PEOPLE'S PARITY PROJECT

NO KINGS:
THE URGENT NEED FOR COURT REFORM

CONTENTS

EXECUTIVE SUMMARY

Since Donald Trump took office in January 2025, his Administration has been hurtling towards authoritarianism. Trump, who asserted during his first term that "I have an Article II, where I have the right to do whatever I want as president,"[1] has in his second term acted even more brazenly as if he has the powers of a king. Following the same playbook as many other would-be authoritarian leaders around the world in recent years, he is using the existing tools of government and law, rather than a military coup, to expand executive power, politicize independent institutions, scapegoat vulnerable communities, and quash dissent.[2] He has violated federal laws and the Constitution by dismantling federal agencies, firing agency officials and tens of thousands of federal employees and ending federal workers' union rights, slashing programs and grants authorized by Congress, kidnapping people and condemning them to extrajudicial imprisonment in other countries, deploying troops in American cities, targeting transgender people, attempting to end birthright citizenship, deleting vital data from government websites, retaliating against law firms, universities, and individuals he sees as enemies, and much more.

While Congress has watched apathetically, the lower federal courts have seemed like an oasis of reason and courage. Litigants have brought hundreds of cases challenging Administration actions as illegal or unconstitutional, and district court judges have done what judges are supposed to do: they have interpreted the law, decided whether the facts before them violate it, and issued remedies, all while carefully explaining their decisions. Judges have done this even as Trump and his minions have attacked and threatened them, ignored their rulings, and called for their impeachment.[3] Accordingly, the Administration has been losing dramatically and in a bipartisan way in the lower courts, with 77 percent of federal district court decisions going against the Administration between February and May.[4]

But the Administration, unhappy with this string of losses in the lower courts, has repeatedly run to the Supreme Court to ask it to intervene on an "emergency" basis—and the Roberts Court has obliged. The Court has ruled in favor of the Administration in these cases 79 percent of the time between January and

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September 1, mostly through short, unsigned orders with barely any explanation.[5] Through these orders the Court has allowed Trump to gut the Department of Education,[6] ban transgender servicemembers from the military,[7] proceed with mass firings of federal employees,[8] and deport migrants to countries to which they have no connection with no chance to raise fears of persecution.[9]

For fans of democracy, the fact that so much of the positive news in the last few months has come from the lower courts might cast doubt on the idea of court reform. It might seem like a bad idea to take power away from the courts when they seem to be the only part of the federal government that is standing up to the Administration.

But in fact, the litigation arising out of the chaos of the first few months of the Trump Administration only highlights the urgent need for court reform.

Court reform is a collection of tools that would strengthen democracy, while preserving the ability of courts to enforce the law. Among other things, these tools include Supreme Court expansion, to rebalance the far-right and illegitimately constituted Roberts Court with justices who would respect the rule of law; and jurisdiction stripping, channeling, or supermajority requirements, to prevent courts from invalidating democracy-enhancing laws passed by the peoples' representatives in Congress.

An examination of the Trump litigation—the almost 400 cases challenging Trump Administration actions filed between January 2025 and September 1, 2025—shows that court reform, as progressives should enact it, would not pose an obstacle to the plaintiffs' success in these cases, or harm the viability of litigation as a tool to fight authoritarianism more broadly. That is because progressive court reform, as People's Parity Project advocates for it, would not limit courts' power across the board. It would specifically limit courts' ability to strike down federal laws as unconstitutional, which is not something the litigants challenging the Trump Administration's executive actions are seeking, but which is a favorite tool of the Roberts Court to cement Republican policy preferences into the Constitution.

Reforming the courts to protect federal laws from being vetoed by judges would prevent the Trump Administration from prevailing in its arguments that the Constitution gives him sweeping powers to violate federal law. More importantly, by removing the ever-present risk that federal judges would strike down as unconstitutional laws they don't like, court reform would make it possible for the people, through political and social movements and ultimately Congress, to change the laws as they see fit. Court reform shifts the power to decide vital questions—like whether the president is immune from prosecution for crimes committed in office, and whether there should be unlimited money in our politics—from the courts to the people. It would help to move us toward a more democratic system in which litigation would not be the primary path available to make policy change, but would still be available as a check on authoritarianism.

The first section of this report provides background on what court reform is. There is no one perfect reform that will fix everything about the federal courts. However, court reform could address two primary problems: that the Roberts Court and some lower courts act like power-hungry partisan policymakers, and that the strong form of judicial review the Supreme Court has long practiced, in which the Court frequently overturns laws that Congress determined

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were constitutional, is fundamentally antidemocratic. Progressives should support reform broadly, and specifically they should:

1. Support legislation modeled on the Judiciary Act of 2023, to add seats to the Supreme Court to rebalance the Roberts Court's illegitimate far-right supermajority,
2. Add jurisdiction stripping, channeling, or supermajority requirements to every piece of progressive legislation to protect it from the courts,
3. Support the No Kings Act, to assert and protect the constitutional principle that the President is not above the law, and
4. Build support for a comprehensive piece of court reform legislation, to include those and other tools, to be enacted when politically possible.

The second section gives an overview. Between January and September 1, 389 lawsuits were filed, challenging more than 90 separate Administration actions.[10] The Administration has been losing dramatically in the trial courts before judges appointed by Presidents of both parties. But the Roberts Court has reversed those lower court decisions in case after case, often on its shadow docket with little or no explanation.

The third section focuses on jurisdiction stripping and channeling. It shows that the challenges to Trump actions would not be hampered by the kinds of jurisdictional reforms that progressives should embrace, namely provisions limiting courts' ability to strike down federal laws as unconstitutional. This is because the Trump lawsuits do not ask the courts to invalidate laws passed by Congress. Instead, they challenge dozens of administrative actions taken without Congressional approval by a President who believes himself to be above the law. In these cases the lower courts are acting consistent with their important but limited role as the interpreter of the law, by deciding whether a given executive order, deportation, grant cancellation, firing, or other executive action is consistent with the Constitution and the laws.

The fourth section acknowledges that jurisdiction stripping and channeling can be used to strengthen or to weaken democracy, as is true of any broadly defined category of structural change, like "passing a law." Congress and the courts have often used jurisdiction striping and channeling to thwart justice by barring less powerful groups, particularly immigrants, from seeking relief in court. This pattern is starkly evident in the Trump litigation. But progressives should not reject court reform tools like jurisdiction stripping based on the inaccurate idea that they always restrict justice, or on the theory that doing so will prevent the right from using them, since that horse is already far away from the barn. Rather, progressives can and should use jurisdiction stripping and channeling and supermajority requirements to protect democracy-enhancing laws and to block dangerous assertions of sweeping executive power. Indeed, if such jurisdictional limits were in place now, they could block the Administration's arguments that the Constitution allows the President to violate federal laws, like those granting removal protections to independent agency heads, stopping the President from "impounding" money that Congress appropriated, and protecting federal employees from irrational and chaotic mass terminations.

The fifth section shows that, at the Supreme Court level, Court expansion and, perhaps, shadow docket reform would have changed the outcomes of many of the Trump litigation cases in which the Roberts Court has already intervened by a 5–4 or 6–3 margin.

The sixth section responds to some common objections to court reform. Reform could weaken the power of litigation as a progressive tool in some cases—although history strongly suggests that the Supreme Court would be unlikely to protect constitutional principles in those cases anyway.

The report concludes that reforming the courts to right-size the role they play in our system of government would shift the power to decide what our Constitution means and what laws we want to govern us away from unelected judges and to the people. In other words, it would help to strengthen our democracy.

INTRODUCTION

The Roberts Court has been one of the Trump Administration's most important weapons in enacting its authoritarian agenda. As a result of a decades-long project by corporations and the Republican party to stock the federal courts with corporate-friendly judges, the courts have for years interpreted and misinterpreted the Constitution and federal laws to rule in favor of the wealthy and powerful and partisan Republican interests. The Roberts Court, whose far-right supermajority is the result of Trump's illegitimate moves to pack it with his nominees during his first term, helped Trump to win reelection in 2024. Since Trump's second inauguration in January, it has rubber-stamped many of his most egregious illegal acts. The Administration is continuing its efforts to pack the courts, naming nominees like Emil Bove, Trump's personal criminal defense attorney, to serve for decades after Trump leaves office. Court reform is a much-needed tool to check the courts as facilitators of autocracy.

For more than 50 years, the Republican party and corporate interests have engaged in a concerted effort to confirm federal judges who would increase the power and profits of corporations at the expense of most people, and further the political interests of the elected officials who appointed them.[11] The three Justices President Trump named to the Supreme Court during his first term were the apex of this project (so far). Before joining the Court, they all had records of siding with the wealthy and powerful and against workers and other less-powerful people.[12] They were all nominated by a president who lost the popular vote, and their confirmations were all the result of illegitimate political maneuvers. Justice Neil Gorsuch was confirmed in 2017 after the Republican-controlled Senate effectively reduced the size of the Court from nine Justices to eight for more than a year after Justice Antonin Scalia died, by refusing to allow even a hearing on President Barack Obama's nominee.[13] The Senate confirmed Justice Brett Kavanaugh in 2018 despite credible accusations of sexual assault and a sham FBI investigation.[14] Justice Amy Coney Barrett was confirmed less than a week before the end of the 2020

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election, when tens of millions had already voted.[15] Because of this court-packing, the Supreme Court is projected to have a majority of its justices appointed by Republican presidents until 2065.[16]

The Roberts Court went on to help Trump win the 2024 election. As People's Parity Project Action showed in its February 2025 report *The Supreme Court Helped Trump Win*, the Court did so by shielding Trump from prosecution for trying to overturn the 2020 election, allowing billionaires and oligarchs to flood politics with money and effectively buy the presidency, gutting the Voting Rights Act and allowing voter suppression, permitting political and racial gerrymandering, blocking many of President Biden's signature policy accomplishments, attacking the labor movement, and generally limiting Americans' imagination as to what kind of world is possible.[17]

In Trump's second term, the Roberts Court has been busy putting its imprimatur on the Administration's authoritarian acts. In the hundreds of lawsuits filed against the Administration, challengers have overwhelmingly won in the lower courts, but the Administration has won before the Supreme Court in 79 percent of cases through September 1. Over and over the Court has granted the Administration's emergency requests and stayed lower court injunctions against the government, almost always through unsigned, unexplained shadow docket orders.[18]

The Trump Administration is looking to the courts to continue his legacy even after his term ends. While the second Trump Administration has set a slightly slower pace with judicial nominations compared to his first, the nominees it has named so far are consistently right wing ideologues, and/or personally loyal to Trump. This is exemplified by Emil Bove, Trump's defense attorney in his felony trial in New York in 2023, who refused to denounce the January 6 insurrection or rule out the possibility of Trump running for a third term, and allegedly told Department of Justice (DOJ) attorneys they might need to say "fuck you" to judges if they tried to stop Trump's illegal deportations.[19] Bove was confirmed to a lifetime position as a Third Circuit judge in July.

While many progressives and democracy advocates have long pushed for court reform to address the many problems of the federal courts, others have been hesitant to embrace it, either out of a sense of futility or out of a concern about treating the courts as partisan bodies. But the No Kings Act, introduced by 34 Democratic senators at the end of the Biden Administration, is a promising sign of movement towards an embrace of court reform as a principled way to protect democracy. In response to *Trump v. United States*,[20] the Roberts Court's 2024 decision giving Trump broad immunity from criminal prosecution, Senate Democrats introduced the No Kings Act to "reassert the constitutional authority of Congress to determine the general applicability of the criminal laws of the United States." The bill states that "no person, including any President, is above the law," and that Presidents and Vice Presidents are not entitled to immunity from prosecution. The bill addresses the high risk that the Roberts Court would strike it down if given the chance by removing the Supreme Court's appellate jurisdiction to dismiss an indictment, overturn a conviction, or otherwise grant immunity in violation of the law. Vitally, the bill also funnels any constitutional challenges to the law itself to the D.C. Circuit, with no appeal available to the Supreme Court.[21]

The No Kings Act is a strong example of the ways progressives can and should use court reform to counter the Roberts Court's project of enshrining autocracy into the Constitution. It rejects judicial supremacy—the idea that the Supreme Court alone gets to decide what the Constitution means, and that, as John Roberts said in 2009, if the public doesn't like it, "that's just too bad."[22] It asserts the right of the people, through Congress, to say that, actually, the Constitution does not make the president into a king.

