer access to agricultural land violates the Constitution's Takings Clause, may have been the debut for a new version of Takings Clause jurisprudence that is particularly destructive to worker-protective laws. The employer and its amici in the *Glacier Northwest* case before the Court this term are citing *Cedar Point* to argue that a strike which incidentally led to the spoliation of a perishable product may constitute a "taking" of employer property.[95] The Court's conservative supermajority could use the Takings Clause to justify invalidating a wide variety of antidiscrimination and other laws.

3. Continued first amendment attacks on public sector unions

Janus, in which the Court's right-wing majority used the First Amendment to weaken public sector unions, was the culmination of a series of cases – *Knox, Harris,* and *Friedrichs v. California Teachers Association*[96] – but it was not the end. The same groups that brought those cases have

[94] Jeffrey W. Brecher, Brian P. Lundgren, Courtney M. Malveaux and Andrew F. Maunz, *U.S. Supreme Court's Decision Curtailing Regulators May Raise 'Major Questions' for Employers*, JacksonLewis (July 13, 2022) jacksonlewis.com/publication/us-supreme-court-s-decision-curtailing-regulators-may-raise-major-questions-employers.
[95] Kevin Vazquez and Jason Vazquez, *What Glacier Argues in its Merits Brief*, OnLabor (Nov. 9, 2022), onlabor.org/what-glacier-argues-in-its-merits-brief/.
[96] *Friedrichs v. Cal. Teachers Ass'n*, 578 U.S. 1 (2016) (per curiam) (affirming judgment below by an equally divided Court).

continued to file dozens of lawsuits challenging all aspects of how public sector unions operate, including attacking the foundational idea of "exclusive representation," under which a union represents and bargains on behalf of all workers in a bargaining unit; seeking refunds of fair-share fees paid in the past; challenging the validity of and specific provisions on union membership cards; and challenging benefits that are available only to dues-paying union members.[97] While these cases are legally baseless and have met with almost uniform failure in the lower courts, the same was true of *Janus* itself until the Court decided to use it to overturn decades of precedent.

Indeed, the Supreme Court majority and right-wing lower courts could potentially use the weaponized First Amendment rationale in *Janus* to strike down a wide variety of laws and regulations that are disagreeable to powerful interests. Once nearly every action can be described as "speech," any requirement that anyone do anything can become a First Amendment violation. The absolutist First Amendment could pose a threat to public financing of elections, requirements that corporations make public disclosures or display warning labels, or that employers allow their employees to wear shirts or buttons with pro-union messages.[98]

4. Letting more allegedly religious employers ignore workers' rights

As discussed above in Section IV.B.1.b, the Court has shown an eagerness to expand the rights of religious employers to violate their employees' rights. It could expand these holdings to give employers even broader immunity from employment and labor laws on the basis of their claimed religious beliefs. For instance, in the same way it gave religious for-profit employers the right not to provide their employees with health coverage for contraception in *Hobby Lobby*, it could expand *Catholic Bishop* to give religious for-profit employers the ability to deny employees the right to form unions.[99]

5. *Lochner*-style freedom of contract justifications for striking down pro-worker laws

Some Justices have also made clear their eagerness to revive the reasoning of the long-rejected *Lochner* era cases themselves. In a dissenting opinion in the 2018 case *Sveen v. Melin*, Justice Gorsuch wrote that he would have invalidated a Minnesota law that automatically nullifies an ex-spouse's beneficiary designation on a life insurance policy when the former couple divorces.[100]

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[97] Daniel DiSalvo, *The Legal Aftermath of Janus v. AFSCME*, Manhattan Institute (Dec. 21, 2021), manhattan-institute.org/legal-aftermath-janus-v-afscme.
[98] Kate Andrias, *Janus's Two Faces*, 2018 Sup. Ct. Rev. 21, 49-52 (2019), https://repository.law.umich.edu/articles/2060.
[99] Charlotte Garden, *Religious Employers and Labor Law: Bargaining in Good Faith?*, Boston University Law Review, Vol. 96, No. 3, at 129 (Sept. 1, 2016), https://ssrn.com/abstract=3002819 (noting that *Catholic Bishop*'s reading of the NLRA is "weak in the context of nonprofit, religiously affiliated employers" and "utterly unsupportable in the context of closely held, for-profit employers").
[100] *Sveen v. Melin*, 138 S. Ct. 1815, 1826 (2018) (Gorsuch, J., dissenting).

