

Provisional Data Report

# The Facts about the Emergency App Docket\*

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## Summary

The data for this report are the 868 21A application (“apps”) filed in the U.S. Supreme Court **through June 29, 2022**. A preliminary analysis of the data shows the following.

### 1. Apps Referred to Individual Justices

1. Individual justices, not the full Court, have the final say on the vast majority of emergency apps. Only about 8% of all apps (n=67) were referred to the full Court (Section 3).
2. Individual justices granted the request about 80% of the time; 99% of the grants were over rather mundane matters (e.g., extending the time to file cert petitions) (Section 3.1).<sup>1</sup>

### 2. Apps Referred to the Court: Court Action

1. Of the apps referred to the Court requesting stays/injunctions, the Court denied or dismissed 68% (30/44); it granted or vacated 32% (14/44).<sup>2</sup>

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\*Prepared for the *New York Times*.

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<sup>1</sup>Then again, see *Novak v. City of Parma*, 21A834 (the City filed a brief opposing Novak’s application to extend the time to file a cert petition); and *Wilford v. NEA*, 21A859 (the NEA filed a response opposing the requested 60-day cert time extension but supporting a 30-day extension).

<sup>2</sup>The denominator is 44, rather than 67, because we exclude the following apps.

- Refilings. 7 of the 67 apps were initially denied by a justice and then refiled with a second justice. As

2. The Court supplied some explanation for its order for only 34% of the apps. But the percentage jumps to 71 when the Court granted the requested relief (Section 4.1).
3. Overall, the “noted” dissent rate is 19 percentage points lower for emergency apps than it is for 2021 term merits cases (through June 29, 2022). But noted dissents were far more frequent in apps granted (86% with one or more dissent) than in apps denied (37%) (Section 4.2).

[Here and throughout, we use the term “noted” to indicate that dissent rates and vote counts can be misleading for emergency apps because silent dissents are possible. The same holds for merits cases, though declining to note a dissent may be more common for emergency apps.]

4. Based on the applicant’s identity/relief requested, conservative causes prevailed more frequently (59%). But again there’s a difference between denied and granted apps: Conservative v. liberal causes roughly split the denied apps (53% conservative win rate) but conservative causes won in 71% of the granted apps (Section 4.3).

### 3. Apps Referred to the Court: Individual Justice Action

1. The data suggest that voting on apps is mostly similar to voting on merits cases.
  - (a) The middle of the Court on merits cases is also the center of power in apps orders. Kavanaugh voted with the majority in all orders (100%), with Barrett and Roberts closely behind (Section 5.1).
  - (b) Rankings of the justices based on the % of conservative votes cast in apps parallel rankings on merits cases—with Thomas the most conservative and Sotomayor, the least (Section 5.2).
2. In addition to ideological patterns, the data reveal a restraint-activism dimension: The three extreme conservatives (Thomas, Alito, and Gorsuch) have promoted more aggressive use of the emergency docket in service of conservative interests, while the center and even liberal justices have exercised more restraint (Sections 5.1 and 5.3, and Figure 1).