COURT REFORM: WHAT AND WHY

Court reform reasserts the power of people to determine what the Constitution means and what laws will govern us. In so doing, it expands the horizon as to what possible futures, now barred or threatened by Supreme Court rulings, could be possible if we reject the idea that the Court is our final national policymaker. Advocates for democracy should join together in loudly calling for Congress to enact court reform to protect our constitution from the federal courts.

On a basic level, court reform is intended to ensure that we have a functioning democracy. As People's Parity Project explained in a 2024 report, *Protecting Workers' Rights and Democracy from the Courts: A Practical Guide to Court Reform*, court reform aims to do this by addressing two primary problems with the federal courts.[23] The first problem is that the current Supreme Court and some lower courts act like partisan policymakers, ignoring precedent and inventing new constitutional principles to implement right-wing policy preferences, like permitting racial and partisan gerrymandering, striking down environmental protections, permitting states to ban abortion, and weakening the labor movement.

The second, related problem is that strong judicial review—that is, courts claiming the last word on whether federal laws are constitutional, with Congress having no practical ability to overturn their decisions—is fundamentally undemocratic. **Strong judicial review, which does not exist in many other constitutional democracies,[24] robs the people of the power to advance, through social movements, activism, and their elected representatives in Congress, their own vision of what the Constitution means.** In addition to invalidating laws that Congress has actually passed, strong judicial review means the Court limits what we think of as possible, chilling advocates and elected officials from even advocating for new laws because of the likelihood that courts would strike them down.[25]

The undemocratic nature of judicial review can be seen throughout American history. The U.S. Constitution is short, vague, mostly more than 200 years old, and one of the most difficult constitutions in the world to amend.[26] Since the mid-1800s, the Supreme Court has frequently struck down democracy-enhancing federal laws as unconstitutional. In 1857 the Court declared in *Dred Scott v. Sanford* that Black people were not

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citizens, and invalidated the Missouri Compromise, which had banned slavery in some federal territories. The decision helped to spark the Civil War. After the war the Court overturned numerous laws passed by the Reconstruction Congress to safeguard the rights of formerly enslaved people, permitting decades of disenfranchisement and racial terror. In the early 1900s it struck down hundreds of worker-protective laws. In more recent years it invalidated affirmative action programs, voting rights laws, campaign finance laws, gun safety laws, and parts of the Violence Against Women Act.[27] Congress, not the courts, has more often acted to enforce constitutional values of equity and justice, as it did during Reconstruction, the New Deal, and during the mid- to late-1900s in enacting civil rights laws and the Voting Rights Act.[28]

While Congres today is sclerotic, cowardly, and full of right-wing extremists, at least some of that is the fault of Roberts Court decisions about the Voting Rights Act, voter suppression, campaign finance, and gerrymandering.[29] And even with an ineffectual Congress, it is more democratic for people, activists, and movements to be able to make their case for policy change to an elected legislature—who can be voted out of office—than to a set of unelected justices with life tenure.

There are also other problems with the federal courts (to put it mildly), including rampant ethics violations by Supreme Court justices, the fact that judges may remain on the bench for 40 or 50 years, and the Court's habit of issuing "shadow docket" rulings without explanation.

There is not one perfect reform that would fix all of these problems. **Court reform is a bundle of tools rather than one magic wand.** Some of the tools complement and rely on each other; for instance, Supreme Court expansion would likely decrease the chances that the Supreme Court would strike down other progressive reforms as unconstitutional. As *Protecting Workers' Rights and Democracy from the Courts: A Practical Guide to Court Reform* explained in more detail, the court reforms that progressives should consider, the problems they would address, and their pros and cons include:[30]

1. **Court expansion:** Adding justices to the Supreme Court through legislation similar to the Judiciary Act of 2023. Congress has passed laws to change the Court's size seven times in U.S. history.[31] The goal would not be to add justices who would always rule in favor of progressive outcomes, but rather to add jurists whose records demonstrate respect for the Constitution's system of checks and balances, precedent, and fairness in judging. Adding justices of this sort could address the crisis of the Court acting as a partisan policymaker. It risks resulting in retaliatory cycles of Court expansion, but other than logistical issues about office space, this is not a reason not to do it.
2. **Jurisdiction stripping:** Broadly, removing courts' jurisdiction over particular kinds of cases. The Constitution allows Congress to make "exceptions" to the Supreme Court's jurisdiction, and it has done so hundreds of times.[32] Depending on how it is used, it can have democracy-enhancing or antidemocratic results. Progressives should use it to prevent courts from hearing constitutional challenges to specific laws or regulations. If used to protect progressive laws, it would address both of the major problems of the courts (the partisan policymaker problem and the undemocratic nature of judicial review) as to those specific laws.
3. **Jurisdiction channeling:** Designating a specific court, agency, or other body to hear specific types of cases. This is also common in U.S. law. It would address the partisan policymaker problem to some extent, although it could shift the inferno of Supreme Court confirmation battles to fights over appointments to other courts or entities.
4. **Supermajority or unanimity requirements:** A rule that a court can only strike down a law on constitutional grounds if a supermajority (for instance, 75 percent), or all, of the court's members agree. Such a requirement exists for the high courts of several states and other countries. It functions as a softer form of jurisdiction stripping, by ensuring courts can only strike down laws if there is very broad agreement they are unconstitutional. It could address both major problems of the courts.

5. **Fast-track congressional fixes to statutory interpretation decisions:** An efficient process for Congress to overrule a Court decision misinterpreting a federal law or regulation. This would address a subset of the partisan policymaker problem by making it easier for Congress to correct courts when they misinterpret federal laws.
6. **Other complementary reforms:** Ethics reform, shadow docket reform, lower court expansion, term limits, and laws to correct antidemocratic judicial doctrines, including *Trump v. United States*. Congress would also be the most appropriate body to address the complicated issue of nationwide injunctions; the Court's cynical decision on that topic in *Trump v. CASA*,[33] discussed in the section The Trump Litigation, certainly should not be the last word. Each of these would complement broader reforms and would address specific problems of the federal courts.

In their next governing moment, progressives should support court reform broadly, and specifically take four steps. First, they should support Supreme Court expansion, through legislation modeled on the Judiciary Act of 2023, which would add seats to the Court to balance out the Roberts Court's illegitimately installed right-wing supermajority. Second, they should add jurisdiction stripping or channeling or supermajority language to all progressive legislation to protect it from the courts. Third, they should support the No Kings Act, which affirms that the President is not above the law and has no immunity from criminal prosecution for crimes committed while in office. Finally, they should introduce broader court reform legislation, to include the first three reforms and others.

THE TRUMP LITIGATION

Between January 20 and September 1, 2025, 389 lawsuits were filed challenging Trump Administration actions. According to the excellent litigation tracker maintained by Just Security, these suits challenge more than 90 separate administrative actions, including the dismantling of agencies including the Consumer Financial Protection Bureau, the U.S. Agency for International Development, and the Department of Education; freezes on government spending; mass terminations of federal employees; bans on transgender people in the military and in women's sports; renditions of Venezuelans under the Alien Enemies Act; the detention and attempted deportation of pro-Palestinian protesters; the end of Temporary Protected Status for hundreds of thousands of immigrants; the removal of vital information from federal agency websites; the establishment of the so-called Department of Government Efficiency (DOGE) and its access to federal databases; and many more.[34]

At the district court level, the Administration has been losing dramatically, increasingly, and in front of judges appointed by presidents of both parties.

- As of May 29, district court judges had issued relief against the Trump Administration in 97 cases.[35]
- Between February and May, 77 percent of district court rulings in Trump cases went against the Administration, with the Administration's loss rate in the district courts increasing from 54 percent in February to a stunning 96 percent in May.[36]
- These losses came from judges across the ideological spectrum, with Trump losing 72 percent of rulings by Republican-appointed judges and 80 percent of those by Democratic-appointed judges in this period.[37]

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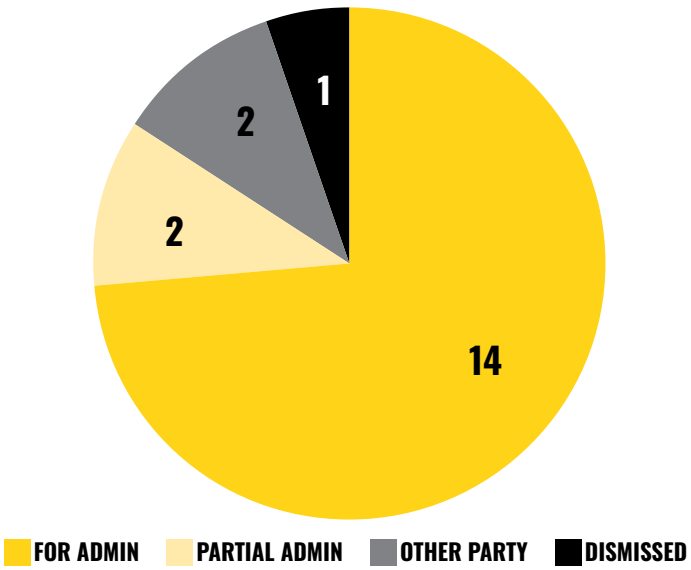
But as the Trump Administration increasingly lost at the lower court level, it found a much more receptive audience in the Roberts Court. The Administration has filed an unprecedented number of emergency applications on the Court's shadow docket, asking the Court to short-circuit the normal litigation process by temporarily reversing lower court injunctions without

full briefing, argument, or opinions. As of September 1, the Administration had filed 21 emergency applications before the Court in less than eight months—more than twice as many as the Bush and Obama Administrations together filed in 16 years.[38]

The Roberts Court has handed the Administration victories in several key cases by almost uniformly staying carefully-reasoned district court opinions in short, unsigned shadow docket opinions. Of the 22 total emergency applications filed by the Trump Administration or the other party between January 20 and September 1, the Court has decided 19; two more were withdrawn, and one was still pending as of September 1. Of those 19, the Court has ruled for the Administration in full in 14, ruled partially for and partially against it in two, decided for the other party in two, and dismissed one case as moot.[39] This gives the government a win rate of 79 percent, a dramatic contrast to its overwhelming losses in the lower courts.[40]

SUPREME COURT EMERGENCY APPLICATION DECISIONS
(JAN 20 – SEPT 1)



In the "Administration wins" column, the Roberts Court has used its shadow docket to reverse lower court rulings and grant the government the temporary relief it sought in cases including:

- *McMahon v. New York*, permitting the Administration to gut the Department of Education.[41]
- *Trump v. American Federation of Government Employees*, permitting the Administration to move forward with large-scale reductions in force and reorganizations across federal agencies.[42]
- *Department of Homeland Security v. D.V.D.*, allowing noncitizens to be deported to third countries to which they have no connection without providing them with a meaningful opportunity to raise fears of persecution or torture.[43]
- *Trump v. Wilcox* and *Trump v. Boyle*, allowing the President to fire independent agency officials in violation of laws containing dismissal protections and decades of precedent.[44]
- *Trump v. J.G.G.*, requiring Venezuelans challenging their deportation to a prison in El Salvador under the Alien Enemies Act to bring individual habeas actions in Texas, rather than a class action lawsuit in D.C.[45]
- *United States v. Shilling*, allowing the military to ban transgender servicemembers.[46]
- *Office of Personnel Mgmnt v. American Fed. of Gov't Employees*, allowing the federal government to fire thousands of probationary employees.[47]
- *Department of Education v. California*, allowing the Department of Education to cancel teacher preparation grants.[48]
- *Noem v. National TPS Alliance*, allowing Homeland Security Secretary Kristi Noem to end Temporary Protected Status for 600,000 Venezuelans in the largest single action stripping a group of immigrants of legal status in U.S. history—approved by theRoberts Court in a two-paragraph order.[49]

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The Roberts Court also delivered a split-the-baby decision in the case of Kilmar Abrego Garcia, a Salvadoran man whom the U.S. mistakenly deported to a prison in El Salvador despite an immigration court order barring the U.S. from sending him there because of the likelihood he would be targeted by gangs. The Court approved the part of a district court judge's