He wrote that such a law violated the Constitution's Contracts Clause. While this case was not about workers' rights, Gorsuch's reasoning is very similar to that the *Lochner* Court used to find that a maximum-working-hours law violates the right to contract. If a majority of the Court adopted Gorsuch's rationale, this theory would give them yet another way to weaken or invalidate state and local minimum wage and workplace health and safety laws.

* * *

If the labor movement succeeded in enacting much-needed laws to codify and expand workers' rights to form unions, such as the PRO Act or the Public Service Freedom to Negotiate Act, those laws would be at high risk of being struck down or invalidated by this Court. This report will not spend time analyzing which legal doctrine the Court would point to as its reason for striking down which pro-worker laws. What is undeniable, based on the Court's track record of anti-worker rulings, is that it would be eager to strike them down, and would come up with legal reasoning to justify that result.

If the Supreme Court is not reformed and continues to seek out and use every opportunity to rule against workers and for corporations, the labor movement faces a bleak future. As union density falls, wages for working people are suppressed, both because there are fewer people in union jobs with good pay and benefits and because the converse of the union "spillover" effect occurs: non-union employers don't feel the need to raise pay to compete with unionized employers, so wages fall or stagnate across whole geographies and sectors of the economy.[101] At the same time, without strong unions to bargain to ensure that productivity gains go to workers instead of CEOs, the percentage of income going to the top 10% balloons.[102]

As the labor movement becomes smaller and weaker, unions have fewer resources to organize non-union sectors. They have fewer resources to do get out the vote campaigns to raise voter participation rates, and to make political contributions to attempt to counter the immense amounts of corporate money flooding our politics. There are fewer unions to serve as "schools" for democracy and to convince white working-class voters to vote based on solidarity and economic self-interest rather than racial resentment.

The result is a further weakening of the underpinnings of democracy at the same time it is under overt attack from the MAGA Republican party and the Supreme Court.

[101] Mishel, *The enormous impact of eroded collective bargaining on wages*, *supra* n. 8.
[102] Mishel and Schieder, *supra* n. 17.

C. COURT EXPANSION IS A NECESSARY RESPONSE TO A RIGHT-WING MAJORITY THAT HAS TURNED THE INSTITUTION ILLEGITIMATE

Adding seats to the Supreme Court would respond not just to the Court majority's harmful, antidemocratic, and unprincipled rulings, but also to numerous other ways in which it has become an illegitimate institution.

The composition of the current Court is the result of brazen partisan schemes Republicans used to pack the Court with extreme right-wing Justices. The Republican-controlled Senate denied President Obama's Supreme Court nominee, Merrick Garland, so much as a hearing after Justice Scalia's death in 2016, holding the seat open for over a year until Justice Gorsuch was confirmed. They confirmed Justice Kavanaugh despite credible allegations of sexual assault and a perfunctory investigation. And they rushed Justice Barrett's confirmation through just days before the 2020 Presidential election.

The three Trump Justices worsen the already antimajoritarian makeup of the Supreme Court. All three were nominated by a President who lost the popular vote, and confirmed by Senators representing less than a majority of Americans.[103] Altogether, two-thirds of the Justices were appointed by Republican presidents despite the fact that a Republican presidential candidate has won the popular vote only once since 1992.

The Court's right-wing majority also behaves in ways that are not legitimate. They have vastly increased the number of cases they decide through the "shadow docket," without hearing full arguments and without any legal reasoning.[104] Some Justices have themselves recognized that the Court is damaging its own legitimacy.[105] Justice Alito has attacked journalists, and even his own colleagues, for drawing attention to the Court's illegitimate actions.[106]

Members of the conservative supermajority behave in ways that would almost certainly violate ethics rules, if any ethics rules applied to them. Justice Thomas has refused to recuse himself from cases involving the January 6 insurrection even though his wife communicated with White House

