UNDUE INFLUENCE: OPERATION HIGHER COURT AND POLITICKING AT SCOTUS

HEARING

BEFORE THE

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U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

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UNDUE INFLUENCE: OPERATION HIGHER COURT AND POLITICKING AT SCOTUS

Thursday, December 8, 2022

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

Washington, DC

The Committee met, pursuant to call, at 12:19 p.m., in Room 2141, Rayburn House Office Building, Hon. Jerrold Nadler [Chair of the Committee] presiding.

Present: Representatives Nadler, Jackson Lee, Cohen, Johnson of Georgia, Cicilline, Swalwell, Lieu, Raskin, Jayapal, Demings, Scanlon, Garcia, McBath, Dean, Escobar, Jones, Ross, Bush, Jordan, Issa, Buck, Gaetz, Biggs, McClintock, Steube, Tiffany, Massie, Bishop, Fischbach, Spartz, and Fitzgerald.

Staff Present: Amy Rutkin, Staff Director and Chief of Staff; Aaron Hiller, Chief Counsel and Deputy Staff Director; John Doty, Senior Advisor and Deputy Staff Director; Arya Hariharan, Chief Oversight Counsel; David Greengrass, Senior Counsel; Moh Sharma, Director of Member Services and Outreach and Policy Advisor; Jacqui Kappler, Oversight Counsel; Roma Venkateswaran, Professional Staff Member/Legislative Aide; Cierra Fontenot, Chief Clerk; Kimia Rahbar, Staff Assistant; Merrick Nelson, Digital Director; Jamie Simpson, Chief Counsel, Courts, Intellectual Property, and the Internet; Evan R. Christopher, Counsel, Courts, Intellectual Property, and the Internet; Christopher Hixon, Minority Staff Director; David Brewer, Minority Deputy Staff Director; Tyler Grimm, Minority Chief Counsel for Policy and Strategy; Stephen Castor, Minority General Counsel; Ella Yates, Minority Member Services Director; Caroline Nabity, Minority Senior Counsel; Brian Nieves, Minority Counsel; Kiley Bidelman, Minority Clerk; Brock Snyder, Minority Staff Assistant; Russell Dye, Minority Communications Director and Counsel; and Nadgey Louis-Charles, Minority Deputy Communications Director.

Chair NADLER. The House Committee on the Judiciary will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to this morning's hearing on "Undue Influence: Operation Higher Court and Politicking at SCOTUS."

Before we begin, I'd like to remind Members that we have established an email address and distribution list dedicated to circu-

lating exhibits, motions, or other materials that Members might want to offer as part of today's hearing.

If you'd like to submit materials, please send them to the email address that has previously been distributed to your offices, and we will circulate the materials to Members and staff as quickly as we can.

I will now recognize myself for an opening statement.

"Lobbying" is a term we hear frequently in Washington, DC. There is an entire industry built around advocacy, outreach, and influencing policymakers and government officials.

To limit abuse and to give the American people transparency into the legislative process, the lobbyists who meet with Members of Congress and their staff must carefully monitor, track, and file disclosures regarding their interactions, and the lawmakers themselves have extensive disclosure requirements when they are treated to gifts, meals, and travel. The same applies to the Executive Branch.

Those who meet with Supreme Court Justices, who have a life term, have no similar ethical requirement. Those who lobby them can pay for Justices' meals, vacations, and conference travel, and do so without letting anyone else know. The Justices' own financial reporting obligations are severely lacking.

We rarely associate the term "lobbying" when discussing the Supreme Court, or influence or advocacy beyond the limits of briefs, motions, and oral arguments, all placed on the record.

The Supreme Court is an institution meant to be beyond both influence and reproach, held in esteem by the general public, and one governed by the facts and laws argued before it.

Unfortunately, as we will hear today, that might not always be the case. The Court may, in fact, be susceptible to outside influence and lobbying.

Recent reporting has uncovered a sophisticated covert lobbying scheme known as Operation Higher Court that operated behind the curtain of the Supreme Court for more than 20 years.

One of our Witnesses, Reverend Schenck, will describe how his organization worked with donors to develop long-term relationships with the conservative-leaning Members of the Supreme Court to move them farther right on faith-based issues.

This quiet lobbying by what he terms "stealth missionaries" generally began as encounters at events held by the Supreme Court Historical Society and evolved to include private dinners and even vacations with the Justices and their wives.

These are not merely social occasions. They had an explicit mission to encourage the Justices to resist compromise and to take hardline stances on priority faith-based issues, issues such as abortion, religious accommodation, and same-sex marriage.

Reverend Schenck's organization identified conservative Christian Justices enjoying a life term who they believed may be sympathetic to their organization's beliefs. His supporters then sought to use this shared faith to infiltrate the Justices' social circles and to push them further to the right, away from compromise, and towards more extreme legal positions.

Access to abortion care, contraception, gay marriage, in all these areas critical to Reverend Schenck's ministry he sought to encourage the Justices to use their faith to decide America's laws.

In his written testimony, Reverend Schenck testified that even he believed the Justices viewed *Roe* v. *Wade* as settled law, but this did not stop him or his supporters from lobbying specific Justices, urging them to undermine women's access to basic medical care.

These efforts, whether through private group prayer sessions, intimate dinners, or lavish trips, ultimately bore fruit when Justice Alito delivered his decision in *Dobbs*, overturning *Roe* v. *Wade* and putting women's healthcare across the country in peril.

We are now left wondering how much of this decision upending decades of established precedent was influenced by the organized wealthy donors lobbying to move the conservative Justices to the right.

To be clear, no one in this story, neither Reverend Schenck, nor his supporters, nor the Justices of the Supreme Court, broke the rules. That is the problem.

If the Supreme Court were subject to a Code of Ethics like the rest of the Federal Judiciary, and like the legislative and Executive Branches, they would need to follow basic financial disclosure reporting, gift rules, and recusal guidelines.

They would need to ask of themselves what every employee of Congress, of the White House, and of the Federal courts asks: What is the nature of this friendly dinner? Is someone asking something of me?

Many in Congress and in the media have focused on the revelation that one of Reverend Schenck's stealth missionaries received advance word of the *Hobby Lobby* decision allegedly from Justice Alito himself.

While this breach of trust is undoubtedly a serious incident, made even more troubling in light of the leak of the *Dobbs* opinion earlier this year, it should not be the key takeaway from Reverend Schenck's story.

The moral of the story is this. Supreme Court Justices cannot effectively self-police their own ethics. We shouldn't expect them to. Without established guidelines, at best we leave Justices with the impossible and exhausting task of evaluating ethics without a clear standard. At worst, we have Justices accepting overtures from individuals seeking to influence the Court with little to no transparency.

Ethics should not be a partisan issue. In 2018, this Committee passed, by voice vote, legislation sponsored by Congressman Issa that would have created a Code of Ethics for the Supreme Court. Our colleague, Congressman Hank Johnson, had since introduced similar legislation.