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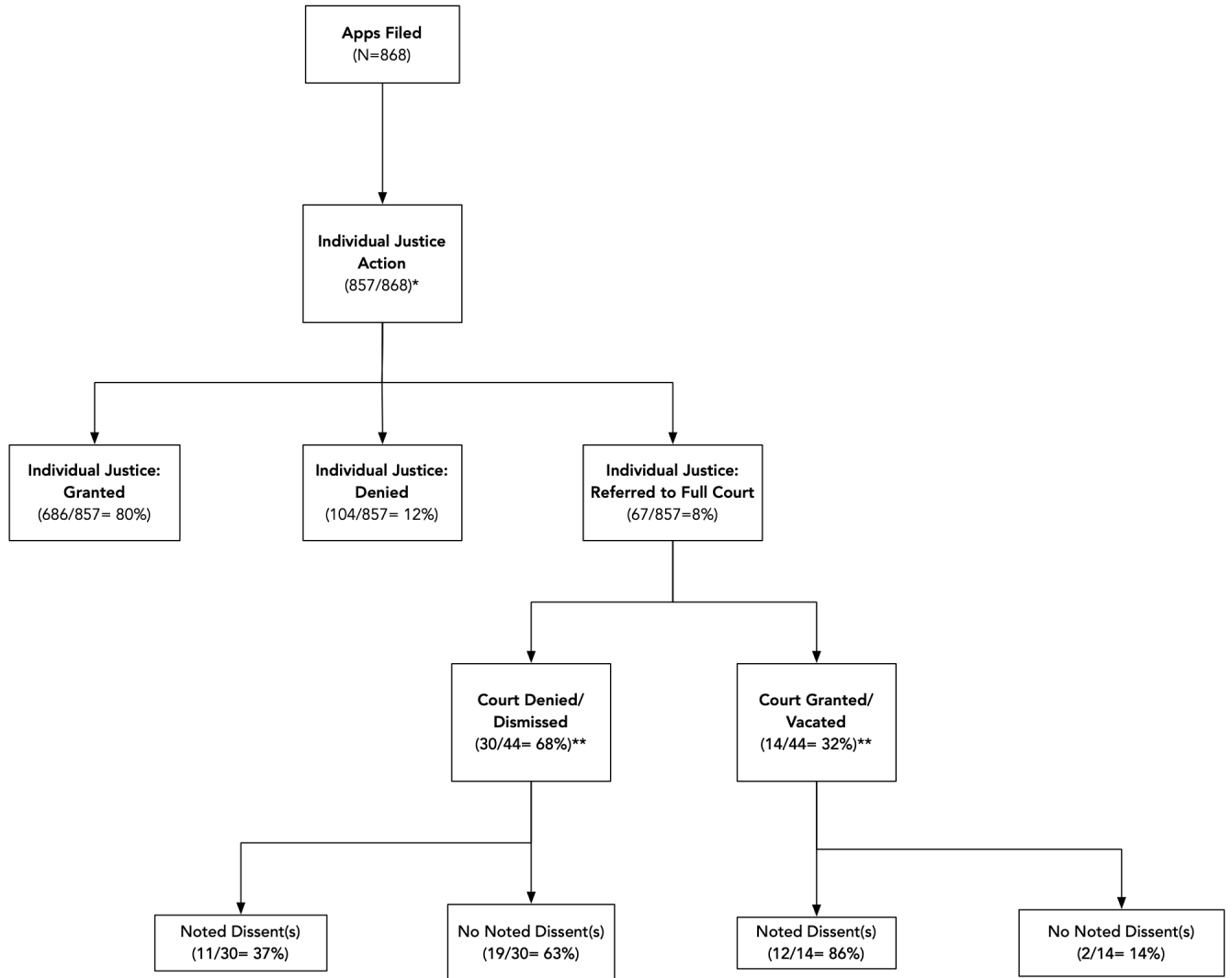
a procedural matter (at least this term), the second justice always referred the app to the full Court, which always denied.

- Consolidations. 3 of the 67 apps were consolidated.
- Dismissals. 13 of 67 apps were dismissed in light of the relief granted in *NFIB v. OSHA*, 21A244 (2022).

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# 1 Overview



\* 3 apps were withdrawn; no action yet on 8 apps.

\*\* The denominator is 44 rather than 67 because we eliminated apps that were refiled, consolidated, or dismissed on *NFIB v. OSHA*, 21A244 (2022). See note 2.

## 2 Apps Filed

Once again, 868= the number of 21A apps filed through June 29, 2022.

## 3 Individual Justice Action

1. In 857 apps, a justice took some action (3= withdrawn; 8= no action as of June 29).
2. Table 1 shows the breakdown of apps referred to each justice.

| Justice   | N of Referrals | % of Total |
|-----------|----------------|------------|
| Kagan     | 145            | 17         |
| Kavanaugh | 141            | 16         |
| Alito     | 137            | 16         |
| Thomas    | 119            | 14         |
| Roberts   | 117            | 14         |
| Barrett   | 57             | 7          |
| Gorsuch   | 53             | 6          |
| Sotomayor | 52             | 6          |
| Breyer    | 36             | 4          |
| Total     | 857            | 100        |

Table 1: Emergency Apps Referred to Individual Justices

### 3.1 Individual Justice Action: Granted

1. Of the 857 apps referred to an individual justice, the justice granted the request/relief in 80% (686/857).
  - (a) The suggestion here is that the vast majority of emergency app requests are granted by individual justices and never considered by the full Court.
2. Of the 686 “grants,” 668 were to extend time to file a cert petition and 11 were to increase word/page limits. That’s **99%** of all grants.
3. All Justices granted +95% of cert time extension requests except Barrett (she granted only 29/48, or 60%).