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[103] Nuru Ibrahim, *Were Most Conservative Supreme Court Justices Appointed by Presidents Who Lost Popular Vote?*, Snopes (May 6, 2022), snopes.com/news/2022/05/06/conservative-supreme-court-justices/. Chief Justice Roberts and Justice Alito were also appointed by a President, George W. Bush, who lost the popular vote when he was first elected President in 2000, but won the popular vote in 2004.
[104] David Leonhardt, *Rulings without explanations*, New York Times (Sept. 3, 2021), nytimes.com/2021/09/03/briefing/scotus-shadow-docket-texas-abortion-law.html.
[105] Josh Gerstein, *Kagan repeats warning that Supreme Court is damaging its legitimacy*, Politico (Sept. 14, 2022), politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766.
[106] Adam Serwer, *By Attacking Me, Justice Alito Proved by Point*, The Atlantic (Oct. 12, 2021), theatlantic.com/ideas/archive/2021/10/alito-supreme-court-texas-abortion/620339/; Jessica Gresko, *Supreme Court justices spar over court legitimacy comments* (Oct. 26, 2022), apnews.com/article/abortion-us-supreme-court-elena-kagan-samuel-alito-government-and-politics-10bf92ae6830573054da5f756a029d1c.

Chief of Staff Mark Meadows to urge him to take steps to overturn the 2020 election, and was questioned by the House January 6 committee about her involvement.[107] During that questioning, she acknowledged that when she texted Meadows that she had spoken to her "best friend" and that their conversation had made her feel better when she was discouraged about the failure of attempts to overturn the election, the "best friend" she was referring to was in fact Justice Thomas.[108]

In an entirely separate series of controversies, in November 2022, the New York Times reported that Justice Alito likely tipped off an activist conservative couple in advance about the outcome and authorship of the Supreme Court's 2014 decision *Burwell v. Hobby Lobby*. Further, the report revealed that the couple had befriended Alito, as well as Justice Thomas and Justice Scalia, as part of a coordinated influence campaign by an anti-abortion group which had wealthy people donate to the Supreme Court Historical Society, become close to the conservative Justices, and invite them to dinners, to their vacation homes, and to private clubs, in order to "embolden" them to write "unapologetically" anti-abortion decisions.[109] Chief Justice Roberts did not respond at all to a letter from the architect of that influence campaign informing him of it and the leak. The Supreme Court's counsel answered questions from lawmakers by asserting that Justice Alito denied the allegation, and that no ethics rules had been violated.[110] This chain of events also casts a different light on the May 2022 leak of the court's *Dobbs* decision eliminating the right to abortion, the Chief Justice's noisy public launch of an investigation[111] and then the relatively anticlimactic conclusion of the investigation that resulted in no suspects identified. Controversially, the investigators admitted that, unlike every other Supreme Court employee and clerk who participated in the investigation, they did not question any of the Supreme Court Justices pursuant to a signed affidavit swearing to tell the truth.[112]

It is no surprise that public confidence in the Court is at a historic low.[113]

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[107] Nina Totenberg, *Legal ethics experts agree: Justice Thomas must recuse in insurrection cases*, NPR (March 30, 2022), npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases.
[108] David Smith, *Ginni Thomas 'never spoke' about 2020 vote to supreme court justice husband*, The Guardian (Dec. 30, 2022), theguardian.com/us-news/2022/dec/30/ginni-thomas-clarence-thomas-2020-election.
[109] Jodi Kantor and Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, New York Times (Nov. 19, 2022), nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html.
[110] Ruth Marcus, *The court's supremely obtuse response to its ethical problems*, Washington Post (Nov. 29, 2022), washingtonpost.com/opinions/2022/11/29/supreme-court-ethics-roberts-alilto/.
[111] Ariane de Vogue, *SCOTUS maintains public silence on Dobbs opinion leak investigation*, CNN (Oct. 21, 2022), cnn.com/2022/10/21/politics/supreme-court-leak-investigation/index.html.
[112] Robert Barnes and Ann E. Marimow, *Supreme Court says it can't determine who leaked draft Dobbs opinion*, Washington Post (Jan. 19, 2023), https://www.washingtonpost.com/politics/2023/01/19/supreme-court-leak-roberts/
[113] Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, Gallup (June 23, 2022), news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

D. RECONSTRUCTION AND NEW DEAL-ERA HISTORY DEMONSTRATES THAT COURT EXPANSION IS NECESSARY

Parallels between the present moment and the Reconstruction and New Deal eras, when court reform proposals were enacted and debated, demonstrate why Court expansion is appropriate and necessary.