I sincerely hope that we can all work together to pass legislation that would help restore America's faith in our highest court.

I now recognize the Ranking Member of the Judiciary Committee, the gentleman from Ohio, Mr. Jordan, for his opening statement.

Mr. JORDAN. Thank you, Mr. Chair.

March 2020, on the steps of the Supreme Court, Senator Schumer said, quote,

> I want to tell you, Gorsuch, I want to tell you, Kavanaugh, you have released a whirlwind, and you will pay the price. You won't know what hit you.

April of last year, the Democrat Chair of the House Judiciary Committee introduced legislation to add four Associate Justices to the United States Supreme Court, to pack the Court.

May 2 of this year, the draft opinion of the *Dobbs* decision was made public. The next day, May 3, the very next day, attacks on churches, crisis pregnancy centers begin. They occur around the country, and they continue for months. Over a hundred churches, crisis pregnancy centers attacked since the leak of that opinion.

Now, you know what they call all that? You know what all that's called? Intimidation. Threats against Justices Gorsuch and Kavanaugh, threats to pack the Court, leaking of an opinion, and attacks on churches, a concerted effort by the left to intimidate the highest court in our land.

I didn't even mention the lies told about Justice Kavanaugh in 2018 during his confirmation process. I didn't mention when Senator Joe Biden and Senate Democrats drove Justice Alito's wife to tears during his confirmation hearing. I didn't mention the Democrats on this Committee who have for the last year attacked Justice Thomas and his wife.

Now, today a hearing about 8-year-old secondhand hearsay—8-year-old secondhand hearsay from a Witness who, for 18 years, took money from pro-life donors, $30 million, and then this year, all of a sudden remembers just weeks after the *Dobbs* leak happened, that eight years ago he heard that, at a dinner party, Justice Alito told his guests that they would like the *Hobby Lobby* decision. Just now remembers that.

Mr. Schenck wasn't there. Justice Alito said Mr. Schenck's story is not true. The dinner guests said Mr. Schenck's story is not true. The Supreme Court said Mr. Schenck's story is not true. *Politico* said, quote, "We spent several months attempting to corroborate Schenck's claim but were unable to locate anyone who heard about the decision from Alito or his wife before its release."

Let me just say part of that again: "We were unable to locate anyone who heard about the decision from Alito before its release."

Even *The New York Times* who broke the story, they said there are gaps in Mr. Schenck's account—gaps in his account. That's liberal speak for this story doesn't add up.

I'll tell you something that did happen. The *Dobbs* draft opinion was, in fact, leaked, and it was made public on May 2, 2022. After that leak, as I've said, dozens and dozens of churches were attacked, dozens and dozens of pro-life crisis pregnancy centers were attacked, protests occurred at Supreme Court Justices' homes, and there was an assassination attempt on Justice Kavanaugh.

To date, in this Congress, not one hearing in the House Judiciary Committee about that leak, not one hearing about the real leak, but here we are today, at the end of the session, having a hearing on the fake leak, from a Witness whose story even the liberal press says, quote, "We were unable to locate anyone who can corroborate what he said." That's what we're doing.

So, I hope maybe in the last week or two of this session of Congress, maybe we can address, begin to look into what happened

with the *Dobbs* decision, how that leak took place. I think that would be something that would merit our time and attention.

I would also point out this, Mr. Chair, before I yield back. We just got his testimony. We were supposed to get his testimony the night before. We just, at 12:20, we get his testimony for a 10 o'clock hearing. Been nice if we'd have had that as well.

With that, I yield back.

Chair NADLER. The gentleman yields back.

I now recognize the Chair of the Subcommittee on Courts, Intellectual Property, and the Internet, the gentleman from Georgia, Mr. Johnson, for his opening statement.

Mr. JOHNSON of Georgia. Good morning, everyone.

Thank you, Chair, for holding this very important hearing on such short notice.

I also want to thank the Witnesses, particularly Reverend Schenck, for being here today.

I appreciate the time that you all have spent here. We were supposed to get started at 10, but we had some things going on, on the floor, that prevented us from meeting at that time. So, I appreciate your forbearance.

For years I've been writing and warning about an ethical crisis at the Supreme Court, and I've introduced legislation to address it. Not just one, but more than one piece of legislation. I've Chaired hearings on it in my Courts Subcommittee, more than one hearing.

I've spoken about it repeatedly, on television, online, in person, to news anchors, experts, and activists. I've been raising the alarm. After almost two Congresses, here's where we are.

The year 2022 has seen more scandals of greater magnitude seeping out of 1 First Street than in any other single year in recent memory.

Yet, what has been done? Unfortunately, we haven't seen any action from the United States Supreme Court itself.

Certainly, they have every reason to want to address this crisis. Their job approval rating is the lowest it's been in the Court's entire history. Record numbers of Americans think the Court is too powerful, too partisan, and far too unaccountable.

Public opinion matters to the Court because it is the public who must respect and abide by the Court's decisions, especially decisions they may disagree with.

That the Court itself is unwilling to hold itself to standards equal even to those for lower-court judges, Members of Congress, and the Executive Branch makes matters even worse.

It took pressure from congressional appropriators just to get the Court to admit that it was even considering an ethics code, but that was three years ago.

I'd say it's been only silence since then, but that would not be true. It's been scandals, it's been Federalist Society speeches behind closed doors, it's been secret dinners with secret donors.

The Court either cannot, or will not, do what is in its own best interest. So, therefore, Congress must step in. The Constitution, and the American people for that matter, have entrusted this body to make the laws necessary to preserve the national well-being.

A Nation whose highest court was secretly and successfully infiltrated for over two decades by activists wining and dining their

way to the legal outcomes they want is not the hallmark of a healthy Nation or a healthy democracy.

So, the answer here is not revolutionary. It's to impose a written Code of Ethics that would require Justices to report more gifts more often and ensure the Justices are not deciding cases for their friends and family members.

My Supreme Court Ethics Recusal and Transparency Act, H.R. 7647, would do all this. My friend and colleague Senator Sheldon Whitehouse led this effort by introducing the SCERT Act in the Senate. Chair Nadler has passed the SCERT Act out of the House Judiciary Committee last May. Now, the time has come for this legislation to be passed by the Full House.

I have every expectation that what we hear today will reinforce the already strong case for serious ethics reform at the Supreme Court. I encourage my colleagues on both sides of the dais to hear this testimony in the appropriate context as only the most recent of the Court's many ethical lapses.

I hope you will be moved to stand up, do your constitutional duty, and do what we must do to keep our Nation healthy and strong, not only in the short term but for the next 250 years.

Again, I want to thank the Witnesses for being here today, especially Reverend Schenck, our whistleblower, for shining a bright light on the need for Supreme Court ethics reform.

Thank you, and I yield back.

Chair NADLER. The gentleman yields back.