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order requiring the government to "facilitate" Abrego Garcia's release from custody in El Salvador, but said the part of the order requiring the government to "effectuate" his return was "unclear, and may exceed the District Court's authority" because of the "deference owed to the Executive Branch in the conduct of foreign affairs."[50] Abrego Garcia remained imprisoned in El Salvador for almost two months after the Court's opaque order.[51] On June 6, the DOJ returned him to the United States and announced that he would be prosecuted in Tennessee for allegedly transporting illegal aliens years earlier, charges which appear dubious at best, and it has since threatened to deport him to Uganda or Eswatini if he does not plead guilty.[52]

In a few cases, the Court has narrowly rejected the Administration's most extreme arguments—decisions which correctly enforced the law, but which resulted in unwarranted plaudits to the Justices for "taking on Trump."[53] The justices blocked the possibly imminent deportation of a group of Venezuelan nationals who had been given no notice and no ability to contest their designation as "enemy aliens" in *A.A.R.P. v. Trump*.[54] The Court also denied the government's request that it block a lower court order requiring it to make congressionally appropriated foreign aid payments for already completed work in *Department of State v. AIDS Vaccine Advocacy Coalition*.[55]

In one emergency petition case in which the Court actually wrote a full opinion, *Trump v. CASA*, the Court reviewed challenges to Trump's executive order denying birthright citizenship to babies born to some non-citizens. But instead of addressing the legality of the executive order, which is clearly unconstitutional and which lower courts had accordingly uniformly enjoined, the Court issued a decision limiting lower courts' ability to issue nationwide injunctions. The decision is based on the opaque, originalist-style reasoning that Congress, in passing the Judiciary Act of 1789, did not give the courts the power to issue universal injunctions because they are not sufficiently similar to the relief "issued by the High Court of Chancery in England" at that time.[56] Of course, in the 234 years since the Judiciary Act was passed the Court never before reached this conclusion, and it repeatedly declined Biden Administration requests to address the issue of nationwide injunctions when Trump-appointed district court judges were busily enjoining Biden Administration policies based on flimsy reasoning. As Elie Mystal wrote in *The Nation*, the Court's decision in *Trump v. CASA* revives an "antebellum, neo-Confederate" approach to citizenship, under which a child's citizenship turns on which state or county they are born in (and whether their parents have the resources to hire a lawyer).[57] Going forward, the Court will almost certainly use the *CASA* rule against nationwide injunctions selectively to allow presidents whose policies they like to violate the constitution without interference by the courts.

The Roberts Court's willingness to hand huge wins to the Trump Administration, many through its shadow docket, betrays its increasing willingness to act without the veneer of staid legal reasoning and its eagerness to eventually reverse many of the other lower court decisions checking the Administration's lawless actions.[58]

COURT REFORM WOULD POSE NO HURDLE TO THE TRUMP LITIGATION

When a court overrules Congress' decision that a particular law is consistent with the Constitution, and the Constitution is almost impossible to amend, the people have effectively lost their ability to advance their vision of what the Constitution means, or to advocate for policy change in that area.

Court reform of the kind recommended in this report would not harm the plaintiffs' challenges in the 389 lawsuits filed against the Trump Administration. This is because none of the lawsuits are the type of claims that would be blocked or impeded by even a broad version of jurisdiction stripping, channeling, or supermajority requirements: namely, challenges to the constitutionality of federal laws. Instead, the lawsuits challenge executive orders, individual and mass firings, funding freezes and cancellations, deportations, and other actions taken without the approval of Congress.[59] Thus, the importance of the Trump litigation, and the good news coming out of the lower federal courts, should not give progressives pause about supporting court reform.

The distinction between challenges to laws and to executive actions may sound technical, but it is vital. Under our system of government, Congress, not the President, makes laws. If the public believes the Constitution allows, or requires, a law—for instance, a campaign finance law, a gun safety law, or a wealth tax—the way they can make this a reality is by organizing and electing people to Congress who will pass those laws . When a court overrules Congress' decision that a particular law is consistent with the Constitution, and the Constitution is almost impossible to amend, the people have effectively lost their ability to advance their vision of what the Constitution means, or to advocate for policy change in that area.

By contrast, when litigants challenge the constitutionality or legality of an executive order, threatening letter, deportation, or agency decree, they are asking courts to enforce the Constitution and the laws passed by Congress by deciding whether a particular set of facts violates them. These are exactly the types of cases that courts should be handling in a constitutional democracy.

A. THE TRUMP LITIGATION CHALLENGES ADMINISTRATION ACTIONS, NOT LAWS

In the hundreds of cases that have been filed challenging Trump actions, we did not find any claims that would be impeded by even a broad version of court reform, because these suits do not challenge laws, but rather executive actions.[60] The following are examples of the dozens of executive actions that litigants are challenging as violations of the Constitution and federal laws:

1. Executive order targeting sanctuary cities.[61]
2. The "fork in the road" deferred resignation offer to federal employees.[62]
3. A stop-work order halting legal resource programs for people facing deportation.[63]
4. The decision to stop providing ASL interpreters for White House briefings, press conferences, and official communications.[64]
5. Executive orders retaliating against disfavored law firms.[65]
6. Executive orders imposing economic and travel sanctions against the International Criminal Court's Prosecutor.[66]
7. Executive orders retaliating against Harvard and Columbia Universities.[67]
8. The Department of Homeland Security's revocation of student visas for international students at Harvard.[68]
9. Removal of Board members and forcible takeover of the independent nonprofit the US Institute of Peace.[69]
10. Executive order requiring independent agencies to abide by the legal interpretations of the President and the Attorney General.[70]
11. Executive orders targeting diversity, equity, and inclusion (DEI) programs and transgender people.[71]
12. Executive order banning gender-affirming care for people under 19.[72]
13. Executive order banning transgender athletes from women's sports.[73]
14. An DOJ review of FBI agents seeking information about their roles in investigating the January 6 attack on the Capitol and Trump's mishandling of classified documents.[74]
15. Reductions in the Social Security Administration's workforce and ability to provide telephone-based services.[75]
16. Removal of information from agency websites, including OMB information about apportionment of Congressionally appropriated funds,[76] HHS clinical trials and other health-related data,[77] and U.S. Department of Agriculture data on climate change.[78]

B. THE ONE ARGUABLE COUNTER-EXAMPLE IS NOT REALLY ONE

In at least one of the Trump cases, a judge has ruled that a federal law is unconstitutional as applied to the plaintiff.[79] But this case is not actually an example of a claim that would be foreclosed by jurisdiction stripping. This is both because the plaintiff in this case did not actually argue that the federal law was unconstitutional, and because even if he had, as-applied challenges should not be barred by jurisdiction stripping, since they do not implicate the antidemocratic problem of judicial review.

Mahmoud Khalil is a green card holder and graduate of Columbia University who was arrested and detained because he participated in pro-Palestinian protests while at Columbia. He challenged as violations of the First Amendment and the Due Process Clause (1) the government's policy of arresting, detaining, and seeking to remove noncitizens who engage in speech supporting Palestinian rights, and (2) Secretary of State Marco Rubio's determination that Khalil's presence or activities in the United States would have negative impacts on foreign policy and thus that he could be deported under 8 U.S.C. § 1227(a)(4)(C)(i), 1227(a)(1)(A) ("the foreign policy ground").[80] The district court judge construed his claims as an as-applied challenge to the statutes comprising the foreign policy ground, and ruled that the statutes were unconstitutionally vague as applied to Khalil.[81]

Khalil did not argue that the "foreign policy ground" statutes were unconstitutional, either facially or as applied to him.[82] But even if the district court judge was right to construe his complaint as an as-applied challenge to the laws, jurisdiction stripping should not implicate Khalil's claim. A judicial decision that the facts of a specific case violate the Constitution does not present the same anti-democratic problem as a judge second-guessing Congress' determination that the law was generally consistent with the Constitution.[83]

JURISDICTIONAL REFORMS COULD PREVENT COURTS FROM INVALIDATING PRO-DEMOCRACY LAWS

Progressives can and should use jurisdiction stripping, channeling, and supermajority requirements to protect federal laws that are vital to a functioning democracy from being overturned by federal courts.

Our review of the litigation against the Trump Administration shows that jurisdiction stripping and channeling are very common in federal law. Unfortunately, those cases also show that Congress has often used jurisdictional tools to block less-powerful groups, including immigrants, federal employees, and recipients of federal grants or contracts, from having their day in court.

Some progressive hesitation about jurisdiction stripping and channeling stems from the fact that the tools have often been used in these harmful ways. But jurisdiction stripping and channeling (and supermajority requirements, a related tool which has not been used in U.S. federal law before) have no particular ideological orientation. It is perhaps a quirk of terminology that a law barring unlawfully detained immigrants from bringing claims in court, and a law preventing courts from striking down a voting rights law, both fall into the category "jurisdiction stripping." The categories are broad, like "passing a law" or "filing a lawsuit," such that they encompass provisions that weaken democracy as well as those that strengthen it.

Progressives should not shy away from using these tools to strengthen democracy because others have used them to weaken democracy. That approach is self-defeating, and will not prevent the already-common harmful uses.

Many other cases in the Trump litigation make clear how progressives could and should use jurisdiction stripping, channeling, and supermajority requirements to strengthen democracy and prevent autocracy. In many cases, the Administration tries to use the Constitution as a shield against enforcement of federal law, making broad, vague claims that Article II of the Constitution grants Trump sweeping powers to ignore laws that stand in his way. The Supreme Court has agreed with him in some cases, using shadow docket orders to allow him to fire leaders of independent agencies in violation of decades-old laws and precedents. While so far the courts have not accepted Trump's other assertions that the Constitution grants him king-like power, it could be just a matter of time. Court reform could prevent these dangerous outcomes.

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A. THE TRUMP LITIGATION SHOWS THAT JURISDICTION STRIPPING AND CHANNELING ARE COMMON, AND OFTEN USED TO THWART JUSTICE

The Trump litigation makes clear how common jurisdiction stripping and channeling provisions are in federal law, and how Congress has often used those tools to limit justice.

Immigration law is a minefield of jurisdiction-stripping provisions. This is vividly illustrated in the cases of Mahmoud Khalil and Rümeysa Öztürk, both of whom were arrested and detained by Immigration and Customs Enforcement (ICE) for pro-Palestinian speech. Khalil and Öztürk each brought habeas challenges to their arrest and detention as violations of their Constitutional rights to free speech and due process.[84] The Trump Administration pointed to multiple jurisdiction stripping or channeling provisions in immigration law which it said barred their claims: one barring judicial review of the attorney general's decision to detain a person pending a decision about whether they will be deported,[85] and one limiting judicial review over questions arising out of removal proceedings to a single consolidated challenge available only after a final order of removal has been entered.[86] In Khalil's case, the Administration also argued that the judicially-created political question doctrine barred courts from reviewing the Secretary of State's determination that his presence or activities would have adverse foreign policy consequences for the U.S.[87]

The trial courts that have considered these arguments have so far rejected them on the ground that the jurisdiction-stripping provisions should be construed narrowly, so as not to preclude judicial review of the constitutionality of a detention.[88]

The government also used jurisdiction-stripping and channeling provisions to try to block immigrants from challenging the Department of Homeland Security's termination of Temporary Protected Status (TPS), an immigration status for people from countries to which it is unsafe to return, for nationals of Venezuela. The government pointed to an immigration law provision depriving lower courts of jurisdiction to enjoin or restrain certain immigration law provisions except on an individual basis,[89] and another one barring judicial review of the attorney general's designation, termination, or extension of TPS.[90] The trial court judge rejected these arguments, in part on the ground that it was not clear Congress intended to preclude judicial review of constitutional challenges.[91] However, the Supreme Court granted the government's request for a stay of the lower court ruling via a shadow docket order with almost no reasoning.[92]