1. Reconstruction

Before and during the Civil War, the Supreme Court was "systemically biased in favor of slavery."[114] The most famous example of this was its 1857 decision *Dred Scott v. Sanford,* holding that enslaved people were not citizens of the United States and were not entitled to any protections in federal courts, and that Congress could not ban slavery from a federal territory.

As David Gans explains in a forthcoming law review article titled *Court Reform and the Promise of Justice: Lessons from Reconstruction*, after the Civil War, the Reconstruction Congress repeatedly changed the number of Justices in order to create a Supreme Court that would protect the rights newly guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments. In 1863, Congress created a new Tenth Circuit and changed the size of the Supreme Court from nine Justices to ten, strengthening support on the Court for President Lincoln's policies and removing the majority previously held by supporters of Chief Justice Taney, the author of the *Dred Scott* opinion.[115] In 1866, Congress reduced the Court's size to seven by attrition, with the result that President Andrew Johnson could not appoint new Justices who would oppose Reconstruction. Then in 1869, under new President Ulysses S. Grant, they changed the Court back to nine Justices.[116]

As Gans recounts, these changes to the Court's size resulted in a Court which generally upheld Lincoln's war-time measures on issues like making paper money legal tender, but it did not result in a Court that honored the Reconstruction amendments.[117] This was in part because Presidents Lincoln and Grant appointed Justices who did not support the Reconstruction amendments. Tragically, the Court effectively gutted those new Constitutional guarantees in decisions like the *Slaughter-House Cases*, in which it effectively nullified a key part of the Fourteenth Amendment by interpreting its prohibition against states abridging the "privileges and immunities" of citizens extremely narrowly,[118] and *United States v. Cruikshank*, which reversed federal convictions for members of a white mob who had murdered Black people, holding that the Fourteenth

[114] David Gans, *Court Reform and the Promise of Justice: Lessons from Reconstruction*, Forthcoming Lewis & Clark Law Review, Vol. 27, No. 3, 2023, 6 (Sept. 9, 2022), srn.com/abstract=4244924.
[115] *Id.* at 6-7.
[116] *Id.* at 7-8.
[117] *Id.* at 9-11.
[118] *Slaughter-House cases*, 83 U.S. 36 (1873).

Amendment did not give the federal government the power to prosecute acts of racial terrorism.[119] The Reconstruction Congress also made other important and dramatic reforms to the Supreme Court, including stripping its jurisdiction to hear a challenge to the Reconstruction Act by a former Confederate, and opening the courthouse doors to people challenging violations of their federal rights.[120]

This complicated history is a reminder that Congress has broad powers over the Court, including over its size, and that there is precedent for it using those powers to protect the Constitution and the rights it guarantees.

2. The New Deal

In the mid-1930s, the Supreme Court struck down numerous important pieces of New Deal legislation intended to pull the nation out of the Depression by extending legal protections to (at least some) workers and creating the beginnings of a social safety net.

President Roosevelt won re-election in a landslide in 1936, and early in 1937 he proposed a bill to add seats to the Supreme Court. Less than two months later, the Supreme Court began to uphold New Deal legislation, including the NLRA and the Social Security Act. While there is debate, many historians view the political pressure generated by Roosevelt's court expansion bill as playing at least some role in influencing the change in the Court's jurisprudence and saving the New Deal.[121]

The Supreme Court's 1937 constitutional "revolution" had far-reaching positive effects on American society. After the Court began allowing worker-protective legislation, including the NLRA, to take effect, waves of worker organizing led to dramatic increases in the size and strength of the labor movement.[122]