I now recognize the Ranking Member of the Courts Subcommittee, the gentleman from California, Mr. Issa, for his opening statement.

Mr. ISSA. Thank you, Mr. Chair.

I want to first associate myself with the Ranking Member's statements. I then want to comment briefly on the statement by the Subcommittee Chair.

I found it an amazing statement that a Member of the House could so vigorously talk about the lack of confidence in the honesty of a body, sitting in this body with all the rules that we now want to add to the Court, some of which I support.

All those rules don't change the fact that on balance the Court has been—and I suspect will continue to be—a group of individuals, nine at the top, over 600 Article III Judges, and countless more Article I Judges, who for the most part deserve the public confidence of the American people that the vast majority of them all the time endeavor to do the right and honorable and ethical thing.

It does us no good today to look at legislation by denigrating another body. The facts are there have been mistakes, perhaps even lapses of judgment, and this body has, on occasion, had to remove a Federal judge.

That doesn't change the fact that although they're human beings, and we should do everything we can to promote greater confidence, we gain very little by implying that this is a bought and paid for organization or that their ethics, which were very high in everyone's mind on the other side of the aisle when they sided with them on an issue or two, suddenly is fraught with unfair influence when they don't like one or two of the last decisions.

The disparagement of Justice Alito and the allegations—which as of today I consider completely unsupported and uncorroborated and in doubt—should be taken for what they are: A day late and a dollar short.

You cannot make an allegation this many years later and not have the American people call into question the purpose and the reason for it. It may be true, but it certainly is not timely and does not seem to pass the test that we should have for a whistleblower.

Having said that, with the majority changing hands, with the Ranking Member undoubtedly being a Chair in the next Congress, and with the possibility that we will be reviewing this legislation once again, I want to make a commitment here today.

I will listen to the testimony. We will continue to meet with individuals on all sides of the issues. We will look for the appropriate balance of self-rule by the Article III Court, the Article III of the Constitution and the Court, and those laws which should be passed to harmonize the left—or, sorry, the Articles I, II, and III of our government.

I believe strongly that what is true for the Executive Branch should be true for Congress, and whenever possible and appropriate should be true for the Justices and the subordinated courts.

So, with that, Mr. Chair, I want to thank you for this conference. Even though I don't think I'm going to agree with some of what I hear today, it is important that we listen with open minds.

Last, I want to reiterate, Mr. Chair, for the years that I've worked with you, because this may be our last hearing—God knows I'm hoping it's our last hearing—it has been a pleasure to work with you.

Chair NADLER. As far as I know, it's our last hearing this year.

Mr. ISSA. Well, then, the point, though, is that I look forward to working with you in the new Congress. You and I Chaired together the Subcommittee on the Courts some years ago. I know that we can, in fact, strike the right balance, and I hope that we all will leave here today with the commitment to do just that.

I thank you for your leadership, and I yield back.

Chair NADLER. The gentleman yields back.

Without objection, all other opening statements will be included in the record.

I will now introduce today's Witnesses.

Reverend Robert Schenck is the founder and President of the Dietrich Bonhoeffer Institute, named for a Protestant leader in Nazi Germany who resisted the rise of fascism and racism in his home country.

Reverend Schenck holds his clergy faculties with the Mid-Atlantic Conference of the Methodist Evangelical Church in the USA. He received his certificate in Bible and Theology from Buffalo School of the Bible, his diploma in Ministerial Studies from Berean College, and his B.A., M.A., and Doctor of Ministry from Faith Evangelical College and Seminary.

Caroline Fredrickson is a distinguished visiting professor from practice at Georgetown University Law Center. She's a nationally recognized expert on the Supreme Court and the U.S. Constitution and recently served on the Presidential Commission on the Supreme Court.

Previously she served for 10 years as President of the American Constitution Society. Professor Fredrickson earned her B.A. from Yale University and her J.D. from Columbia Law School.

Mark Paoletta is a partner at Schaerr Jaffe LLP, representing clients in congressional hearings and investigations. Before entering private practice, Mr. Paoletta most recently served as General Counsel for the Office of Management and Budget under the Trump Administration and as counsel to former Vice President Mike Pence.

Mr. Paoletta received his B.A. from Duquesne University and his J.D. from Georgetown University Law Center.

Donald Sherman is the Senior Vice President and Chief Counsel of Citizens for Responsibility and Ethics in Washington, or CREW. Mr. Sherman has a distinguished resume in ethics and oversight across the Federal Government, including time working in the White House, in both the House and the Senate, and in a Federal agency.

Mr. Sherman owned both his undergraduate and law degree from Georgetown University.

We welcome our distinguished Witnesses, and we thank them for participating today.

I will begin by swearing in our Witnesses.

I ask that you please rise and raise your right hand.

Do you swear or affirm under penalty of perjury that the testimony you're about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Chair NADLER. You may be seated.

Let the record show that the Witnesses have answered in the affirmative.

Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in five minutes.

To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you have one minute to conclude your testimony. When the light turns red, it signals your five minutes have expired.

Reverend Schenck, you may begin.

TESTIMONY OF ROBERT L. SCHENCK

Mr. SCHENCK. Thank you, Mr. Chair, Ranking Member, Members of the Committee. I am Reverend Robert Schenck, an ordained evangelical minister and former lead missionary for Faith and Action in the Nation's Capital, a religious organization active on Capitol Hill from 1995–2018.

I am now President of the Dietrich Bonhoeffer Institute here in Washington, named after the World War II-era German theologian and Nazi resister who tried to protect the German Evangelical church from Nazi cooptation before he was executed in 1945.

Our institute supports ethically courageous leaders, like our namesake, who address the social issues of our time.

I am here to present facts, as I know them, about Operation Higher Court, a Christian mission that I directed as part of Faith and Action for 20 years, to bolster conservative Supreme Court Justices in the views they already held.

I had no qualms about complying with this Committee's subpoena to testify, but I did not seek this public forum. After four decades of public life, I now relish the serenity of time with family, friends, colleagues, and my beloved books.

Neither did I instigate the news coverage surrounding this subject. That began when a reporter overheard a former colleague talking about prayers, we had with some of the Justices inside the Supreme Court Building.

Before that, following stories about the leak of the *Dobbs* decision this past May, *The New York Times* had learned about my role in an earlier leak related to my work at the Court, but I did not go on the record with them until much later.

That was after I received no acknowledgement of the letter I sent to Chief Justice John Roberts in July detailing the matter. I had written it principally out of a concern that a Court subordinate would unfairly take the blame for the *Dobbs* leak, suffering draconian punishment. Yet, I knew a Justice would face no consequence for such a breach.

By the time I went on the record, I was convinced there was even more significant implications, not only to the 2014 leak but also to the facts surrounding it.

Operation Higher Court involved my recruitment of wealthy donors as stealth missionaries who befriended Justices that shared our conservative social and religious sensibilities. In this way, I aimed to show these Justices that Americans supported them and thanked God for their presence on the Court and the opinions they rendered.