A similar pattern has played out in lawsuits challenging Trump's mass firings of federal employees. The government has argued that the federal courts lack jurisdiction over the challenges, even those brought by parties who are not employees, because the Civil Service Reform Act (CSRA) channels federal employees' claims of unfair labor practices and challenges to personnel actions to the Federal Labor Relations Authority (FLRA) and the Merit Systems Protection Board (MSPB), respectively.[93] The Administration's argument is especially craven given that Trump is simultaneously trying to kneecap the same agencies it says are employees' only recourse. On February 10, Trump illegally fired the Chair of the FLRA and two members of the MSPB, leaving it without a quorum and unable to issue decisions.[94]

Whether the Administration will succeed in channeling fired employees' claims to weakened agencies is unclear. Several judges have at least preliminarily agreed that the CSRA's jurisdiction-channeling provisions mean challenges to Trump's mass firings must go to the FLRA or the MSPB, even if those fora could not hear constitutional claims, might be extremely inefficient, and would be unable to grant full relief.[95] At least two district courts found they did have

jurisdiction over mass termination claims because, among other things, the claims would otherwise be precluded from judicial review entirely, but appeals courts stayed their injunctions.[96] The Fourth Circuit sent another case back to the district court to consider whether the Administration's attacks on the MSPB so "undermine[]" the purpose of the CSRA "that the jurisdiction stripping scheme no longer controls."[97]

The Administration has similarly argued that lawsuits over its, and DOGE's, termination of hundreds or thousands of government contracts and grants must be channeled to the Court of Federal Claims (CFC) under an 1887 law called the Tucker Act. The CFC is limited in the types of claims it can hear; it can usually only award money damages at the end of a case, not injunctive relief early on, and claimants cannot raise many constitutional and statutory claims before it.[98]

In an unsurprising turn, the Roberts Court seems to agree with these arguments. In April, in a 5–4 shadow docket order in *Department of Education v. California*, it granted an emergency application for a stay of a lower-court order reinstating cancelled educational grants, stating that the Tucker Act likely channeled jurisdiction over any claims about government contracts to the CFC.[99] As Justices Elena Kagan, Sonia Sotomayor, and Ketanji Brown Jackson pointed out in dissent, the Court's reasoning was dubious, mischaracterizing its own precedents and the facts of the case.[100] The Court doubled down on this reasoning in August when it granted another stay of a lower court order blocking the Administration's cancellation of almost $800 million in research grants.[101]

Several lower courts have cited *Department of Education v. California* in refusing to grant relief or injunctions against contract and grant terminations,[102] while others have distinguished the order, finding it does not reach claims that the government is cancelling contracts with no stated reason, or in violation of the law, or as an act of unconstitutional retaliation.[103]

As these examples make clear, federal law is already replete with instances of conservative jurisdiction stripping and channeling. Of course, it is uncertain how courts would respond to progressive versions of jurisdiction stripping like the No Kings Act. As discussed above, lower courts have responded to existing jurisdiction stripping provisions in widely varying ways, sometimes interpreting them broadly even if that meant plaintiffs were prevented from bringing serious claims altogether, but sometimes construing them narrowly to allow challenges to alleged rights violations.

Realistically, there is a significant risk that the Roberts Court would refuse to enforce progressive jurisdiction stripping laws, not because of any particular legal principle but because the outcomes of those laws would not be to the Court supermajority's liking. The Court has never ruled that jurisdiction stripping violates the Constitution, although it has expressed concerns, stating that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear," to avoid the "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[104] However, as just discussed, the Trump Administration is arguing that numerous jurisdiction-stripping provisions can block courts from hearing constitutional claims by immigrants, federal employees, and recipients of government contracts or grants. As Justice Sotomayor pointed out in her dissent to the Court's June 23 shadow docket order in *Department of Homeland Security v. D.V.D.*, in which the Court allowed noncitizens to be deported to third countries without any ability to express fear of persecution, the Roberts Court may or may not have already agreed with those arguments: one of the possible rationales for the Court's unexplained decision in that case to is the government's argument that a jurisdiction-stripping provision in immigration law can block due process claims.[105]

The uncertainty about whether the Court would respect progressive jurisdiction stripping, or any other progressive court reform measure, counsels in favor of pairing those provisions with Court expansion. Adding justices with records of respect for the Constitution's system of checks and balances and separation of powers would increase the chances that the Court would respect laws passed by Congress, including court reform laws.

B. PROGRESSIVES SHOULD USE REFORM TOOLS TO PROTECT PRO-DEMOCRACY LAWS FROM THE COURTS

The Trump Administration is making sweeping claims that Article II of the Constitution gives the president the power to violate the law. These include the claim that he can fire the heads of independent agencies in

violation of statutory dismissal protections, a claim the Roberts Court has endorsed via shadow docket orders. It also includes as-of-yet unsuccessful arguments that the Constitution gives him the power to fire probationary federal employees in violation of federal personnel laws; pause federal grants, loans, assistance programs, and foreign aid payments in violation of the Impoundment Control Act; suspend refugee admissions in violation of the Impoundment Control Act and other laws; and disappear immigrants without due process in violation of immigration laws.

As will be discussed, in each of these cases, jurisdiction stripping or channeling, or supermajority requirements, could prevent the courts from entertaining these sweeping arguments that the Constitution gives the president the power to violate the law.

1 FIRING HEADS OF INDEPENDENT AGENCIES

So far, Trump's most successful assertion that the Constitution allows him to violate federal law has come in his firings of independent agency officials. These firings violate laws like the 1935 National Labor Relations Act, which allows the president to remove Board members "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other reason."[106] Despite this, the Supreme Court blessed these firings in unsigned shadow docket orders in *Trump v. Wilcox* in May, and *Trump v. Boyle* in July.[107] As Professor Kate Shaw put it, "In doing so, the court effectively allowed the president to neutralize some of the last remaining sites of independent expertise and authority in the executive branch."[108]

The Administration has illegally fired at least 18 officials at independent agencies. Unsurprisingly, several of the fired officials have been Black women, and many have been at agencies that protect the rights of workers. At least two of these firings rendered agencies' decision-making boards without a quorum and unable to issue decisions. And two of the targeted agencies, namely the MSPB and the FLRA, are the same ones that the Administration is arguing should be the sole avenue for challenges to its mass firings of federal employees.

So far, the following fired independent agency officials have challenged their firings:

- **Gwynne Wilcox**, the first African-American woman to serve as a member of the National Labor Relations Board, which protects private sector employees' rights to unionize and work together to improve their working conditions. Her termination in January left the Board without a quorum and unable to issue decisions. She was reinstated after a lower court found her firing unlawful, removed again when the D.C. Circuit issued a stay, reinstated after a reversal by the en banc D.C. Circuit, and then removed after the Supreme Court stayed the lower court's order in *Trump v. Wilcox*.[109]
- **Cathy Harris**, a member of the Merit Systems Protection Board, which protects federal merit systems principles against partisan and political interference. Her case was consolidated with Wilcox's at the D.C. Circuit level, so she has also been fired, reinstated, removed, reinstated, and removed again.[110]
- **Hampton Dellinger**, the Special Counsel in the Office of the Special Counsel, which protects federal employee whistleblowers.[111]
- **Susan Grundmann**, former Chair of the Federal Labor Relations Authority, which administers labor relations between the federal government and its employees.[112]
- **Jocelyn Samuels**, a Commissioner of the Equal Employment Opportunity Commission, which enforces federal civil rights laws barring discrimination in employment.[113]
- **Sara Aviel**, the President and CEO of the Inter-American Foundation, which funds community-led development in Latin America and the Caribbean, in violation of a law that says only the IAF's Board can appoint and fire its president.[114]
- **Rebecca Slaughter and Alvaro Bedoya**, the two Democratic Commissioners of the Federal Trade Commission, which enforces civil antitrust law and promotes consumer protection.[115]
- **All three Democratic members of the Privacy and Civil Liberties Oversight Board**, which advises the president about privacy and civil liberties issues related to terrorism.[116]
- **Three Biden-appointed members of the Consumer Product Safety Commission**, the agency that develops safety standards for consumer products and coordinates recalls.[117]
- **Shira Perlmutter**, the Register and Director of the U.S. Copyright Office, after her office issued a draft report concluding that not all generative AI training qualifies as "fair use."[118]

- **Alvin Brown**, the Vice-Chair of the National Transportation Safety Board, which investigates airline and other transportation accidents.[119]
- **Mary Comans**, the Chief Financial Officer of the Federal Emergency Management Agency, which handles disaster response.[120]
- **Lisa Cook**, the Federal Reserve Governor, allegedly because of suspected mortgage fraud, as Trump tries to pressure the Federal Reserve to cut interest rates.[121]

The Administration responded to the various officials' challenges to their dismissals by arguing that Article II gives the president the unfettered authority to fire agency leaders, regardless of laws protecting them from termination. This so-called "unitary executive theory" is historically and legally dubious, and is in significant tension with the 1935 Supreme Court decision *Humphrey's Executor v. United States*, which upheld termination protections for the leaders of the Federal Trade Commission.[122]

The district courts that have ruled on these terminations almost uniformly rejected the Administration's unitary executive arguments.[123] But in April, the Roberts Court "temporarily" allowed the removals of Gwynne Wilcox and Cathy Harris in a brief shadow docket order that contained almost no reasoning, but suggested that the court was likely to overturn *Humphrey's Executor* and give the president wide latitude to fire independent agency heads.[124] (Except, the Court was careful to note, the heads of the Federal Reserve, whom it said can retain removal protections because of the Fed's "unique[] structure" and "distinct historical tradition"—code for "because firing Jerome Powell would upset the stock market.") In July the Court issued a similar shadow docket order staying the reinstatements of the three fired Commissioners to the Consumer Products Safety Commission.[125]

At least one lower court has interpreted *Wilcox* to mean that the president can even remove the leaders of a government-created independent nonprofit. In late June, a panel of three Trump-appointed judges on the D.C. Circuit cited *Wilcox* in a decision staying a lower court injunction barring Trump from replacing the board and president of the United States Institute of Peace, an independent nonprofit corporation created by Congress that is not part of the Executive Branch at all.[126]

Congress could have, and still could, protect independent agency heads from termination by passing a jurisdiction stripping or supermajority provision. A jurisdiction stripping measure would state that the federal courts do not have jurisdiction to hear challenges to the removal protection provisions of the NLRB, the MSPB, the FLRA, the EEOC, and other independent federal agencies, whether those challenges are asserted by plaintiffs or defendants in a lawsuit. A supermajority requirement would require agreement by some threshold percentage of judges on the Supreme Court or an en banc appeals court—say 75 percent, or all of the judges participating in the decision—to strike down the removal protection provision or the jurisdiction-stripping provision.

Alternatively, Congress could follow the example of the No Kings Act, and channel constitutional challenges to the jurisdiction-stripping provision to a particular court, like the D.C. Circuit.[127] However, this may be less ideal since it would not address the antidemocratic nature of judicial review, and would intensify the right-wing court-packing of the D.C. Circuit (or any other court to which the cases are sent).

Enacting jurisdictional changes to shield removal protections from legal attack would eliminate the uncertainty and instability that have resulted from Trump's firings and the courts' see-sawing decisions for the people who depend on the agencies' work. More substantively, by asserting its own understanding that the Constitution allows independent agencies whose leaders are protected from arbitrary removal, Congress could prevent the president from exercising King-like power.

Protecting those laws with jurisdiction-stripping, channeling, or supermajority requirements would return the power to decide what laws govern us to the peoples' elected representatives in Congress.

Trump has made broad assertions that his Article II power allows him to ignore laws passed by Congress in many cases beyond those related to the firing of heads of independent agencies. To date, the Administration has not prevailed in these arguments. However, they give the Roberts Court and similarly inclined lower court judges the opportunity to expand the boundaries of the Court's already sweeping vision of executive authority (at least for some presidents) by striking down laws that Congress determined were constitutionally justified. Protecting those laws with

jurisdiction-stripping, channeling, or supermajority requirements would return the power to decide what laws govern us to the peoples' elected representatives in Congress.

3. "PAUSING" ALL FEDERAL GRANTS, LOANS, AND ASSISTANCE PROGRAMS IN VIOLATION OF THE IMPOUNDMENT CONTROL ACT

Trump and his allies, including the architects of Project 2025, have repeatedly advanced the theory that the Constitution gives the president the power to "impound," or refuse to spend, money that Congress has already appropriated.