To be sure, the gains for workers were not equitable. The exclusion of many workers of color and women from the NLRA and other New Deal-era laws, and from some unions, entrenched existing racism and sexism. However, some unions organized across racial lines. The "industrial" unions which organized under the umbrella of the Congress of Industrial Relations, founded in 1935, organized workers of all races, viewing racism as a way employers pitted workers against each other and weakened their collective power. CIO unions organized the entire, relatively low-skilled workforces of industries like auto manufacturing, as opposed to the approach of "craft" unions

[119] *United States v. Cruikshank*, 92 U.S. 542 (1876).
[120] Gans, *supra* n. 114, at 13-17.
[121] Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, The American Historical Review, Vol. 110, Issue 4, at 1052-1080 (Oct. 2005), doi.org/10.1086/ahr.110.4.1052.
[122] Kate Andrias, *The New Labor Law*, The Yale Law Journal, Vol. 126, No. 1, at 17-18 (October 2016), yalelawjournal.org/article/the-new-labor-law.

that organized narrow classes of skilled and mostly white male workers. CIO unions also held anti-racist trainings for workers and organizers, and created interracial sports teams and social groups.[123] The successful wave of union organizing by CIO and other unions during the Depression and post-war period led to several decades of a strong middle class and relative income equality.

As discussed above, the current Court is busy crafting a new *Lochner* era, in which it uses a variety of legal tools to invalidate pro-worker laws and to rig the rules in favor of corporations. As was true during the Depression, today there is intense energy behind worker organizing, but the numbers of workers in unions are very low, due in part to the Court's rulings.

A major difference between today and 1937 is that today it will be necessary to actually expand the Court, rather than just proposing to do so, in order to restore balance and legitimacy to the institution. The Supreme Court of 1937 was at least arguably sensitive enough to political pressure to change course to permit the enactment of popular, worker-protective laws in response to President Roosevelt's landslide electoral victory and court-reform proposal. But today's Court has continued to issue strongly ideological decisions despite record-high public disapproval, prominent discussion of its institutional illegitimacy, and years' worth of court expansion proposals. Expanding the Court to add four more fair-minded Justices will be necessary to address the harms it has done and the illegitimacy that taints it.

E. THE ARGUMENTS AGAINST COURT EXPANSION ARE UNPERSUASIVE

Supporting Supreme Court expansion can feel like a radical and dangerous idea to those who understand the importance that a fair judiciary should play in upholding justice for all. Indeed, the primary argument against expanding the Court is that doing so would politicize it and harm its legitimacy in the eyes of the public.

But the ship of preserving the Supreme Court as a legitimate and apolitical institution sailed long ago. The very unfortunate truth is that the current Court *is* illegitimate. Its current 6-3 hard-right supermajority is the result of political, antidemocratic brute force and hypocrisy by Republican Senators and Donald Trump. Its majority decisions regularly ignore precedent and the Justices' own purported judicial philosophies to enact the policy preferences of powerful corporations and the Republican party.[124]

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[123] Michael Beyea Reagan, *The CIO Was One of the Most Successful Anti-Racism Movements in U.S. History*, In These Times (July 6, 2022), inthesetimes.com/article/cio-anti-racism-civil-rights-industrial-unions-workers-organizing-black-lives-matter.
[124] Sheldon Whitehouse, *A Right-Wing Rout: The Roberts Court's Partisan Opinions*, ACS Issue Brief (April 24, 2019), acslaw.org/issue_brief/briefs-landing/a-right-wing-rout-what-the-roberts-five-decisions-tell-us-about-the-integrity-of-todays-supreme-court/.

Another argument is that Republicans will just add additional seats the next time they regain the Presidency and the Senate, resulting in a never-ending arms race. Even if this were to happen, it is unlikely that it would result in a Court more harmful to the labor movement, an equitable economy, or democracy than the current one – but doing nothing about the current Court's slide into illegitimacy will, in fact, accelerate the decline of all of those things.

In the meantime, adding seats would create the space for the possibility of pulling our democracy back from the brink in ways that would be lasting. These include passing labor law and economic justice reforms that could expand the Democratic voting base, securing voting rights so that future counter-majoritarian election results are less likely, and making D.C. a state to begin to ameliorate the antidemocratic nature of the Senate.

