

United States Senate

May 5, 2022

COMMITTEES:
ARMED SERVICES
COMMERCE, SCIENCE, AND
TRANSPORTATION
JUDICIARY
VETERANS' AFFAIRS

The Honorable Charles Schumer
United States Senate
Washington, D.C. 20510

Dear Leader Schumer:

We are writing to express our grave concern about the manner in which you have responded to the recent leak of the Supreme Court's draft opinion in *Dobbs v. Jackson Women's Health Organization*. Immediately after this draft was leaked, you attacked the Supreme Court justices from the floor of the Senate, and again from the steps of the U.S. Capitol. Specifically, during your May 3, 2022 remarks on the floor of the U.S. Senate, you stated, "Several of these conservative justices . . . have lied to the U.S. Senate, ripped up the Constitution, and defiled both precedent and the Supreme Court's reputation."¹ We have serious concerns about your decision to slander our Supreme Court justices in order to achieve your preferred policy results.

Your accusation that the so-called "conservative" justices lied to the U.S. Senate not only is inappropriate but also patently misrepresents the facts. Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett all acknowledged during their hearings before the Senate Judiciary Committee that *Roe v. Wade* is an important precedent of the Supreme Court.² But as all judicial nominees in recent history have done—including, most recently, Judge Ketanji Brown Jackson—they declined to comment on how they would rule in specific cases, including any case seeking to overrule or narrow *Roe*. Indeed, it would have been inappropriate for any of them to prejudge the issue of abortion. This is exactly the kind of neutrality that Americans expect in their Supreme Court justices.

Furthermore, your suggestion that overruling precedent is tantamount to "rip[ping] up the Constitution" and "defil[ing] . . . the Supreme Court's reputation" is deeply troubling. Under your logic, states could discriminate against Black Americans³ and ban interracial marriage.⁴ We have no doubt that you would oppose such laws, and we are sure you believe that *Brown v. Board of Education*⁵ and *Loving v. Virginia*⁶—both of which overturned precedents of the Supreme Court—

¹ *Schumer calls reported Supreme Court vote to overturn Roe v. Wade 'an abomination'*, NBC NEWS, May 3, 2022, <https://www.nbcnews.com/video/schumer-condemns-leaked-supreme-court-draft-opinion-on-overturning-roe-v-wade-139182661672>.

² *See, e.g., What Supreme Court Justices have said about 'Roe v. Wade' and the draft opinion leak*, NPR, May 3, 2022, <https://www.npr.org/2022/05/03/1096398276/what-supreme-court-justices-have-said-about-roe-v-wade-and-the-draft-opinion-lea>.

³ *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

⁴ *Pace v. State*, 106 U.S. 583 (1883), overruled recognized by *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵ *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

⁶ *Loving v. Virginia*, 388 U.S. 1 (1967).

were rightly decided. There is no question that you support the Court overturning precedent where the Constitution and principles of stare decisis so require it—you just don't want the Court to overturn the precedents *you* happen to like. But it is not the role of our Supreme Court to make decisions based on politicians' preferred policy results.

Unfortunately, this is not the first time you have attacked the integrity of our Supreme Court and attempted to intimidate the Court into ruling the way you want. On March 3, 2020, you stood at the steps of the Supreme Court and threatened Justices Kavanaugh and Gorsuch that they would “pay the price” if they did not reach the Left's desired result in another case involving abortion that was pending before the Supreme Court.⁷ This kind of inflammatory rhetoric is toxic to our democratic system of government.

In the past, you have voiced concern that our democracy is at risk,⁸ but the leaked draft opinion would restore the democratic process that the Supreme Court eroded in *Roe*. Overturning *Roe* would put decisions regarding the legality of abortion back in the hands of American voters—exactly where they belong in our democratic republic. If the Supreme Court's ultimate opinion in *Dobbs* mirrors the draft that was leaked earlier this week, we would expect you to celebrate the Court's decision as a victory for democracy. It appears, however, that your primary concern is not preserving democracy; your concern is achieving your political agenda and enshrining the right to an abortion, regardless of the will of the people or the text of the Constitution.

Our concern in this regard is substantiated by your caucus's threatened legislative response to the leaked draft opinion. Because the draft opinion conflicts with the Left's agenda on abortion, your Democratic colleagues have renewed your call for the Senate to destroy the filibuster and pack the Supreme Court, and you have not renounced this proposal.⁹ Make no mistake: these are tactics of authoritarian leaders. Dictators change the rules and shatter norms when they cannot achieve their political goals through the democratic process. It should give all Americans pause to know that Senate Democrats are attempting to fundamentally alter the structure of our Supreme Court simply because a case might not go their way. Ironically, this attempt to pack the Court with radical progressives will have the precise opposite effect of what you and your colleagues have claimed to want—it will politicize and undermine the legitimacy of our nation's highest court.

We urge you to make very clear to the American people that all threats and intimidation tactics against our Supreme Court justices are abhorrent. We further urge you to pledge that you

⁷ Robert Barnes & Colby Itkowitz, *Roberts rebukes Schumer for saying justices will 'pay the price' for a vote against abortion rights*, WASH. POST, Mar. 4, 2020, https://www.washingtonpost.com/politics/schumer-vows-kavanaugh-gorsuch-will-pay-the-price-for-vote-on-abortion-rights-case/2020/03/04/ce4ae2b4-5e5a-11ea-9055-5fa12981bbbf_story.html.

⁸ John Nichols, *Chuck Schumer: 'I Believe That Democracy Is at Risk and We Cannot Fail'*, THE NATION, May 12, 2021, <https://www.thenation.com/article/politics/chuck-schumer-interview-filibuster/>.

⁹ Emma Colton, *Dems resuscitate court packing position after leaked SCOTUS draft decision*, FOX NEWS, May 3, 2022, <https://www.foxnews.com/politics/court-packing-supreme-court-democrats-roe-v-wade-leaked-draft>.

will respect the independence of the Supreme Court, regardless of how it rules in *Dobbs*, and that you will refrain from trying to exert political pressure to influence the decisions of the Court.

“It is emphatically the duty of the Judicial Department to say what the law is.”¹⁰ Those words are no less true today than they were when Chief Justice Marshall first wrote them in *Marbury v. Madison*. The Supreme Court is not a political tool. Our Supreme Court first and foremost must interpret the Constitution, free from the influence of the political branches of government. To preserve the separation of powers in our constitutional system, we must do everything we can to ensure that our justices remain free to decide cases in accordance with the rule of law.

Sincerely,



Marsha Blackburn
United States Senator



Mike Lee
United States Senator



Ted Cruz
United States Senator

¹⁰ *Marbury v. Madison*, 5 U.S. 137 (1803).