Our overarching goals were to gain insights into the conservative Justices' thinking and to shore up their resolve to render solid, unapologetic opinions, particularly against abortion.

I called this our "ministry of emboldenment." It was not an attempt to change minds. Beyond convivial small talk, our missionaries did not engage liberal members of the Court.

My recruits for Operation Higher Court were older, highly accomplished, and independently minded. They did not take kindly to being told where to go, what to do, or how to do it. Successfully deploying them required their autonomy.

I did suggest tactics to cultivate affinity, but otherwise our folks were on their own. Most of them limited their support to regular prayers on behalf of the Justice's family, warm personal greetings, and assurances of good will at social functions and sending greeting cards on special occasions.

They might also host Justices or their spouses for meals at restaurants, private clubs, or their homes, and sometimes the Justices reciprocated.

The *Hobby Lobby* leak resulted from one of these arrangements.

Throughout this ordeal, I've had to look deeply at what my cohorts and I did at the Supreme Court. I believe we pushed the boundaries of Christian ethics and compromised the High Court's promise to administer equal justice.

I'm also conscious we were never admonished for the type of work our missionaries did. Quite to the contrary. In one instance, Justice Thomas commended me, saying something like, Keep up what you're doing. It's making a difference.

I humbly apologize to all I failed in this regard—members of the Court, its employees, and those at the Supreme Court Historical Society who expected better of me.

Most of all, I beg the pardon of the folks I enlisted to help me do work that was not always transparently honest.

Jesus Christ said of himself, "I am the way, the truth, and the life." I'm here today in the interest of truth-telling, and I'm prepared to answer any questions the Committee may have for me. Thank you.

[The statement of Mr. Schenck follows:]

Testimony of Rev. Robert Schenck, D. Min.

December 8, 2022

U.S. House of Representatives
Committee on the Judiciary

Hearing

Undue Influence: Operation Higher Court and Politicking at SCOTUS

I am the Reverend Dr. Robert Lenard Schenck, an ordained evangelical minister of 40 years and the former lead missionary for Faith and Action in the Nation's Capital, a religious organization active on Capitol Hill between 1995 and 2018. Since 2015, I have been the founding president of The Dietrich Bonhoeffer Institute in Washington, DC, named after the renowned World War II-era German theologian and Nazi resister who worked to protect the German Evangelical church from Nazi co-optation before being executed at the Flossenburg concentration camp in the waning days of the war. The Institute supports and encourages ethical and morally courageous leaders to address the social crises of their time and has taken a particular interest in gun violence prevention and immigration issues.

I hold degrees in Bible and Theology, Religion, Christian Ministry, and Strategic Leadership with a concentration in the theology of church and state. During my career, I have served as a pastor, seminary instructor, denominational official, and evangelist, preaching in more than 1000 pulpits across the United States and several other countries. In 2006, I helped lead a historic dialogue between American evangelical church representatives and Moroccan Islamic leaders. In addition, I was the first appointed chaplain to serve the Capitol Hill Executive Service Club. In that capacity, I often delivered the invocational prayer at the U.S. Capitol Police Officer of the Year Awards Ceremony.

Until recently, I was a national leader in the anti-abortion movement and was based in Buffalo, New York. In that connection, I was arrested for blockading clinics and was the subject of numerous federal injunctions restricting my protest activity. I then moved to Washington, DC, where I shifted my strategy to privately persuading elected and appointed officials to embrace a strongly conservative social policy agenda. I also organized public events such as the annual

National Memorial for the Pre-born and their Mothers and Fathers, presentations of Ten Commandments plaques to public officials, staging a Live Christmas Nativity at the U.S. Capitol, and holding prayer meetings, Bible studies, church services, and news conferences outside the White House, inside Congressional hearing rooms, and on the plaza of the Supreme Court.

My most ambitious undertaking was Operation Higher Court. It involved recruiting, training, and deploying wealthy volunteer couples who we paired with sympathetic Supreme Court justices and their spouses to bolster, encourage, and applaud the Justices' conservative opinions. While I will describe that effort in more detail, I want to first complete my brief biography.

About ten years ago, I started questioning my religious community's positions on guns, abortion, same-sex marriage, and religious liberty, among other concerns. I eventually broke with the orthodoxy I had long followed and became a dissenting voice among my culturally and theologically conservative peers. Finally, in 2018 I closed down Operation Higher Court and its parent organization, Faith and Action. Today I advocate for an empathetic, humane, and reality-based approach to complex moral problems and personal crises, respecting the dignity, autonomy, and moral agency of the individuals involved. My 2018 book, Costly Grace: An Evangelical Minister's Rediscovery of Faith, Hope, and Love, tells the story of that transition.

I live in Alexandria, Virginia, with my wife of 45 years, Cheryl E. Schenck, a former school-based occupational therapist and for the last twelve years, a psychotherapist in private practice. We have two adult children and a much-loved son-in-law, and we thoroughly enjoy my first grandchild's hugs. These days, I spend most of my time guiding the religious non-profit I lead, reading, researching, and writing for my blog at revrobshenck.com, along with other religious platforms and journals. I also consult with clergy and denominational leaders on the challenges evangelicals face today.

After more than 40 years of very public life, I relish the quietude of time with family, friends, colleagues, and my beloved books. While I had no qualms about complying with the Committee's subpoena to appear before it and submit this written testimony concerning the

subjects of interest to the committee, I did not seek such a public forum; neither did I instigate the news accounts associated with this subject. I want to make clear to those interested in this hearing how the reports came about that resulted in my testimony today. It began when a reporter overheard a former colleague talking about the prayers we held with some of the Justices inside the Supreme Court building. That information began the cascade of media interest in the story. Simultaneously, a contemporary associate spoke with friends about my role in a leak of the *Hobby Lobby* result of 2014; that information reached the New York Times, which subsequently contacted me to ask if the story was true. After initially declining to answer questions, I agreed to two limited, strictly off-the-record, and restricted-from-publication interviews. After two extraordinarily persistent publications hounded me to go on the record, I eventually granted the much more polite New York Times exclusive and extensive access to me, along with the kind of documentation I could provide. I resolved to go public with my story because I felt it was best for the American people to know what happened, and it was in the best interests of the Supreme Court because public trust is crucial to its preservation and successful functioning. I also considered what I did a moral obligation. I chose to work with the New York Times because I felt a well-researched account was much better than a poorly researched one or one that might involve histrionics. I stand by the facts I provided to reporters Jodi Kantor and Jo Becker and published in their history of my activities at and surrounding the Supreme Court during the years I was active there.

This statement will give the Committee an overview of how and why I interacted with particular Supreme Court justices, including socializing with them, visiting in chambers, and having the occasional prayer with some. I will also explain how others associated with my organization hosted certain justices at their homes, at restaurant meals, and on hunting trips, and how particular justices reciprocated that hospitality and what came of it. Finally, I'll explain how I gained advanced knowledge of the outcome of the 2014 *Burwell v. Hobby Lobby* opinion, which was significant to religious conservatives.