### 3.2 Individual Justice Action: Denied

1. Of the 857 apps, a justice denied the request in 12% (104/857). Table 2 shows the type of relief denied.

| Relief Requested        | N Apps | % of Total |
|-------------------------|--------|------------|
| Denied Stay             | 47     | 45         |
| Denied Extend Time      | 27     | 26         |
| Denied Injunction       | 11     | 11         |
| Denied Appeal           | 7      | 7          |
| Denied Word/Page Limits | 7      | 7          |
| Denied Other            | 5      | 5          |
| Total                   | 104    | 100        |

Table 2: Type of Relief Denied by Individual Justices

2. **Deny Extend Cert Time.** Of the 104 denials in Table 2, 27 were denials to extend time to file a cert petition (19 of the 27 were by Barrett).
3. **Denied Injunctions/Stays.** Taken together, denied stays/injunctions is the largest category of denials: 56%, or 58/104 of the apps denied.
  - (a) Table 3 breaks down the 58 denials of stays/injunctions by justice. (See also Table 4 below for a comparison of denials versus referrals to the full Court.)
  - (b) Note: Whether the individual justices consult with one another (even informally) before denying is unknown.

| Justice   | N of Denials<br>(Stays/Injunctions) | % of Total |
|-----------|-------------------------------------|------------|
| Roberts   | 10                                  | 17         |
| Kagan     | 9                                   | 16         |
| Thomas    | 8                                   | 14         |
| Alito     | 7                                   | 12         |
| Kavanaugh | 7                                   | 12         |
| Breyer    | 6                                   | 10         |
| Barrett   | 5                                   | 9          |
| Gorsuch   | 3                                   | 5          |
| Sotomayor | 3                                   | 5          |
| Total     | 58                                  | 100        |

Table 3: Justices’ Denials of Stays/Injunctions

### 3.3 Individual Justice Action: Referred to the Court

1. The individual justices referred 67 of the 857 apps—8%—to the full Court. Consolidations, refilings, and dismissals were eliminated from the analysis to follow (see note 2), leaving 44 referrals to the Court.

2. Table 4 compares the 44 referrals to the Court for stays/injunctions and the 58 denials of injunctions/stays, by justice. E.g., 7 apps were submitted to Breyer for stays/injunctions. He denied 86% (6) and referred 14% (1) to the Court.

| Justice   | Stays and Injunctions  |                        | N Apps |
|-----------|------------------------|------------------------|--------|
|           | % Denied<br>by Justice | % Referred<br>to Court |        |
| Breyer    | 86                     | 14                     | 7      |
| Gorsuch   | 75                     | 25                     | 4      |
| Thomas    | 73                     | 27                     | 11     |
| Barrett   | 71                     | 29                     | 7      |
| Roberts   | 67                     | 33                     | 15     |
| Kagan     | 56                     | 44                     | 16     |
| Sotomayor | 50                     | 50                     | 6      |
| Kavanaugh | 44                     | 56                     | 16     |
| Alito     | 35                     | 65                     | 20     |
| Average % | 57                     | 43                     | 102    |

Table 4: Comparison of Justices’ Denials of Stay/Injunction Requests versus Referrals to the Court. 58 apps were denials and 44 were referrals

3. Note the % split: For apps requesting stays/injunctions, the individual justices denied 57% on their own and referred 43% to the full Court.
4. Comparing the denials (n= 58) and referrals (n= 44):
- (a) *Capital apps were almost always referred to the full Court.* Of the 102 apps under analysis in Table 4, 16 were capital cases; 15 of the 16 were referred to the full Court.<sup>3</sup>
  - (b) *Apps with amicus curiae briefs were never denied by an individual justice.* 20 of the 102 apps were supported or opposed by one or more amici;<sup>4</sup> none of the 20 were denied by an individual justice. Then again, there were no amici in 24 of the 44 apps referred to the Court.

## 4 Apps Referred to the Court: Court Action

The justices referred 67 apps to the full Court. The analysis that follows eliminates 3 consolidated apps, 13 dismissed on *OSHA*, and 7 that were refiled—and so is based on 44 apps (see note 2).