The Constitution gives Congress the power of the purse, and Congress passed the Impoundment Control Act (ICA) in 1974 to make clear that the president cannot refuse to spend money Congress has impounded, except in narrow circumstances.

But in a 2023 campaign video, Trump claimed the power to ignore the ICA. He asserted, "We can simply choke off the money" and that "[f]or 200 years under our system of government, it was undisputed that the president had the Constitutional power to stop unnecessary spending through what is known as Impoundment."[128] An organization founded by Russ Vought, Trump's OMB Director and an architect of Project 2025, followed up in 2024 by publishing a paper arguing that the Impoundment Control Act is unconstitutional.[129]

Within the first week after Trump took office, OMB issued a memorandum imposing a "pause" on all federal grants, loans, and financial assistance programs that might be implicated by his executive orders against diversity, equity, and inclusion programs, "gender ideology," the Green New Deal, and other MAGA bugbears. At least seven lawsuits were filed challenging the "pause,"[130] including *New York v. Trump*, in which the attorneys general of 22 states and D.C. alleged that the funding pause violated the separation of powers, the Spending Clause, the Appropriations Clause, and other constitutional provisions and federal laws including the Impoundment Control Act.[131]

The Administration's responses to these lawsuits do not directly argue that the ICA is unconstitutional. Instead, they claim that the freeze on federal spending is not an impoundment. But they seem to preserve the option to make the constitutional argument eventually. For instance, they make broad assertions that a court order stopping the Administration's freeze on federal funds would "prevent[] the president from exercising the discretion that is committed to him under Article II of the Constitution."[132]

So far, the courts have not agreed. In *New York v. Trump*, the District of Rhode Island granted a temporary restraining order (TRO) against the "pause," which the First Circuit refused to stay, and the district court has issued further orders enforcing the TRO.[133]

A jurisdiction stripping or channeling or supermajority requirement could protect the Impoundment Control Act from constitutional attack by stating that the federal courts lack jurisdiction to hear constitutional attacks on the ICA, channeling those challenges to a particular court or body, or requiring a supermajority of judges participating in the decision to strike it down. This would help to protect Congress' constitutional role as the branch of government responsible for determining how federal funds are spent.

3. FREEZING FOREIGN AID-RELATED FUNDS IN VIOLATION OF THE IMPOUNDMENT CONTROL ACT AND APPROPRIATIONS LAWS

On his first day in office, Trump signed an Executive Order suspending U.S. foreign aid for 90 days, and beginning to dismantle the United States Agency for International Development (USAID). Several lawsuits were filed, including one by USAID contractors who alleged that the suspension violated the ICA and other laws and constitutional provisions.

In response, the Administration argued that the president has "vast and generally unreviewable" power over foreign affairs, including the power to "determin[e] how foreign aid funds are used."[134]

A district court in that case denied the plaintiffs' request for a TRO.[135] A judge in another case granted a TRO and then a partial injunction, requiring USAID to pay $2 billion in foreign assistance for work already performed.[136] In the absence of any other court orders enjoining the dismantling of the agency, USAID effectively shut down on July 1.[137]

While the courts have not so far explicitly embraced Trump's argument that his powers over foreign affairs permit him to unilaterally veto foreign aid, Congress can and should include jurisdiction-stripping, channeling, or supermajority language protecting both the ICA and appropriations laws from constitutional attack. In the appropriations context, it would be important to draft the jurisdiction-stripping or similar

provision carefully so that it protects appropriations laws from arguments that another branch of government has the constitutional authority to disregard them, but not from challenges to the constitutionality of specific uses of funding.

4. SUSPENDING REFUGEE ADMISSIONS IN VIOLATION OF THE IMPOUNDMENT CONTROL ACT AND OTHER LAWS

Trump indefinitely suspended refugee admissions to the United States on his first day in office. The U.S. Conference of Catholics Bishops sued, alleging the suspension violated the Immigration Nationality Act, the Refugee Act of 1980, the Impoundment Control Act, and the Administrative Procedure Act (APA). In response, the government again argued primarily that its action was not an impoundment. But it again also seemed to be preserving the ability to argue that those laws violate the president's constitutional powers. It asserted that the president has the "lead role … in foreign policy," giving him the "broad discretion to set the terms and conditions on which the United States provides [foreign] assistance."[138]

The Court in *Conference of Catholic Bishops* denied the plaintiffs' motion for a preliminary injunction on the ground that the resettlement agency's claims were actually contractual, and so the Tucker Act channeled jurisdiction to the Court of Federal Claims.[139] A judge in another challenge brought by refugees, their family members, and resettlement agencies granted a preliminary injunction against the dismantling of the refugee program, but the 9th Circuit granted a partial stay of that injunction.[140]

Jurisdiction stripping, channeling, or supermajority provisions could protect the ICA, Congressional appropriations laws, and the Refugee Act, which established the U.S. refugee program, from constitutional attacks.

5. FIRING PROBATIONARY FEDERAL EMPLOYEES IN VIOLATION OF FEDERAL PERSONNEL LAWS

On February 13, 2025, Trump's OPM ordered federal agencies to fire tens of thousands of probationary employees en masse, using a boilerplate notice falsely claiming that the terminations were for performance reasons. Several groups filed lawsuits, including one by labor unions and nonprofit organizations alleging that the firings violated the APA, separation of powers, and federal laws regulating agency hiring and firing. The Administration responded, preposterously, by arguing that the Administration had not ordered the mass terminations. But it also suggested that the laws about federal hiring and firing might violate the president's constitutional powers, asserting that the president has "inherent constitutional authority under Article II" to decide "whom to fire and remove … and what processes to employ in making those determinations."[141]

The Trump Administration has asserted that the president's Article II powers over foreign affairs and immigration are so broad that the courts do not have the authority to second-guess his actions in deporting noncitizens to a country they are not from for extrajudicial imprisonment in a brutal prison. Court reform provisions could block this dangerous argument.

The district court agreed with the plaintiffs, finding that OPM's order to agencies to fire all their probationary employees was done without legal authority and ordering the reinstatement of about 16,000 probationary employees of the agencies named in the lawsuit.[142] The Supreme Court stayed the injunction on the ground that the nonprofit plaintiffs did not have standing,[143] but after additional plaintiffs joined, the district court judge entered another injunction.[144]

Congress should protect federal personnel laws from attacks like Trump's by adding jurisdiction stripping, channeling, or supermajority requirements to prevent courts from entertaining arguments that they are unconstitutional. While other protections against illegal mass terminations are also needed, including possibly clarifications to the CSRA and changes to standing doctrine, jurisdictional changes to protect laws from attack would remove one major hurdle to employees being able to vindicate their rights.

6. DISAPPEARING IMMIGRANTS IN VIOLATION OF IMMIGRATION LAWS

The Trump Administration has asserted that the president's Article II powers over foreign affairs and immigration are so broad that the courts do not have

the authority to second-guess his actions in deporting noncitizens to a country they are not from for extra-judicial imprisonment in a brutal prison. Court reform provisions could block this dangerous argument.

In March 2025, the Administration flew nearly 300 Venezuelan nationals, three-fourths of whom had no criminal records, to a notorious mega-prison in El Salvador for potentially indefinite extrajudicial imprisonment, even after District of D.C. Judge Boasberg ordered the government to turn around the planes if they had already taken off.[145] Trump claimed the authority to do this under the Alien Enemies Act of 1789 (AEA), which allows removals of people based on their nationality during war. Trump signed a proclamation invoking the AEA, falsely asserting that the United States was under "invasion" by the Venezuelan gang Tren de Aragua, and that Tren de Aragua is controlled by the Venezuelan government.[146]

Venezuelan citizens who were sent to El Salvador, or who feared they might be, brought lawsuits challenging the renditions on the ground that the AEA does not apply since the United States is not at war, that the "deportations" violated the Immigration and Nationality Act and statutes protecting immigrants from being sent to countries where they might face torture, and that there was a lack of due process, among other claims.[147]

The government responded that the courts lack jurisdiction to even review the AEA proclamation. In *J.G.G. v. Trump*, the case in which the government ignored Judge Boasberg's order that planes be turned around, the government argued that the judge's TRO "violates the President's inherent Article II authority," which includes "expansive authority over foreign affairs, national security, and immigration."[148] The question of whether Trump properly invoked the AEA, they said, was a "nonjusticiable political question."[149] In other briefs in the same case, the government asserted that the President's "plenary authority, derived from Article II and the mandate of the electorate," allowed him to remove "designated terrorists" without court oversight,[150] and that the President's "inherent Article II powers, especially when exercised outside the United States, are not subject to judicial review or intervention."[151]

Multiple courts have ruled that Trump's invocation of the AEA is unlawful, because, as a Trump-appointed judge in the Southern District of Texas put it, the statute's reference to "invasion" or "predatory incursion" applies only to an "attack by military forces," not a "non-military action."[152] One Trump-appointed district court judge ruled in Trump's favor on the legality of his AEA proclamation.[153] The Supreme Court also weighed in to say that the government must provide notice before removing people under the AEA.[154]

In these cases, Trump is not asking the courts to overturn a federal law he dislikes, but rather arguing for a special constitutional carve-out from general laws that give federal courts jurisdiction over legal challenges. The Administration's argument echoes the one it made with smashing success last year in *Trump v. United States*, in which the Roberts Court invented a new constitutional rule that the president cannot be prosecuted for most crimes committed in office.

A jurisdiction-stripping, channeling, or supermajority law modeled on the No Kings Act could thwart these anti-democratic arguments. Rather than protecting a particular law from a facial challenge, it would declare the constitutional principle that the president's invocation of the AEA and other immigration laws is not immune from judicial review, and strip or channel jurisdiction over challenges to itself.

SUPREME COURT REFORM COULD PREVENT HARMFUL DECISIONS IN THE TRUMP LITIGATION

In addition to jurisdiction stripping, channeling, and supermajority requirements, Supreme Court expansion is a key reform that progressives and other democracy advocates should embrace. In case after case, the Roberts Court uses its decisions to implement its partisan political preferences. Absent Court expansion, the right-wing bloc of the Court could continue to enact its partisan agenda for decades to come.

In expanding the Court, progressives should not seek to add justices who would be the mirror images of the Roberts Court supermajority—that is, willing to ignore precedent and legal principles in order to consistently rule in favor of progressive outcomes. Rather, they should confirm justices who would respect the Constitution's system of separation of powers and checks and balances, and would not seek to overrule Congress' judgment because they disagreed with it, or permit a president to disregard the law simply because they liked his or her politics. As Justice Jackson said in her dissent from a shadow docket order permitting the Administration to proceed with large-scale reorganizations of federal agencies without Congressional approval, "If a President runs roughshod over the carefully crafted statutes that authorize and animate the Federal Government … he discards and disables the democratic system that created those laws. It is the duty of judges to safeguard that system."[155] More members of the Court should have that kind of respect for our constitutional system.

Absent Court expansion, the right-wing bloc of the Court could continue to enact its partisan agenda for decades to come.