Any argument that expanding the Court is impermissible is simply incorrect. Changing the size of the Court through legislation like the Judiciary Act of 2021 is perfectly legal. The number of Justices on the Court is set by statute, not by the Constitution. Congress has changed the size of the Court legislatively seven times, most recently in 1869, when it increased it to 9 Justices to match the number of Circuit Courts at that time.[125] Now there are 13 Circuits, and the Judiciary Act would increase the number of Justices to 13. (Senate Republicans also effectively changed the size of the Court from 9 to 8 from 2016 until 2017, when they refused to consider President Obama's nominee after the death of Justice Scalia.)

The political case against supporting the Judiciary Act is that it is unlikely to pass, and so groups that support it are wasting their time and perhaps alienating allies. But this is a cynical and self-fulfilling prophecy. Our system of government works, if it does, because citizens and advocates support bills they think are important in order to draw attention to the issues they highlight and build support for them over the long term. Court expansion has become more popular with the general public and gained supporters over the last several years not because it is guaranteed to pass, but because people recognize that the Court poses a greater and greater threat, and want solutions that will protect our democracy.

F. OTHER JUDICIAL REFORMS ARE ALSO NEEDED: LOWER COURT EXPANSION AND SUPREME COURT TERM LIMITS AND ETHICS RULES

The judicial branch is in need of other reforms in addition to Supreme Court expansion. The lower courts are in desperate need of additional judgeships to keep up with increasing caseloads and to increase demographic and professional diversity on the bench. Congress has not meaningfully increased the number of federal trial and appeals court judges since 1990. Our country's

[125] Congressional Research Service, *"Court Packing": Legislative Control over the Size of the Supreme Court* (Dec. 20, 2020), everycrsreport.com/files/2020-12-14_LSB10562_29ff9f27d1874bea99cae30eee535af7ed165e96.pdf.

population has increased by about a third in those 30+ years, and caseloads have increased accordingly, leading to case backlogs and delayed justice across the country. Adding seats to the lower courts would also allow the President to increase the diversity of the federal bench significantly.[126]

Supreme Court Justices should also have term limits. Currently, Justices may serve for 40 or 50 years, decades after the relevancy of their pre-Supreme Court professional experience and their nomination and confirmations. Vacancies occur unpredictably upon Justices' deaths or politically timed retirements, and every Supreme Court nomination is an immense battle because it will shape the direction of the country for generations. Adding term limits so that Justices' terms would end at staggered, predictable times would turn down the heat on Supreme Court nomination battles.

Finally, the Justices currently are not bound by any ethics rules, leaving them free to make their own standardless and unreviewable decisions about whether to recuse themselves from cases in which they have a conflict of interest or their impartiality is questionable. Justices should be bound by an ethics code and improved disclosure requirements, just like other judges are. As discussed above in Section V.C., just the ethical lapses that have been in the news in the past few months – the leak of the *Dobbs* and *Hobby Lobby* decisions, the coordinated effort by wealthy right-wing activists to befriend and "embolden" the conservative Justices, Justice Thomas's refusal to recuse himself from insurrection-related cases despite his wife's involvement – make exceedingly clear that ethical standards are needed.

While all of these reforms are necessary, without Court expansion they will not fully address the problem. Adding four seats to balance the Court is necessary for the future of the labor movement, an equitable economy, and a functioning multiracial democracy.

VI. Conclusion

While the current state of the labor movement, the economy, and our democracy may feel bleak, there is tremendous reason for hope. The remarkable energy behind union organizing and strikes across the country shows that workers are not just fed up with their current situation, but can see a better future and are willing to take risks to fight for it.

The Judiciary Act of 2021 is a much-needed reform that will help restore the Supreme Court's legitimacy so that the Court will apply the law fairly and even-handedly. This will permit today's courageous workers to use their collective power to fight for policies to fix our broken labor laws,

[126] Maggie Jo Buchanan and Stephanie Wylie, *It is Past Time for Congress to Expand the Lower Courts*, Center for American Progress (July 27, 2021), americanprogress.org/article/past-time-congress-expand-lower-courts/.

move towards an economy that works for everyone, and create a functioning multiracial democracy, without the Supreme Court waiting in the wings to dismantle what they are building.