My ministry in Washington, DC, began in August 1994, when my family and I relocated to the metro Washington, DC, area from our native Buffalo, New York. My first post was as the organizing pastor of a new congregation called the National Community Church on Capitol Hill,

which was also the setting for our first pro-life event, which we dubbed "The Memorial for the Pre-born." However, I surrendered my pastoral position in February 1996 to pursue developing what would later become Faith and Action in the Nation's Capital. Initially operating under the moniker of "Operation Save Our Nation," I instituted a religious and moral outreach program to congressional members, their staff, and other federal employees; this involved conducting Bible studies, prayer meetings, and eventually small to large ceremonies held in congressional offices and hearing rooms during which I would present recipients with plaques of the Ten Commandments, asking that they be publicly displayed and privately obeyed. My team of paid personnel, volunteer clergy and lay people expanded over the years, allowing us to add similar programs to accomplish our aim of "bringing the Word of God to bear on the hearts and minds of those who make public policy in America."

In March 1996, my team and I concluded that the Supreme Court was a necessary part of our designated mission field. By then, I was convinced that no matter how much pro-life legislation or executive policy success we achieved, inevitably, any gains would be frustrated, diminished, or nullified by the existence of *Roe v. Wade*. As what has sometimes been called a "super precedent," *Roe* was long seen as nearly impossible to overturn. Moreover, even staunchly anti-abortion nominees to the Court had assured members of the Senate that they saw *Roe* as "settled law." The reversal of *Roe* became the single overarching objective for our national movement. In November 1999, my organization acquired a row house at 109 2nd Street, NE, opposite the East Facade of the Supreme Court, to use as our base of operations for outreach to the Court and the other two branches of the federal government. We hoped, as other organizations have, that proximity would be helpful to our cause.

Between 1996 and 2001, our group's moniker was Operation Save Our Nation, or OSON. During this time, I became aware of the Supreme Court Historical Society. Eventually, I joined as a member, befriending its then-executive director, Dr. David Pride, and other employees and officers. Knowing how vital membership growth and fundraising are to any non-profit institution, I immediately offered to recruit members and deliver significant prospective donors to the Society. I learned that the Society sponsors an annual dinner for members in conjunction with its annual business meeting, which is held in the Court's building. I learned that the Chief

Justice hosts the event and that most of the associate justices attend. As a result, I was keenly interested in the hour-long pre-dinner reception held in the Court's conference rooms, where guests could approach the Justices and engage in small talk. I first attended the event in June 2000, where I carefully observed the interactions between guests and the various Justices. They appeared to me to be more curious about the non-legal professionals with whom they conversed than the more common attorneys and law professors who were present. I also noted how a significant number of guests carefully and, at times, aggressively jockeyed for position to ensure they could get facetime with at least a few of the Justices, particularly the then-Chief Justice, William Rehnquist. In that setting, I had my own brief exchange with Chief Justice Rehnquist and a warmer and more substantive one with Associate Justice Clarence Thomas, with whom I shared more than one mutual acquaintance.

Following my experience at the dinner, I determined to use it and the Society's various other events, such as lectures at the Court (generally hosted by a Justice) and discussion forums (often involving Justices or high-level Court officials), as initial contact points with the Justices. My purpose was to develop relationships with the Justices who held positions sympathetic to religious conservatives' general concerns. In this way, I could gain insights into their thinking regarding the questions and cases that come before them and, perhaps, read their disposition toward the topics of most significant interest to me and my cohorts. Over time, I also thought my associates and supporters might be able to shore up the resolve of the conservative members. Our concern was for cases we adjudged beneficial to the country's culture, such as those restricting or banning abortion, euthanasia and assisted suicide, as well as same-sex relationships, especially marriage, and those expanding religious liberty, predominantly Christian practice, and public displays of Christian belief. The Historical Society was also a place where my cohorts and I could learn more about the customs, traditions, mores, and protocols of the Court, easing our entry into their social circles.

Between 2001 and 2002, I determined that my activist profile, frequent media appearances, and occasional commentary at the microphone station on the Supreme Court's front plaza could place me at a deficit in establishing a rapport with the relevant Justices. At the same time, I was getting to know and talk with Court employees, fellow Supreme Court Historical Society members, and

less visible pro-life legal advocates. These individuals knew more than I did about the internal workings of the Court and had regular contact with the conservative Justices. My interlocutors led me to conclude that the wealthier donors to my organization and the less visible legal professionals in my universe were reasonable prospects for carrying out the mission of developing relationships with consequential Justices and bolstering their moral and religious sensibilities. I hoped that by boosting their morale, we might see stronger opinions by such Justices as Antonin Scalia, Clarence Thomas, and perhaps even Sandra Day O'Connor and Chief Justice Rehnquist.

It was also from 2001 to 2002 that my organization formulated a new moniker, Faith and Action in the Nation's Capital, or "Faith and Action" for short, which replaced the earlier Operation Save Our Nation. Due to the sensitive nature of our work inside the Supreme Court (which I had now dubbed "Operation Higher Court"), I directed my organization's personnel to keep it as invisible as possible. Except for one or two mentions in our donor newsletter, we only referenced the initiative in internal settings. In consultation with key donors, particularly attorney Bernie Reese of Rockford, Illinois, and his wife, Leonna "Lee" (both now deceased), I refined a process for enlisting, training, and deploying mainly married donor couples as what I called "stealth missionaries." Their task would be to “adopt” a designated Justice (with their spouse, if applicable), first as a prayer concern, then as possible conversation partners, and ultimately as familiar acquaintances, if not friends. We termed the nature of the stealth missionaries’ work “the ministry of emboldenment.” At that time, the Justices we saw as potentially receptive and certainly consequential were Chief Justice Rehnquist, as well as Justices Kennedy, Scalia, and Thomas, with the latter two being the most approachable. Beyond being convivial at Court social functions, our operatives made no attempt to build relationships with the known liberal members of the Court.

In the beginning stages of this endeavor, I met with likely missionary recruits recommending they join the Supreme Court Historical Society and make substantial donations to distinguish themselves and possibly rise to trusteeship. This status would give them privileged access to highly coveted tickets for often sold-out Society events and allow them to sit in front of the courtroom's bar, making them more noticeable to the Justices hosting lectures and the like. Such

advantages would facilitate easier and more frequent contact with our missionaries' "targets." Moreover, because Court personnel assumed the Society properly vetted its trustees, I concluded their status as trustees might assuage suspicions about our missionaries' motives. One of the first couples to embrace the project was Donald "Don" and Gayle "Crede" Wright of Dayton, Ohio. They would become our most successful model of stealth missionary work.