The Judiciary Act of 2023 would have added four justices to the Court. If that bill had been enacted before this year and the new seats had been filled with justices with records of respecting the rule of law, that could have prevented several of the harmful Roberts Court decisions of this year which were reached by a 5–4 or 6–3 margin:[156]

- *National Institutes of Health v. American Public Health Association*, allowing the government to terminate $783 million in research grants linked to DEI initiatives (5–4; partial dissent by Chief Justice Roberts and Justices Sotomayor, Kagan, and Jackson, who

Shadow docket reform could, at a minimum, codify the requirements that when acting through the shadow docket Justices disclose how they voted, give at least some reasoning, and, in particular, use a traditional standard of review that includes weighing the public interest and whether "irreparable harm" to people may result.

would have left lower court injunction in place; partial dissent by Justices Thomas, Alito, Gorsuch, and Kavanaugh, who would have also vacated other parts of lower court order)[157]

- *McMahon v. New York*, allowing the gutting of the Department of Education to proceed (6–3; Justices Sotomayor, Kagan, and Jackson dissenting)[158]
- *Trump v. CASA*, limiting courts' power to enter nationwide injunctions against Trump's Executive Order purporting to limit birthright citizenship (6–3; Justices Sotomayor, Kagan, and Jackson dissenting) (this is the only decision on this list issued on the merits, rather than via the shadow docket)[159]
- *Trump v. Wilcox*, allowing the president to fire independent agency officials (6–3; Justices Kagan, Sotomayor, and Jackson dissenting)[160]
- *Trump v. J.G.G.*, requiring Venezuelans challenging their deportation to a prison in El Salvador under the Alien Enemies Act to bring their claims through individual habeas actions in Texas instead of a class action lawsuit in D.C. (5–4; Justices Sotomayor, Kagan, Barrett, and Jackson dissenting)[161]
- *United States v. Shilling*, allowing the military to ban transgender servicemembers (6–3; Justices Sotomayor, Kagan, and Jackson dissenting)[162]
- *Department of Education v. California*, allowing the Department of Education to cancel teacher preparation grants (5–4; Justices Roberts, Kagan, Sotomayor, and Jackson dissenting)[163]

These decisions also show the value of shadow docket reform as a complement to other, broader types of reform. Shadow docket reform could, at a minimum, codify the requirements that when acting through the shadow docket Justices disclose how they voted, give at least some reasoning, and, in particular, use a traditional standard of review that includes weighing the public interest and whether "irreparable harm" to people may result.[164] The Roberts Court has perverted these traditional standards beyond recognition by holding that any injunction against the president constitutes "irreparable harm" to the executive's ability to do what he wants to do.[165] The application of a traditional standard of review certainly should have changed the outcome of several of these cases; for instance, in *Wilcox*, removing Gwynne Wilcox from her seat at the NLRB did not just harm her personally, but harmed working people across the country by depriving the NLRB of its independence, and of a quorum, so that it cannot issue decisions.[166] Of course, whether the Roberts Court would actually follow a law requiring the Court to apply such a standard is another question—another argument in favor of Court expansion.

As the Trump litigation makes its way through the courts and more of the cases arrive at the Supreme Court's regular docket, there will certainly be many more examples of harmful decisions which Court expansion could have prevented.

RESPONDING TO CONCERNS ABOUT COURT REFORM

One of the progressive objections to court reform stems from the idea that courts must be able to serve as defenders of the rights of less-powerful groups by striking down unjust laws. Famous Supreme Court decisions from the Warren Court era, like *Brown v. Board of Education*, which held that school segregation was unconstitutional, seem to exemplify this role for courts. But *Brown*, and other landmark progressive decisions like *Obergefell v. Hodges*, which struck down state laws barring gay marriage, were challenges to state, not federal, laws. This is an important distinction in a system in which the federal Constitution is supposed to govern over state laws and constitutions, and in which some states have strongly resisted federal constitutional law. Also, the Warren Court era was a relative blip in centuries' of history during which the Supreme Court has generally been a reactionary force.[167]

It is true that there are trade-offs to enacting court reform. Broad or widespread jurisdiction stripping, channeling, or supermajority requirements could weaken litigation as a tool for justice in some cases by preventing successful challenges to unjust federal laws. Although there are no examples of this in the Trump litigation so far, that is in part because of Trump's impatient focus on enacting sweeping change through executive orders and actions rather than legislation.

Congress has certainly passed terrible laws. In the 1700s, it passed the recently rediscovered Alien Enemies Act, giving the president broad powers to deport people based on their nationality during wartime. In the 1800s it passed the Indian Removal Act of 1830, endorsing the genocide of Native Americans; the Fugitive Slave Act, requiring that people who escaped enslavement be returned to their "owners"; and the Chinese Exclusion Act, the first race-based immigration law. In the 1900s, it enacted the Immigration and Restriction Act of 1921, which put numerical limits on immigration, and the Hyde Amendment, restricting the use of federal funds for abortion.

One thing that all of these terrible laws have in common, apart from being racist and/or antidemocratic, is that the Supreme Court never found them unconstitutional.[168] Another is that it is possible for a future Congress, pressured by voters, to change or eliminate them—unlike a terrible Supreme Court decision decided on constitutional grounds.

One thing that all of these terrible laws have in common, apart from being racist and/or antidemocratic, is that the Supreme Court never found them unconstitutional. Another is that it is possible for a future Congress, pressured by voters, to change or eliminate them—unlike a terrible Supreme Court decision decided on constitutional grounds.

So, it is true that if the current Administration successfully enacted its policies into federal law—for instance, if Congress passed bills banning gender-affirming care or making pro-Palestinian speech a deportable offense—and a broad version of jurisdiction stripping were in place, the courts would be unable to entertain challenges to those laws. The solution would have to be political rather than legal. But, based on the Court's centuries of history and the current reality of the Roberts Court, there is little reason to think that the Supreme Court would stand up for constitutional principles in such cases anyway.

These nightmare scenarios are an argument for designing court reform carefully. Progressives should use jurisdiction stripping and related tools to protect specific laws, like voting rights laws, in much the same way far-right forces in Congress have used those tools selectively to achieve their own policy goals. Progressives should also leave courts the power to find that laws are being unconstitutionally applied under the facts of specific cases.

It is also certainly likely that the right could respond to progressive court reform with retaliatory measures, such as further increases to the size of the Supreme Court and more jurisdiction stripping to protect antidemocratic laws. But these cats are already out of their bags. As was discussed previously, right-wing jurisdiction stripping is already very common in American law. The Republican Senate also changed the size of the Supreme Court without even passing a law, shrinking it from nine to eight from the time of Justice Scalia's death in 2016 until Justice Gorsuch's confirmation in 2017. And it is hard to say that a 20- or 30-member Supreme Court would be much worse than the Roberts Court is now.

Court reform would not guarantee progressive outcomes. But it would do what it is intended to do: strengthen democracy, so that the people could have more power to decide the meaning of the Constitution and the future of the country.

CONCLUSION

In a functional democracy, the courts would not make as much of our national policy as they do. Court reform would help to right-size the role of the courts by handing some power back to the peoples' elected representatives.

As many commentators have pointed out, the courts alone will not save us from the chaos and destruction that the Trump Administration is wreaking on our government and society.[169] Courts are by definition reactive, often slow, and they have limited power to force a recalcitrant party to comply with their orders, particularly when that party is the federal government. Also, the Roberts Court and many of the lower federal courts are packed with judges devoted to ruling for corporations, the powerful, and the Republican Party.

But court reform could strengthen the peoples' ability to save ourselves. In a functional democracy, the courts, the least accountable branch of government, would not make as much of our national policy as they do. The federal courts control an increasing swath of national policy decisions, including those about gun control, voting rights, money in politics, affirmative action, and climate change policy. Court reform would help to right-size the role of the courts by handing some of that power back to the peoples' elected representatives.

As the Trump litigation shows, even sweeping court reform would not impede many challenges to illegal and unconstitutional actions undertaken by an authoritarian or tyrannical president. Jurisdiction stripping or channeling or supermajority requirements could prevent the courts from striking down federal laws, from the Impoundment Control Act to campaign finance laws, which are key to our democratic system. Court expansion could prevent the Roberts Court from acting as an all-powerful adjunct to the Trump Administration. The No Kings Act could restore accountability to our system by making clear that the president is not above the law. Used wisely, court reform tools could make it possible for people to fight autocracy and shape our national future.

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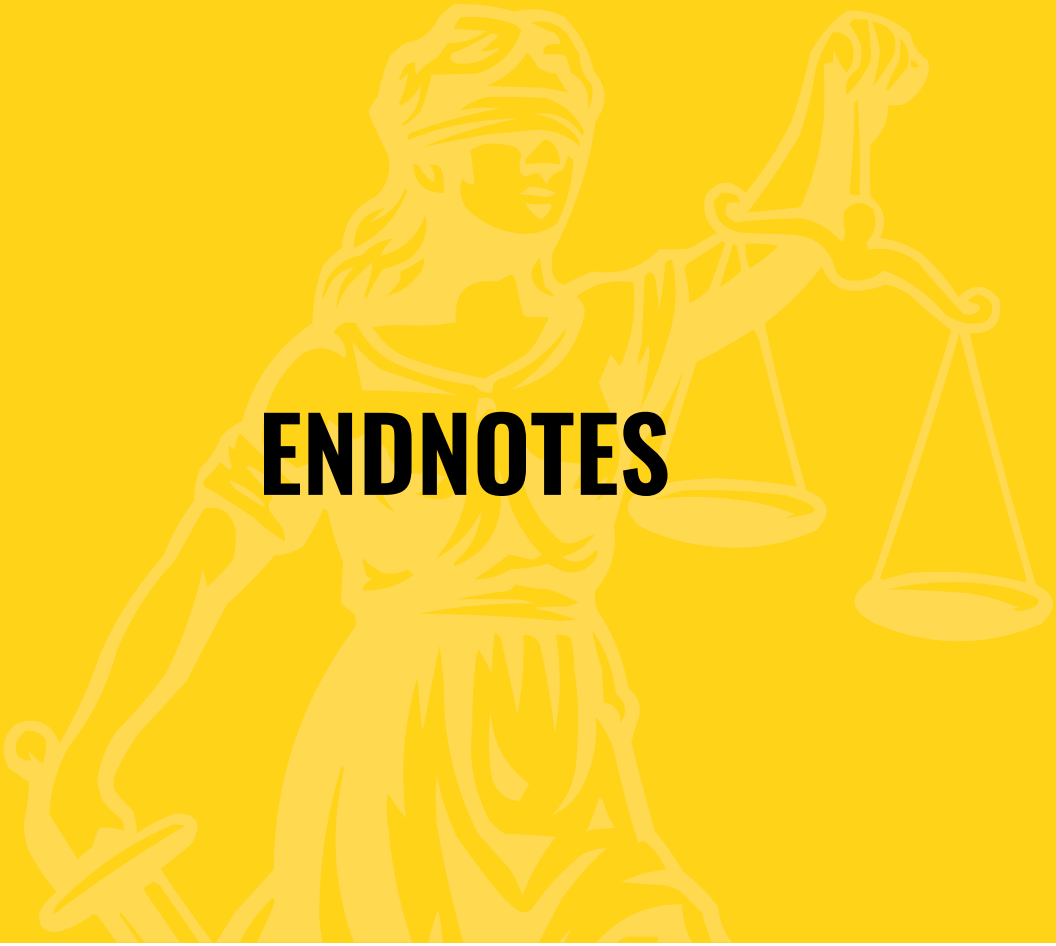

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62 Labor unions sued OPM challenging the "fork in the road" deferred resignation offer as a violation of the Constitution and federal laws. *American Fed. of Gov't Employees v. Ezell*, No. 1:25-cv-10276 (D. Mass.).

63 Immigrant advocacy organizations filed a lawsuit challenging DOJ's stop-work order halting funding for two legal resource programs to give basic legal information to noncitizens facing deportation as a violation of the First Amendment, the Appropriations Clause, and the APA. *Amica Center for Immigrant Rights et al. v. U.S. Department of Justice*, No. 1:25-cv-00298 (D.D.C.).

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68 *President and Fellows of Harvard College v. Department of Homeland Security*, No. 1:25-cv-11472 (D. Mass.).

69 *U.S. Institute of Peace v. Jackson*, No. 1:25-cv-00804 (D.D.C.).

70 National committees of the Democratic party challenged Trump's executive order requiring independent agencies to abide by the legal interpretations of the president and the attorney general, alleging that as applied to the Federal Election Commission it violates the Federal Election Campaign Act (FECA). The plaintiffs seek a declaratory judgment that the FECA is constitutional, which under a broad version of jurisdiction stripping would not be necessary; the courts would not have the power to declare federal laws unconstitutional. *Democratic National Committee v. Trump*, No. 1:25-cv-00587 (D.D.C.).

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81 *Khalil v. Trump*, ___F.Supp.3d ___, 2025 WL 1514713, *50-52 (D.N.J. May 28, 2025).

82 Third Amended Petition for Writ of Habeas Corpus and Complaint, *Khalil v. Trump*, No. 2:25-cv-01963-MEF-MAH, Doc. 236 (D.N.J. May 8, 2025), https://storage.courtlistener.com/recap/gov.uscourts.njd.564334/gov.uscourts.njd.564334.236.0.pdf.