Of the 44 apps, the Court denied stays/injunctive relief or dismissed 68% (30/44). In the remaining 32% (14/44), the Court granted some relief—a stay, injunction, reversal.

<sup>3</sup>The exception is 21A61, an application filed by South Carolina to stay the Fourth Circuit’s decision. Roberts denied the app.

<sup>4</sup>Including motions to file.

## 4.1 The Court: Explanations for Its Orders/Decisions

1. Table 5 shows the type of explanation the Court gave for its orders in the 44 referred apps. For example, for 66% of the 44 apps, the Court issued (usually) a one-sentence order with no explanation.
2. But note that for 29% of apps granted (4/14), the Court gave some reasoning in a per curiam opinion.

| Explanation             | All Apps | Apps Denied | Apps Granted |
|-------------------------|----------|-------------|--------------|
| Order: No Explanation   | 66%      | 83%         | 29%          |
| Order: Under 200 words  | 18       | 10          | 36           |
| Order: 200-500 words    | 7        | 7           | 7            |
| Per Curiam: 2000+ words | 9        | 0           | 29           |
| Total N                 | 44       | 30          | 14           |

Table 5: The Court’s Explanation for Its Order in All 44 Apps (30 Apps Denied and 14 Apps Granted)

## 4.2 The Court: Vote Splits

1. As Table 6 shows, when the Court denied relief, it’s more often unanimous than not (63% or 19/30) but when it granted, it’s usually divided: no dissent in only 2 of the 14 apps (14%).
  - (a) Overall, though, the Court is more unified over emergency apps than merits cases: a 48% unanimity rate for apps versus 29% for cases (through June 29, 2022). (But keep in mind that silent dissents may be more common in emergency apps than in merits cases.)
  - (b) One suggestion here is that it’s unwise to combine analyses of the emergency and merits dockets.

| Vote Split | All Apps | Apps Denied | Apps Granted |
|------------|----------|-------------|--------------|
| 9-0/8-0    | 48%      | 63%         | 14%          |
| 8-1        | 5        | 7           | —            |
| 7-2        | 2        | —           | 7            |
| 6-3/5-3    | 32       | 27          | 43           |
| 5-4        | 14       | 3           | 36           |
| N of Apps  | 44       | 30          | 14           |

Table 6: Comparison of Apparent Vote Splits when the Court Denied versus Granted Apps

2. When the Court split 6-3/5-3 (14 apps), *the most common configuration of dissenters* was Thomas/Alito/Gorsuch (n=8 apps) followed by Breyer/Sotomayor/Kagan (n=6 apps).



- (a) Thomas/Alito/Gorsuch most commonly dissented together when the Court denied (7/8 apps)
  - (b) Breyer/Sotomayor/Kagan most commonly dissented together when the Court granted (5/6 apps)
3. These patterns suggest another reason why combining the emergency and merits dockets is inadvisable: for the merits docket, the three Democratic appointees are in dissent far more often than the three most conservative justices. E.g., through June 29, 2022: In the 18 6-3 decisions, the three Democratic appointees were in dissent in 12 (67%), while the three extreme Republicans dissented together in only 2 of the 18 (11%)

### 4.3 The Court: Ideological Direction

1. For the 44 apps, we specified an ideological direction of the Court’s order (conservative or liberal) based on the applicant’s identity/relief requested.
2. Table 7 shows the ideological breakdown for all apps and for denials and grants. For example, overall 59% of the 44 apps resulted in orders favoring conservative interests; 53% of the 30 apps denied were conservative, etc.
3. One general takeaway is that conservative interests are the big winners when the Court grants relief. (Which may explain mostly liberal criticism of the emergency docket.)

|              | All Apps | Apps Denied | Apps Granted |
|--------------|----------|-------------|--------------|
| Conservative | 59%      | 53%         | 71%          |
| Liberal      | 41       | 47          | 29           |
| Total Apps   | 44       | 30          | 14           |

Table 7: Ideological Direction of the Court’s Order

#### 4. Additional Notes on Apps Denied

- (a) 81% of the conservative denials were unanimous (13/16). This may suggest restraint on the part of the 3 liberals; they didn’t note dissents from denials even if the denials favored conservative interests.
- (b) Only 43%—6/14—liberal denials were unanimous. As to the the remaining 8: Thomas, Alito, and Gorsuch noted dissents in 7; Thomas alone dissented in 1. This may suggest ideological activism on the part of the three extreme conservatives.
- (c) Section 5.3 examines restraint versus activism in more detail.