It's important to note that the people I recruited as stealth missionaries for Operation Higher Court were older, highly accomplished, and independently minded. They did not take kindly to being told where to go, what to do, or how to do it. That was especially true of the Wrights. Therefore, to successfully deploy them required that I allow them unlimited autonomy. I saw my role as imparting the vision for this new form of personal ministry to Supreme Court Justices, then stepping back as our recruits carried that mission out in whatever ways they deemed appropriate. I casually suggested tactics that might prove fruitful, including researching the Justices' family and religious histories and seeking points of commonality. Then, I suggested using these shared points to cultivate affinity. As such relationships blossomed, I recommended that missionaries extend invitations to their target Justices or their spouses for meals at restaurants, private clubs (which were preferable for privacy), and their homes, but especially their country, vacation, or other unique properties. Such hospitality was in keeping with several biblical warrants regarding being generous to others. Most of our stealth missionaries limited their support for their justice couples to regular prayers on their behalf, warm personal greetings, assurances of goodwill at various social functions, and sending greeting cards on special occasions. The Wrights were much more gregarious, forward, and, ultimately, successful in this endeavor. They had established meaningful rapport within a short period with the Scalias and the Thomases. Later, after Justice Samuel Alito joined the Court, the Wrights quickly struck up what they described to me as a friendship with him and his wife, Martha-Ann. From time to time, my staff or one of the missionary couples would tell me of brief visits to the chambers of some of the Justices. I recall Justices Kennedy, Scalia, and Thomas being mentioned in this context. I understood those visits to be social in nature, with some of the exchanges including a brief prayer offered by the missionary visitor for the Justice. I also paid visits to the chambers of Justices Scalia and Thomas, offering prayers for them, their families, and our country. In the case of Justice Thomas, he had invited me to his chambers on one occasion to view the plaque of the

Ten Commandments given to him by the Wrights that was prominently displayed in the entryway to his office. It was an example of the wood-mounted stone sculptures we routinely presented to public officials as part of our National Ten Commandments Project promoting the public Ten Commandments displays.

From the time Chief Justice John Roberts arrived in September 2005, I had detected a more relaxed, less guarded atmosphere inside the Court. My fellow pro-life advocates and I credited that to the Chief's obvious commitment to his Catholic faith, especially as it was expressed in his family's parish, The Church of the Little Flower in Bethesda, Maryland, and his wife Jane's history of involvement with a pro-life crisis pregnancy center. The new tone at the court made it easier for our stealth missionaries to operate.

As the Wrights and others ambitiously took on Operation Higher Court, I was often distracted by several other continuous or annual Faith and Action programs. These included the National Memorial for the Preborn and their Mothers and Fathers, a gathering of pro-life advocates held in one of the House or Senate hearing rooms on the anniversary of *Roe v. Wade* and in conjunction with the large-scale March for Life, The Ten Commandments Project, presenting plaques of the Decalogue to Members of Congress and other elected and appointed officials, a National Day of Prayer observance on the steps of the Supreme Court, co-sponsorship of the U.S. Capitol Bible Reading Marathon and Annual U.S. Capitol Police Officer of the Year Awards ceremony, and a Capitol Hill Christmas Live Nativity. In addition to these responsibilities, I also conducted incidental chaplain-like duties such as the occasional wedding, funeral, or crisis pastoral counseling session for members of this House, Senators, staff, or other House, Senate, or U.S. Capitol employees. Additionally, I kept up a robust speaking itinerary, preaching up to 40 Sundays a year in churches spread across the country, speaking at conferences, addressing denominational conventions, and sitting for in-studio media interviews. I also hosted 50-100 church leaders each year as part of my organization's National Ministry Cabinet, sometimes arranging for these clergy to visit with Justices in chambers or elsewhere in the Court building. For these reasons, I could not closely monitor Operation Higher Court, which took on a life of its own.

My staff would inform me of our missionaries' progress within the Supreme Court Historical Society and other similar societies and clubs where they might encounter a Justice—such entities included Legatus events, an organization of Catholic CEOS, corporate presidents, managing partners, and business owners, and the Capitol Hill Republican Club and University Club. In this regard, the John Carroll Society was especially important. It sponsors the annual Red Mass held at St. Matthew's Cathedral the Sunday before each Supreme Court term starts. Most Justices typically attended the Mass, and a luncheon often followed. Our missionaries could approach the Justices in this intimate, less guarded, spiritual setting. In addition, it was known the Chief Justice's wife, Jane, was an officer in the Society, and the family's then-pastor, Monsignor Peter Vaghi, highly esteemed among pro-life advocates, was a prominent figure in its circles. Attendance by the Justices diminished somewhat after Justice Ruth Bader Ginsburg ceased her participation after taking offense at an overtly anti-abortion sermon in 2008.

In 2008, my team and I formalized the orientation process for missionary recruits, establishing a verbal protocol briefing and occasional missionary debriefings held at our headquarters building. By then, to make our building more attractive to personnel at the Court, we had christened it "The Honorable William J. Ostrowski House" for a retired New York State Supreme Court judge and pro-life advocate. That same year, as part of Operation Higher Court, my team and I arranged for approximately 40 top donors to the Council for National Policy (CNP) to meet several Justices during a jointly sponsored reception with the Supreme Court Historical Society. (I need to note here that I had not disclosed the mission or existence of Operation Higher Court to the Society's employees or officers; they did not know of our intentions beyond introducing prospective donors to the Society's programs.) The CNP is a network of top conservative influencers in business, government, politics, religion, and academia. Following this one encounter, I did not monitor how the CNP or its donors may have continued engaging with the Court or the Historical Society.

In 2010, I began consulting with an exploration team seeking a prominent metropolitan location for the Museum of the Bible, a project of the Green Family of Oklahoma City, owners of the national Hobby Lobby chain of retail stores. I first came to know owners David and Barbara Green in 2000. That year I conferred on them the National Ten Commandments Leadership

Award during an event held in the U.S. Senate Hart Building. The Greens later became major donors to the parent organization of Operation Save Our Nation, the precursor to Faith and Action. I advocated for Washington to be the museum's site, making the argument to the search team that, among other benefits, top U.S. government officials, including Supreme Court justices, might find such an institution appealing and benefit personally and professionally from associating with it. After the Green Family indeed chose Washington, DC, for their $500 million project, I arranged for Hobby Lobby president Steve Green and his wife, Jackie, to attend the Chief Justice's private Christmas Party so Steve could talk up the museum with the Chief and other likely sympathetic members of the Court.