83 It is certainly possible that if a version of jurisdiction stripping allowed as-applied but not facial challenges to a law, litigants could bring multiple "as-applied" challenges to a law in an attempt to achieve the same thing as a facial challenge. For instance, under a system of broad jurisdiction-stripping, instead of challenging the Voting Rights Act as unconstitutional on its face, states could bring as-applied challenges to the application of the VRA to their own redistricting or voter ID systems. But jurisdiction stripping language could be written to try to protect against this problem, and the harm resulting from successful as-applied challenges to pro-democracy laws would be less than the harm from striking down the laws entirely.

84 Amended Petition for Writ of Habeas Corpus and Complaint, 1-3, *Khalil v. Trump*, 2:25-cv-01963-MEF-MAH, No. 38 (S.D.N.Y Mar. 13, 2025), https://storage.courtlistener.com/recap/gov.uscourts.njd.564334/gov.uscourts.njd.564334.38.0_1.pdf; First Amended Petition for Writ of Habeas Corpus and Complaint, 1-3, *Öztürk v. Trump*, No. 1:25-cv-10695, No. 12 (D. Mass. Mar. 28, 2025), https://storage.courtlistener.com/recap/gov.uscourts.mad.282503/gov.uscourts.mad.282503.12.0.pdf.

85 8 U.S.C. § 1226(e)) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien …"), cited in Respondents' Opposition to Petitioner's Motion for a Preliminary Injunction, 20-21, *Khalil v. Trump*, 2:25-cv-01963-MEF-MAH, No. 156 (S.D.N.Y April 2, 2025), https://storage.courtlistener.com/recap/gov.uscourts.njd.564334/gov.uscourts.njd.564334.156.0.pdf [hereinafter Respondents' Opposition, *Khalil v. Trump*].

86 8 U.S.C. § 1252(b)(9) (provision titled "Consolidation of questions for judicial review," requiring that "all questions of law and fact, including interpretation and application of constitutional and statutory provisions" arising out of removal proceedings be "consolidated" so that judicial review is only "available only in judicial review of a final order" of removal); cited in Respondents' Opposition, *Khalil v. Trump*, supra n. 85, at 8.

87 Respondents' Opposition, *Khalil v. Trump, supra* n. 85, at 23.

88 *Öztürk v. Trump*, No. 25-CV-10695-DJC, 2025 WL 1009445, at *4 n. 1 (D. Mass. Apr. 4, 2025); *Khalil v. Trump*, No. 25-cv-01963 (MEF) (MAH) (D.N.J. June 11, 2025), https://storage.courtlistener.com/recap/gov.uscourts.njd.564334/gov.uscourts.njd.564334.299.0_1.pdf.

89 8 U.S.C. § 1252(f)(1), cited in *Nat'l TPS Alliance v. Noem*, No. 25-CV-01766-EMC, 2025 WL 957677, at *10-13 (N.D. Cal. Mar. 31, 2025).

90 8 U.S.C. § 1254a(b)(5)(A), cited in *Nat'l TPS Alliance v. Noem*, No. 25-CV-01766-EMC, 2025 WL 957677, at *15-17 (N.D. Cal. Mar. 31, 2025).

91 *Nat'l TPS Alliance v. Noem*, No. 25-CV-01766-EMC, 2025 WL 957677, *17 (N.D. Cal. Mar. 31, 2025).

92 *Noem v. National TPS Alliance*, No. 24A1059 (U.S. May 19, 2025), https://www.supremecourt.gov/docket/docketfiles/html/public/24a1059.html.

93 See, e.g., Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction, 11-14, *National Treasury Employees Union v. Vought*, No. 1:25-cv-00381-ABJ (D.D.C.), Docket No. 31, Feb. 24, 2025, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277287/gov.uscourts.dcd.277287.31.0_2.pdf (arguing the CSRA deprived courts of jurisdiction over lawsuit challenging shutdown of the Consumer Financial Protection Bureau), *argument rejected without discussion, Nat'l Treasury Emps. Union v. Vought*, No. CV 25-0381 (ABJ), 2025 WL 942772, at *6 (D.D.C. Mar. 28, 2025). Although the text of the CSRA does not explicitly limit judicial review over federal employees' labor or employment claims, United States v. Fausto, 484 U.S. 439, 456, (1988) (Stevens, J., dissenting), the courts have interpreted the law as implicitly channeling jurisdiction over those claims to the agencies. *Id.* at 455 (Scalia, J.).

94 Lower courts reinstated the fired officials because their terminations were in violation of statutes protecting them from dismissal without cause. *Grundmann v. Trump*, No. 25-425 (SLS), 2025 WL 782665 (D.D.C. Mar. 12, 2025), *Harris v. Bessent*, 775 F.Supp.3d 164 (D.D.C. Mar. 4, 2025). But the Supreme Court issued a shadow docket stay of the order reinstating Cathy Harris to the MSPB, indicating that it will permit Trump to fire independent agency heads at will. *Supreme Court Action Leaves MSPB Without a Quorum Again*, Fedweek, April 15, 2025, https://www.fedweek.com/fedweek/supreme-court-action-leaves-mspb-without-a-quorum-again. The D.C. Circuit also granted an administrative stay of the order reinstating FLRA Chair Grundmann. *Grundmann v. Trump*, No. 1:25-cv-00425 (D.C. Cir. June 18, 2025), https://storage.courtlistener.com/recap/gov.uscourts.cadc.42039/gov.uscourts.cadc.42039.01208749811.0.pdf.

95 *Nat'l Treasury Emps. Union v. Trump*, No. 25-CV-00420 (CRC), 2025 WL 561080, at *5-8 (D.D.C. Feb. 20, 2025) (court lacked jurisdiction over federal employee union's claims challenging firing of probationary employees, "fork in the road" deferred resignation offer, and executive order directing large-scale RIFs; under the CSRA, claims must be brought before the FLRA). See also *AFGE v. Ezell*, Civ. No. 25-10276-GAO, 2025 WL 470459, at *2 (D. Mass. Feb. 12, 2025) (dissolving TRO pausing deadline for employees to accept the "fork in the road" deferred resignation program on the basis that the court lacked jurisdiction under the CSRA). See also *American Foreign Serv. Ass'n v. Trump*, No. 25-cv-352 (CJN), ___ F. Supp.3d ____, 2025 WL 2097574 (July 25, 2025) (in case filed by unions challenging dismantling of USAID, granting government's motion to dismiss in part on grounds that the Foreign Service Act of 1980 channeled their claims to foreign service-specific agencies analogous to the FLRA and MSPB).

96 *American Fed. of Gov't Employees v. Office of Personnel Management*, 771 F. Supp. 3d. 1127 (N.D. Cal. Mar. 24, 2025) (Alsup, J.) (reversing initial dismissal of a challenge to OPM's direction to agencies to fire probationary employees en masse and granting TRO), *TRO stayed on other grounds*, No. 24A904, 2025 WL 1035208, at *1 (U.S. Apr. 8, 2025) (mem.) (finding private organization plaintiffs lacked standing), new injunction issued, 2025 WL 1150698 (N.D. Cal. Apr. 18, 2025) (finding that the other plaintiffs in the case, namely unions, had standing). See also *Maryland v. United States Dep't of Agric.*, No. CV JKB-25-0748, 2025 WL 800216, at *12 (D. Md. Mar. 13, 2025) (granting TRO sought by 19 states requiring multiple federal agencies to reinstate probationary employees who were fired en masse and not to conduct unlawful RIFs), *stay of PI granted*, No. 25-1248, 2025 WL 1073657, at *1 (4th Cir. Apr. 9, 2025) (finding district court likely lacks jurisdiction under the CSRA, citing the Supreme Court's decision in OPM v. AFGE).

97 *National Ass'n of Immigration Judges v. Owen*, 139 F. 4th 293 (4th Cir. June 3, 3025).

98 Daniel Jacobson and John Lewis, *Overcoming the Tucker Act After Department of Education v. California*, Lawfare, Apr. 17, 2025, *https://www.lawfaremedia.org/article/overcoming-the-tucker-act-after-department-of-education-v.-california*.

99 *Dep't of Educ. v. California*, 604 U.S. _____, _____, 145 S. Ct. 966, 968 (Apr. 4, 2025) (per curiam).

100 *Id*. at 969-978.

101 *National Institutes of Health v. American Public Health Assoc.*, 606 U.S. _____ (2025) (Aug. 21, 2025), *https://www.supremecourt.gov/opinions/24pdf/25a103_kh7p.pdf*.

102 See, e.g., *American Ass'n of Colleges for Teacher Ed. v. McMahon*, No. 25-1281 (4th Cir. Apr. 10, 2025), *https://storage.courtlistener.com/recap/gov.uscourts.ca4.178114/gov.uscourts.ca4.178114.30.0.pdf* (one-page order citing Dept. of Ed. v. California and granting government motion to stay PI blocking Dept. of Ed. from terminating grant programs under executive orders targeting "gender ideology" and DEI); *Widakuswara v. Lake*, No. 25-5144, 2025 WL 1288817, at *3 (D.C. Cir. May 3, 2025) (blocking district court order barring Administration from dismantling the United States Agency for Global Media, which oversees Voice of America), *rev'd on other grounds*, 2025 WL 1378735 (D.C. Cir. May 7, 2025) (*en banc*) (granting partial administrative stay of district court's order); *Am. Ass'n of Colleges for Tchr. Educ. v. McMahon*, No. 25-1281, 2025 WL 1232337, at *1 (4th Cir. Apr. 10, 2025) (staying district court's preliminary injunction against termination of teacher preparation grants under anti-DEI Executive Order); *Massachusetts Fair Hous. Ctr. v. Dep't of Hous. & Urb. Dev.*, No. CV 25-30041-RGS, 2025 WL 1225481 (D. Mass. Apr. 14, 2025) (dissolving TRO against DOGE's termination of fair housing grants, based on Dep't of Ed v. California).

103 See, e.g., *Rural Development Innovations Limited v. Marocco*, 2025 WL 1807818 (D.D.C. July 1, 2025) (granting preliminary injunction in part against cuts to the United States African Development Foundation and appointment of new board member); Rhode Island v. Trump, No. 1:25-CV-128-JJM-LDA, 2025 WL 1303868, at *6 (D.R.I. May 6, 2025) (granting preliminary injunction against drastic cuts to several small agencies); *Woonasquatucket River Watershed Council v. U.S. Dep't of Agric.*, No. 1:25-CV-00097-MSM-PAS, 2025 WL 1116157, at *14 (D.R.I. Apr. 15, 2025) (granting preliminary injunction against freezing of already-awarded grants for infrastructure, energy, climate, and other programs under the Inflation Reduction Act and Infrastructure Investment and Jobs Act); *Maine v. United States Dep't of Agric.*, No. 1:25-CV-00131-JAW, 2025 WL 1088946, at *14 (D. Me. Apr. 11, 2025) (granting TRO against termination of federal funds based on Maine's refusal to discriminate against transgender athletes).

104 *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Patchak v. Zinke*, 583 U.S. 244, 253 (2018) (plurality opinion stating in dicta that "So long as Congress does not violate other constitutional provisions," its ability to determine the jurisdiction of federal courts is "plenary"). *See also* Presidential Commission, *Final Report*, *supra* n. 31, at 162-169 (stating that the more jurisdiction stripping legislation leaves open some avenues to adjudicate the constitutionality of a statute, the more likely it is to survive legal challenges).

105 *Dep't of Homeland Security v. D.V.D.*, No. 24A1153, *15, 600 U.S. _____ (June 23, 2025) (dissent of Sotomayor, J.), *https://www.supremecourt.gov/opinions/24pdf/24a1153_l5gm.pdf*.

106 29 U.S.C. § 153(a).

107 *Trump v. Wilcox*, 605 U.S. _____, No. 24A966 (May 22, 2025), *https://www.supremecourt.gov/opinions/24pdf/24a966_1b8e.pdf*; *Trump v. Boyle*, No. 25A11, 606 U.S. _____ (2025), *https://www.supremecourt.gov/opinions/24pdf/25a11_2cp3.pdf*.