#### 5. Additional Notes on Apps Granted

- (a) Of the 14 grants only 4 were decided in the liberal direction; and only one of the 4 was unanimous (21A33). The three other liberal grants were divided—with Thomas, Alito, and Gorsuch dissenting in one (21A477); and Thomas, Alito, Gorsuch, joined by Barrett in one (21A240) and Kagan in the other (21A720).

- (b) Nine of the 10 conservative grants were issued by divided votes, with Kagan and Sotomayor dissenting in all 9; Breyer joined them in 8, Roberts in 2, and Barrett in 1.

## 5 Apps Referred to the Court: Individual Justice Action

### 5.1 Individual Justices: Majority Voting

- Table 8 shows voting with majority in all 44 apps referred to the full Court (30 denials and the 14 grants) and Table 9 shows voting with the majority in the 23 apps generating 1 or more noted dissents.

|           | (1)        |           | (2)         |           | (3)          |
|-----------|------------|-----------|-------------|-----------|--------------|
|           | % Majority |           | % Majority  |           | % Majority   |
|           | All Apps   |           | Apps Denied |           | Apps Granted |
| Kavanaugh | 100        | Kavanaugh | 100         | Kavanaugh | 100          |
| Barrett   | 95         | Barrett   | 100         | Barrett   | 86           |
| Roberts   | 93         | Roberts   | 97          | Roberts   | 86           |
| Breyer    | 77         | Kagan     | 93          | Alito     | 79           |
| Alito     | 77         | Breyer    | 93          | Thomas    | 79           |
| Gorsuch   | 76         | Sotomayor | 90          | Gorsuch   | 77           |
| Thomas    | 75         | Alito     | 77          | Breyer    | 43           |
| Kagan     | 73         | Gorsuch   | 76          | Sotomayor | 36           |
| Sotomayor | 73         | Thomas    | 73          | Kagan     | 29           |
| Average % | 82         |           | 89          |           | 68           |

Table 8: Percent in the Majority in the 44 Apps Referred to the Full Court (30 Apps Denied and 14 Apps Granted). All justices participated in all apps except Gorsuch. He was out for 1 deny and 1 grant.

|           | (1)<br>% Majority<br>All Apps |           | (2)<br>% Majority<br>Apps Denied |           | (3)<br>% Majority<br>Apps Granted |
|-----------|-------------------------------|-----------|----------------------------------|-----------|-----------------------------------|
| Kavanaugh | 100                           | Kavanaugh | 100                              | Kavanaugh | 100                               |
| Barrett   | 91                            | Barrett   | 100                              | Barrett   | 83                                |
| Roberts   | 87                            | Roberts   | 91                               | Roberts   | 83                                |
| Breyer    | 57                            | Breyer    | 82                               | Alito     | 75                                |
| Alito     | 57                            | Kagan     | 82                               | Thomas    | 75                                |
| Gorsuch   | 55                            | Sotomayor | 73                               | Gorsuch   | 73                                |
| Thomas    | 52                            | Gorsuch   | 36                               | Breyer    | 33                                |
| Kagan     | 48                            | Alito     | 36                               | Sotomayor | 25                                |
| Sotomayor | 48                            | Thomas    | 27                               | Kagan     | 17                                |
| Average % | 66                            |           | 70                               |           | 63                                |

Table 9: Percent in the Majority in the 23 Apps Referred to the Full Court with 1 or More Noted Dissents (11 Apps Denied with Dissent and 12 Apps Granted with Dissent). All justices participated in all apps except Gorsuch. He was out for 1 app (a grant).