My activities and those of the missionary couples continued apace through the years. Come 2014, my team and I were closely monitoring three cases before the Court (*McCullen v. Coakley*, in which one of our early Operation Higher Court recruits had filed an amicus brief, along with other groups allied with ours; *Town of Greece v. Galloway*, again, for which one of our early recruits submitted an amicus, along with other allied groups, (it is also worth noting I had long known one of the pastors involved directly in the matter before the Court and had met with him before and following oral argument in the case); and, of most significant interest to my team and me, *Burwell v. Hobby Lobby*. The *Hobby Lobby* case, and another, *Conestoga Wood Specialties Corp. v. Sebelius* consolidated with *Hobby Lobby*, were again subjects of amici briefs submitted by early recruits to Operation Higher Court, and numerous allied organizations to my own. As previously indicated, I also knew the principals in these cases, having had a long personal association with the Hobby Lobby Corporation owners, and the company's president.

As the *Hobby Lobby-Conestoga Wood* case proceeded, I consulted with our pro bono constitutional litigation counsel and Operation Higher Court stealth missionary, Bernie Reese, on whether to submit an amicus curiae brief in support of Hobby Lobby. We decided not to do so because many of our allied groups were submitting briefs reflecting our position on the case. I often publicly and privately discussed the case with colleagues, donors, team members, other Operation Higher Court stealth missionaries, and representatives of allied groups and organizations. In advance of the oral arguments, during a stay at the Siesta Key-Sarasota, Florida, winter house owned by Don and Gayle Wright, I visited and had prayer with the Hahns,

owners of Conestoga Wood Specialties Corporation, the other respondents in the case, who owned a winter house nearby.

On March 25, 2014, I attended the oral argument in the *Hobby Lobby* case, having obtained a reserved seat from the Marshal's office. Earlier that day, I had convened a prayer service in the Supreme Court's cafeteria dining area, which attorneys for both Hobby Lobby and Conestoga Wood Specialties Corporation attended, along with David and Barbara Green and members of the Hahn family. Though we did not communicate directly at that time, I was aware that Don and Gayle Wright were seated in either Justice Scalia's or Alito's reserved guest benches near the Court's dais. Following oral arguments, I was the first to comment at the media microphone tree outside the Court, followed by David and Barbara Green.

The Wrights and I had spoken several times, in person and by phone, about the importance of the case. The Wrights were also aware of my relationship with Green family members and that David and Barbara Green were donors to our organization. Following oral argument, as the Court deliberated and the writing of opinions began, Gayle Wright and I continued conversations about the case and its implications for the country.

As June 2014 approached and the end of the court's 2013 term, I discussed with my team how we would manage the announcement of the *Hobby Lobby* opinion. Sometime in the last week of May or on June 1 or 2, Gayle Wright informed me by phone that she and her husband, Don, would be dining with Justice and Mrs. Alito the day after that year's Supreme Court Historical Society dinner, which occurred on June 2, placing their get-together on June 3. She suggested it would be a busy day for Don and her but that she might try to stop by our building to say Hi. I informed her I would be flying to California that day so I couldn't receive them. Sometime during the remainder of our call, and in the context of the meal with the Alitos, Gayle said something to the effect of "Maybe we can learn something about what's happening at the court." Given the context of the conversation, I took that to mean the impending *Hobby Lobby* decision. I said something back to her to the effect of "That would be helpful." Knowing the strict practice of the Court to keep opinions highly confidential, I dismissed Gayle's suggestion as unrealistic wishful thinking. I landed in Los Angeles mid-day on June 4 and later discovered an email from

Gayle which read, "Rob, if you want some interesting news, please call. No emails. Gayle" Based on our earlier phone conversation, and because it was highly unusual for Gayle to insist on only audio communication, I anticipated this was news on the *Hobby Lobby* decision. When we spoke on the phone later that day, Gayle relayed that she had learned the outcome of the *Burwell v. Hobby Lobby* case while at the meal with the Alitos, that it was in Hobby Lobby's favor, and that "Sam is writing it." I was shocked by the thought that I had advanced knowledge of an important and consequential Supreme Court case. My impulse was to call colleagues and associates to notify them, but I only called my wife and brother, Paul, to tell them what I had learned. Both urged me to keep it confidential and share it with no one else. I resolved to do that, knowing that if the information were to travel beyond my closest confidants, it would risk my and our missionaries' further access to the Justices and the Court in general. Blame for the leak might even extend to Supreme Court Historical Society personnel and Court employees, whom I wished to protect. For all these reasons, I resolved to keep the information sacrosanct and use it only to privately formulate a public relations strategy surrounding the official release of the opinion whenever that might happen. (At one point, I violated my resolution in a casual phone conversation with my oldest sister, Kathleen Bauer, whom I knew would keep it to herself.)

As the days went on, I wrestled with whether to share the information about the *Hobby Lobby* Case with the Greens, who had a much greater interest in its outcome than I did, and whom I hoped would renew a philanthropic interest in our work, especially at the Court. There were times when I paced the floor in my study and wrung my hands with anxiety over this question. Still, I kept the information to myself, using it to formulate language for a news release, public statements, and donor communications. While I knew Justice Alito was the author, and the opinion was in favor of *Hobby Lobby*, I was careful to cast it with some measure of uncertainty so staff and other court-related interlocutors wouldn't ask about the source of my confidence in victory. Still, as the days went on, in my conversations and communications, I waxed more certain about the outcome in my written and spoken communications. On June 12, in an email to Kaitlynn Hendricks, Faith and Action's Digital Media Platform Specialist and Content Developer, I said of an Alito-authored Hobby Lobby win, "from all the information I have, I think this will be it." However, I couldn't know what day the decision would be released, as such scheduling decisions are dynamic, often up until the last minute. However, as June came to a

close, it became easier to predict. Once we knew it would likely be the last day of the term, June 30, I became preoccupied with telling the Green Family what I knew about the outcome. Meanwhile, at 10:17 AM on June 29, I sent an embargoed news release to Dan McCullough of Christian Newswire, telling him in an email, "If positive--and I'm confident now it will be--I'm taking an educated guess on Alito."

Then in the late afternoon of June 29, 2014, I spoke with Steve Green by phone, conveying what I knew about the case in words to the effect of "God has answered your prayers and given your family favor. I have good reason to say this based on my communications with people close to the Court and the Justices. I am sure you will be pleased with the decision's author. We couldn't ask for better." I'm unsure whether I named Justice Alito in that conversation because I worried that doing so would be the worst form of violating the Court's custom of secrecy. Steve thanked me profusely and suggested he would pass the news along to his parents because he would be out of the country the following day. We said a short prayer of thanksgiving together and ended the call. That evening, at 6:05 ET, to ensure Steve kept the information I gave him only to his family members, I sent him an email saying, in part, "Glad we could connect and talk about such important matters. As I mentioned, we'll need to keep it strictly 'in the family.'"

At 11:59 PM the same night, I sent an email to Kaitlynn Hendricks, the communications specialist for Faith and Action, directing her to include specific language in all her social media posts and an email communique to our donors. Referencing the possibility of a positive outcome, I wrote in parenthesis, "confidential: I have good reason to believe it will be." I also presumed the author to be Justice Alito, instructing Ms. Hendricks to include my quote, "We're thankful to God that Justice Alito authored this opinion."