108 Kate Shaw, *Why Is This Supreme Court Handing Trump More and More Power?*, New York Times, May 25, 2025, *https://www.nytimes.com/2025/05/25/opinion/supreme-court-trump-power.html*.

109 *Wilcox v. Trump*, 775 F. Supp. 3d. 215 (D.D.C. Mar. 6, 2025) (declaring Wilcox's termination unlawful and that she could continue to serve); stayed, 2025 WL 980278 (D.C. Cir. Mar. 28, 2025) (granting stay of district court decision; removing Wilcox); *vacated on reconsideration en banc*, No. 25-5037, 2025 WL 1021435 (D.C. Cir. Apr. 7, 2025), *rev'd*, ___ U.S. ___, 2025 WL 1063917 (Apr. 9, 2025) (temporarily staying district court's order; removing Wilcox); 605 U.S. _____, (May 22, 2025), https://www.courtlistener.com/opinion/10590095/trump-v-wilcox/ (staying lower court order).

110 *Harris v. Bessent*, 775 F.Supp.3d 164 (D.D.C. Mar. 4, 2025) (declaring that Harris remains a member of the MSPB unless removed for cause), *stayed*, 2025 WL 980278 (D.C. Cir. Mar. 28, 2025) (granting stay of district court decision; removing Harris); *vacated on reconsideration en banc, No. 25-5037, 2025 WL 1021435 (D.C. Cir. Apr. 7, 2025), rev'd*, ___ U.S. ___, 2025 WL 1063917 (Apr. 9, 2025) (temporarily staying district court's order; removing Harris); 605 U.S. _____, (May 22, 2025), https://www.courtlistener.com/opinion/10590095/trump-v-wilcox/ (staying lower court order).

111 *Dellinger v. Bessent*, 766 F. Supp.3d. 57 (D.D.C. Feb. 12, 2025), (granting temporary restraining order permitting Dellinger to continue to serve as Special Counsel), *permanent injunction granted*, 768 F. Supp.3d 33 (D.D.C. Mar. 1, 2025), *injunction stayed pending appeal*, 2025 WL 717383 (D.C. Cir. Mar. 5, 2025) (removing Dellinger, with opinion explaining reasoning to follow). After this, Dellinger announced that he was dropping his case.

112 *Grundmann v. Trump*, 770 F.Supp.3d 166 (D.D.C. Mar. 12, 2025) (declaring Grundmann's termination was unlawful and that she can continue to serve); *administrative stay granted*, No. 1:25-cv-00425 (D.C. Cir. June 18, 2025) (removing Grundmann again).

113 *Samuels v. Trump*, No. 25-cv-01069 (D.D.C.) (no decision yet).

114 *Aviel v. Gor*, 780 F.Supp.3d 1, (D.D.C. Apr. 4, 2025) (granting preliminary injunction reinstating Aviel as president and CEO of the IAF), *motion for emergency stay pending appeal denied*, 2025 WL 1600446 (D.C.Cir., June 05, 2025), *summary judgment for Aviel granted*, 2025 WL 2374618 (D.D.C. Aug. 14, 2025).

115 *Slaughter v. Trump*, No. CV 25-909 (LLA), 2025 WL 1984396 (D.D.C. July 17, 2025) (granting permanent injunction and ordering Slaughter reinstated; dismissing Bedoya's claim because he voluntarily resigned), *stay pending appeal denied*, 2025 WL 2145665 (D.D.C. July 24, 2025), *motion to stay denied*, USCA Case #25-5261 (D.C. Cir. Sept. 2, 2025).

116 *LeBlanc & Felten v. United States Privacy and Civil Liberties Oversight Board*, No. 25-cv-00542, 2025 WL 1840591 (D.D.C. May 21, 2025) (holding the terminations were unlawful and that the officials should continue to serve), *stay pending appeal granted*, 2025 WL 1840591 (D.C. Cir. July 1, 2025).

117 *Boyle v. Trump*, 2025 WL 1677099 (D. Md. June 13, 2025) (permitting fired commissioners to resume their duties), *stay pending appeal denied*, 2025 WL 1808180 (4th Cir. July 1, 2025), stay granted, No. 25A11, 606 U.S. _____ (2025).

118 *Perlmutter v. Blanche*, 2025 WL 2159197 (D.D.C. July 30, 2025) (denying motion for preliminary injunction), *motion for injunction pending appeal denied*, 2025 WL 2409755 (D.C. Cir. Aug. 20, 2025). Jim Saksa, *Judge declines to halt firing of Copyright Office head Shira Perlmutter*, Roll Call, May 28, 2025, https://rollcall.com/2025/05/28/judge-declines-to-halt-firing-copyright-office-shira-perlmutter/.

119 *Brown v. Trump*, No. 1:25-cv-01764 (D.D.C.) (no decision yet).

120 *Comans v. Executive Office of the President*, No. 1:25-cv-01237 (E.D.Va.) (no decision yet).

121 *Cook v. Trump*, No. 1:25-cv-02903 (D.D.C.) (no decision yet).

122 *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

123 *See supra* nn. 109-122.

124 Amy Howe, *Orders to reinstate agency heads on hold as court considers Trump's appeal*, SCOTUSblog, April 9, 2025, https://www.scotusblog.com/2025/04/orders-to-reinstate-agency-heads-on-hold-as-court-considers-trumps-appeal/.

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127 No Kings Act, S. 4973 (118th Congress), https://www.congress.gov/bill/118th-congress/senate-bill/4973/text.

128 Molly Redden, *How Trump Plans to Seize the Power of the Purse from Congress*, ProPublica, Nov. 26, 2024, https://www.propublica.org/article/trump-impoundment-appropriations-congress-budget; Trump Vance, *Agenda47: Using Impoundment to Cut Waste, Stop Inflation, and Crush the Deep State*, June 20, 2023, https://www.donaldjtrump.com/agenda47/agenda47-using-impoundment-to-cut-waste-stop-inflation-and-crush-the-deep-state.

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130 Just Security Litigation tracker, *supra* n. 10.

131 *New York v. Trump*, No. 25-CV-00039, 2025 WL 715621, at *3 (D.R.I. Mar. 6, 2025).

132 Emergency Motion for Immediate Administrative Stay (by 10:00 a.m., February 11, 2025) and Stay Pending Appeal, 11, New York v. Trump, No. 25-1138 (1st Cir. Feb. 10, 2025), https://storage.courtlistener.com/recap/gov.uscourts.ca1.52482/gov.uscourts.ca1.52482.00108246498.1.pdf.

133 *New York v. Trump*, 764 F.Supp.3d 46 (D.R.I. Jan. 31, 2025) (granting TRO), *enforced by*, 2025 WL 440873 (D.R.I. Feb. 10, 2025), *stay denied*, 2025 WL 455494 (1st Cir. Feb. 11, 2025); 2025 WL 715621 (D.R.I. Mar. 6, 2025) (granting preliminary injunction), *stay pending appeal denied*, 133 F.4th 51 (1st Cir. Mar. 26, 2025), enforced by 2025 WL 1009025 (D.R.I. Apr. 4, 2025).

134 Defendants' Opposition to Plaintiff's Motion for a Temporary Restraining Order, 15, *Personal Services Contractor Ass'n v. Trump*, No. 25-, No. 13 (D.D.C. Feb. 24, 2025), https://storage.courtlistener.com/recap/gov.uscourts.dcd.277562/gov.uscourts.dcd.277562.13.0.pdf.

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138 Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, 18-19, *U.S. Conference of Catholic Bishops v. Department of State*, No. 25-cv-00464 (D.D.C. Feb. 26, 2025), https://storage.courtlistener.com/recap/gov.uscourts.dcd.277558/gov.uscourts.dcd.277558.25.0.pdf.

139 *United States Conf. of Cath. Bishops v. U.S. Dep't of State*, _____ F. Supp. 3d _____, No. 1:25-CV-00465 (TNM), 2025 WL 763738, at *5 (D.D.C. Mar. 11, 2025).

140 *Pacito v. Trump*, 768 F. Supp. 3d 1199, 1211 (W.D. Wash. Feb. 28, 2025), *emergency motion to stay granted in part and denied in part*, No. 25-1313 (9th Cir. Mar. 25, 2025), https://refugeerights.org/wp-content/uploads/2025/03/9th-decision.pdf (preserving preliminary injunction for people who were conditionally approved for refugee status before Jan. 20, 2025; otherwise staying the injunction); *injunction framework issued*, 2:25-cv-0255-JNW (W.D.Wash. July 14, 2025), https://storage.courtlistener.com/recap/gov.uscourts.wawd.344495/gov.uscourts.wawd.344495.145.0.pdf, *administrative stay granted*, 25-1313 (9th Cir. July 19, 2025).

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160 *Trump v. Wilcox*, No.24A966, 605 U.S. _____ (May 22, 2025), https://www.courtlistener.com/opinion/10590095/trump-v-wilcox/.

161 *Trump v. J.G.G.*, No.24A931, 604 U.S. _____ (Apr. 7, 2025), https://www.supremecourt.gov/opinions/24pdf/24a931_2c83.pdf.

162 *United States v. Shilling*, No 24A1030 (May 6, 2025), https://storage.courtlistener.com/recap/gov.uscourts.wawd.344431/gov.uscourts.wawd.344431.115.0.pdf.

163 *Department of Education v. California*, 24A910 (Apr. 4, 2025), https://www.supremecourt.gov/docket/docketfiles/html/public/24A910.html.

164 See Steven I. Vladeck, *Texas's Unconstitutional Abortion Ban and The Role of the Shadow Docket*, Testimony before the Senate Committee on the Judiciary, p. 13, 32-33, Sept. 29, 2021, https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf.

165 *Trump v. CASA*, 2025 WL 1773631, *24 (June 27, 2025), https://www.supremecourt.gov/opinions/24pdf/24a884_8n59.pdf ("When a federal court enters a universal injunction against the Government, it improperly intrudes on a coordinate branch of the Government and prevents the Government from enforcing its policies against nonparties … That is enough to justify interim relief.") (internal quotations and citations omitted).

166 *Trump v. Wilcox*, No.24A966, 605 U.S. _____, 145 S.Ct. 1415, 1420 (May 22, 2025) (Kagan, J., dissenting) ("What matters, in other words, is not that Wilcox and Harris would love to keep serving in their nifty jobs … the interest at stake is in maintaining Congress's idea of independent agencies").

167 *Protecting Workers' Rights and Democracy from the Courts*, *supra* n. 23, at 5-15.

168 *Ludecke v. Watkins*, 335 U.S. 160 (1948) (rejecting challenge to President Truman's use of the Alien Enemies Act three years after the end of World War II); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding the United States can unilaterally break treaties with Native American tribes); *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) and *Ableman v. Booth*, 62 U.S. 506 (1859) (holding federal fugitive slave laws precluded contrary state laws and state court decisions); *Chinese Exclusion Case*, 130 U.S. 581 (1889) (upholding the Chinese Exclusion Act); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding Hyde Amendment). *See generally* Nikolas Bowie, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, Written testimony for Presidential Commission on the Supreme Court of the United States, 10-11, June 30, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5168441.

169 Elie Mystal, *The Courts Can't Stop the Trump-Musk Coup*, The Nation, Feb. 7, 2025, https://www.thenation.com/article/politics/courts-cant-stop-the-trump-musk-coup/; Maya Sen, *Why federal courts are unlikely to save democracy from Trump's and Musk's attacks*, Harvard Kennedy School Ash Center for Democratic Governance and Innovation, Feb. 12, 2025, https://ash.harvard.edu/articles/why-federal-courts-are-unlikely-to-save-democracy-from-trumps-and-musks-attacks/; Michael Podhorzer, *The Courts Will Not Save Us*, Substack, Mar. 3, 2025, https://substack.com/home/post/p-158270134; Daniel Bessner interviewing Samuel Moyn, *The Courts Won't Save Us*, Jacobin, April 30, 2025, https://jacobin.com/2025/04/trump-supreme-court-law-crisis; Stephen I. Vladeck, *The Courts Alone Can't Save Us*, New York TImes, March 20, 2025, https://www.nytimes.com/2025/03/20/opinion/trump-courts-disrupt-break.html.

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