2. Looking at the All Apps column (col. 1) in Table 8, % voting with the majority is high—no surprise considering the relatively high overall unanimity rate. Kavanaugh’s 100% and Barrett’s 95% are also not unexpected (they’re central players this term) and will likely parallel their voting in merits cases. Clearly, the middle of the Court is the winner—the center of power—in the emergency apps game.
  - (a) The same holds for apps with noted dissent (Table 9): Barrett and especially Kavanaugh dominate.
3. Turning to Apps Denied (col. 2 in Tables 8 and 9): If denials are a rough measure of judicial restraint, the center justices (Roberts, Kavanaugh, Barrett) and the three liberals are at the top, rarely dissenting. The three extreme conservatives are more activist, more prone to dissent when the Court denies relief.
  - (a) *Had Thomas/Alito/Gorsuch had their way, the Court would have granted relief in 7 more apps* (for Thomas, 8 more), perhaps exacerbating criticism of the Court’s use of truncated procedures.
  - (b) 4 of the 7 were COVID-related (21A90, 21A125, 21A145, 21A599). The remaining three were about affirmative action (21A590) and election law (21A455, 21A772)
  - (c) Also worth noting: In all 7, the applicant could be characterized as “conservative”
4. Finally, comparing Apps Denied and Apps Granted (N=13) (cols. 2 and 3 in Tables 8 and 9), the % ranking of majority voting flips between the 3 extreme conservatives and the 3 liberals. The suggestion is that the general pattern of activism-restraint remains: Thomas, Alito, and Gorsuch are in the middle range when the Court grants relief, while the three liberals dissent more often than not.
  - (a) Of the 14 apps granted, the three extreme conservatives noted dissent in only 3 (in one, joined by Barrett and; in another, joined by Kagan).

- (b) By contrast, in the 14 granted apps, one or more of the Democratic appointees dissented in 9.
- Of course, these patterns reflect more than activism-restraint; ideology is at play too. The extreme conservatives dissented when relief was denied to conservative applicants; likewise, the three liberals dissented together when the Court granted relief to conservative applicants (e.g., 3 COVID apps [21A23, 21A244, 21A8]). (See Section 5.2 for more on ideology.)
  - But, again, to the extent that grants of relief drive criticism of the so-called “shadow docket,” Thomas, Alito, and Gorsuch (with help from Kavanaugh and Roberts/Barrett) are largely responsible.

## 5.2 Individual Justices: Ideological Voting

- Tables 10 and 11 show the percentage of conservative votes in unanimous and non-unanimous decisions.
- In both tables, a clear and familiar ideological pattern emerges: the three extreme conservatives (Thomas, Alito, and Gorsuch) usually vote in favor of conservative applicants/claims and the three liberals (Breyer, Sotomayor, and Kagan) generally vote against those applicants/claims.
- The three middle justices are more variable, voting with the conservatives when the Court grants reliefs but in a more liberal direction when the Court denies.
- Still, and overall, the ideological rankings depicted in Tables 10 and 11 mirror merits voting.

|           | % Conservative Votes (All Apps) |             |              |
|-----------|---------------------------------|-------------|--------------|
|           | All Apps                        | Apps Denied | Apps Granted |
| Thomas    | 84                              | 80          | 93           |
| Alito     | 82                              | 77          | 93           |
| Gorsuch   | 81                              | 76          | 92           |
| Barrett   | 59                              | 53          | 71           |
| Kavanaugh | 59                              | 53          | 71           |
| Roberts   | 52                              | 50          | 57           |
| Breyer    | 36                              | 47          | 14           |
| Kagan     | 36                              | 47          | 14           |
| Sotomayor | 32                              | 43          | 7            |
| Average   | 58                              | 58          | 57           |

Table 10: Percent Conservative Votes in the 44 Apps Referred to the Full Court (30 Apps Denied and the 14 Apps Granted). All justices participated in all apps except Gorsuch. He was out for 1 deny and 1 grant.

|           | % Conservative Votes (Non-Unan. Apps) |             |              |
|-----------|---------------------------------------|-------------|--------------|
|           | All Apps                              | Apps Denied | Apps Granted |
| Thomas    | 100                                   | 100         | 100          |
| Alito     | 96                                    | 91          | 100          |
| Gorsuch   | 95                                    | 91          | 100          |
| Barrett   | 52                                    | 27          | 75           |
| Kavanaugh | 52                                    | 27          | 75           |
| Roberts   | 39                                    | 18          | 58           |
| Breyer    | 9                                     | 9           | 8            |
| Kagan     | 9                                     | 9           | 8            |
| Sotomayor | 0                                     | 0           | 0            |
| Average   | 50                                    | 41          | 58           |

Table 11: Percent Conservative Votes in in the 23 Apps Referred to the Full Court (11 Apps Denied with Dissent and 12 Apps Granted with Dissent). All justices participated in all apps except Gorsuch. He was out for 1 app (a grant).

### 5.3 Individual Justices: Ideological Voting v. Judicial Self-Restraint

1. Taken collectively the data suggest that voting on apps is similarly ideologically patterned as voting on the merits of cases. But there's also some hint in the data that the three extreme conservatives (Thomas, Alito, and Gorsuch) have promoted more aggressive use of truncated procedures in service of conservative interests, while the center and even liberal justices have exercised more restraint
2. Figure 1 confirms this impression. It shows the percentage of votes to grant relief based on the applicant's/claim's ideology.

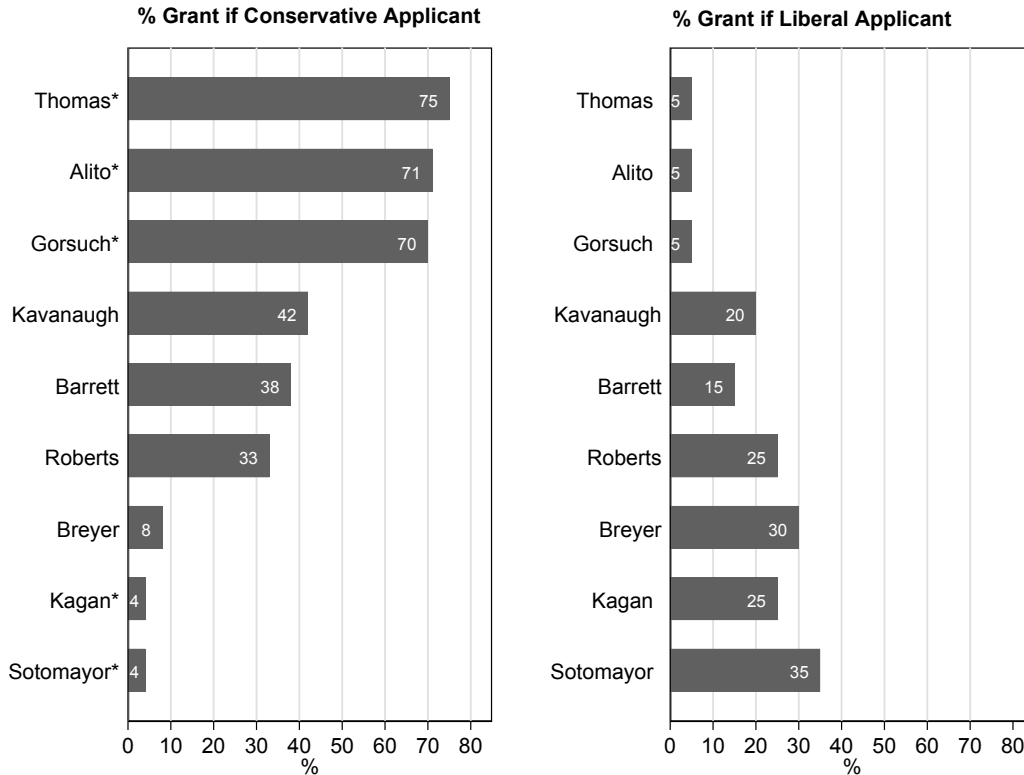


Figure 1: Percent Votes to Grant Based on the Applicant's Ideology. \* indicates a statistically significant difference, at  $p \leq 0.05$ . 24 apps were filed by conservative applicants; 20 apps were filed by liberal applicants.

3. Looking first at the three extreme conservative justices, they almost never vote in favor of a grant when the applicant is liberal but frequently vote for a grant when the applicant is conservative. The difference for each justice is statistically significant.
  - (a) The suggestion here is one of extreme activism rushing to push through conservative interests/causes.
4. The Democrats are more likely to grant apps that favor liberal interests; for Kagan and Sotomayor, the difference is statistically significant at  $p \leq 0.05$  (for Breyer,  $p = 0.06$ ). But note: The percentage-point differences are far lower. Kagan, for example, voted to grant 25% for liberal applicants and 4% for conservative applicants—for a 21 percentage-point difference. For Thomas, Alito, and Gorsuch, the percentage-point differences were triple (70 for Thomas, 66 for Alito, and 65 for Gorsuch). Even Sotomayor's gap (31 percentage points) is substantially lower.
5. As to the three center justices, they're more inclined to grant when then applicant is conservative (though not in the majority of apps). But for none is the difference statistically significant.