The following day, I called my staff and directed them to implement the plan we had mapped out on June 12. It included directing Dan McCullough of the Christian News Wire to send out the pre-written news release on the *Hobby Lobby* win to the media as soon as the opinion was read from the bench. My team insisted we give Dan a negative option, which I approved out of concern that my refusing to do so would reveal I had insider information. Nevertheless, I indicated we would also stage a prayer service that morning on the sidewalk in front of the

Court, offering thanksgiving to God for the Greens' and Hahns' victory. Simultaneously, I took my seat in the courtroom at the appointed time, anxiously awaiting what I knew to be inevitable, that Justice Alito would read the majority opinion. When the Chief Justice announced that, I prepared to exit the courtroom as soon as Justice Alito finished reading. Once outside, I made remarks to reporters and supporters at a podium set up for that purpose. It was my custom to raise a paper copy of any opinion I commented on in front of the Court following the release of decisions, so I asked my staff to obtain one, but they were unable to do so. So, I proceeded without it and referred instead to handwritten notes I had made in the courtroom.

The next day, July 1, my staff released the donor communique I had written, presuming a Hobby Lobby win and an Alito-authored opinion. Gayle Wright emailed me that same day at 4:30 PM ET. Under the subject line, "Sam," she informed me, "I sent your email about hobby lobby [sic] case to Sam. He sent me an email back saying he appreciated your comments very much. How about that?"

In August 2014, I delivered my chairman's address to the annual meeting of the Evangelical Church Alliance, an association of evangelical ministers, missionaries, and military chaplains. In it, I alluded to my advanced knowledge of the *Hobby Lobby* decision, saying, "I was praying Justice Alito would get the *Hobby Lobby* case because of his moral, ethical, and even theological sensibilities. None of the experts predicted that was going to happen. After two decades at the Court, though, I've learned to listen to certain people and certain chatter, and I thought I had a pretty good handle on how it would come out." I then detailed how the opinion did come out. While protecting the details and not revealing much, I did want my constituents to know that I could gain extraordinary access to generally inaccessible and vital information about the Court's work.

At the Green family's invitation and their expense, my wife, Cheryl, and I traveled to Oklahoma City in October 2014 to attend a launch ceremony for the Museum of the Bible project. During an evening soiree at the Hobby Lobby corporation headquarters campus, I began a conversation with Steve Green, who signaled his parents standing nearby to join our conversation circle. As he did, Cheryl stepped away with her iPhone to take photos of the impromptu reunion, knowing I

would value them as a memento and for promotional purposes. Then, as Steve prompted me to re-tell the story of my disclosure of the case to him on the eve of the decision's announcement, Cheryl captured it in a sequence of frames. Finally, all three Greens thanked me for my supportive role in their case.

In my mind, our departure from Oklahoma City the next day marked the close of the *Hobby Lobby* episode. Faith and Action in the Nation's Capital continued its standard set of programs for the next two years, with Operation Higher Court as a component. By then, I was in regular conversation with a different group of collegial interlocutors who challenged me to look differently at the social and political views I had held for three decades. After reflecting on my doctoral work from 2009 to 2012, examining American evangelicalism's politicization, I came to see my pro-life, pro-traditional family, and pro-religious liberty activism through different interpretative lenses. Reconsidering past experiences with individuals who had chosen to end their pregnancies and comparing them with the contemporary accounts of others with whom I was working on various projects left me with a less certain and more nuanced view of abortion and its attendant public policies. In this same period, I became the subject of a documentary film investigating the attitudes of American evangelical church leaders toward gun ownership and related public policy. In the course of that production, I was asked several times in different ways whether being pro-gun was pro-life. These spiritual and intellectual inquiries and exercises left me with a different opinion on complex moral questions like abortion. The 2015 release of the Emmy Award-winning film Armor of Light began my public separation from the ideological circles I had inhabited for most of my adult life.

In November 2016, I was working with a ghostwriter to produce a memoir for HarperCollins Publishers. In it, I recounted three significant conversions that have shaped my formation: My initial conversion from nominal Judaism to belief in the Jesus of the Sermon on the Mount, who cared for the poor, the marginalized, and the oppressed; from a simple faith to a highly politicized one that produced the kind of activism I carried out on sidewalks in front of abortion clinics, and later inside Capitol Hill federal buildings using moral suasion; and finally a return to following Jesus as the paragon of loving God and neighbor. The latter came principally through reading the body of literature by and about Dietrich Bonhoeffer.

While working on my memoir project, I composed a journal-like entry for my ghostwriter, Marianne Szegedymazak. In it, I referenced the leak of the *Hobby Lobby* decision, telling her on November 16, 2016, "Word of the decision in the much-anticipated, highly media-monitored case was leaked to me through back channels at the Court days before it was to be announced--something that has rarely happened in American history." I later instructed Ms. Szegedymazak not to include the leak or any other sensitive material about the Court in the final manuscript. I feared such revelations would compromise court personnel, embarrass our stealth missionaries, and damage relationships I valued at the Supreme Court Historical Society.

I mentioned the leak again in either late 2016 or early 2017 when I recounted it to a consultant who was profiling prospective major donors for The Dietrich Bonhoeffer Institute. The Green family was on the prospecting list. The profiling included identifying unusual experiences with the prospects that could become the basis for a personal appeal for their significant support. The consultant I spoke to wishes to remain anonymous out of concern for his other clients, but he told a New York Times reporter and me that he vividly remembers my account of the *Hobby Lobby* leak because it fit so perfectly in his wheelhouse as a fundraiser, it had all the elements of a good prospect, including a philanthropic billionaire-class family, a prominent American public institution, and a unique benefit extended to the prospective donor.

I was pursuing the development of the new entity because I felt my days as an influential conservative activist were quickly and appropriately coming to an end and that I could no longer lead my old organization with integrity. I expressed this to my board of directors, who agreed with my plan to sunset Faith and Action in the Nation's Capital and its various programs, including Operation Higher Court. I began a search for an acquisition partner interested in continuing the premier programs that Faith and Action's 50,000 donors had supported for some 25 years. In 2018, Faith and Action in the Nation’s Capital suspended all programming, and in 2019 Liberty Counsel of Orlando, Florida, assumed two of Faith and Action's principal employees, the majority of our programs and organs of communication, and took possession of our property on 2nd Street, NE, across the street from the Supreme Court. As a result, I resigned as Lead Missionary and assumed the full-time presidency of The Dietrich Bonhoeffer Institute.

Since we closed on the Capitol Hill property in 2019 until now, I have had no contact with Liberty Counsel or Faith and Liberty, the program they operate from Faith and Action's old headquarters.

The *Hobby Lobby* episode faded in my memory while building the Bonhoeffer Institute, authoring articles and opinion pieces, and managing major life events, including the arrival of a first grandchild. Then, on May 2, 2022, the Capitol Hill-based journal Politico published a leaked draft opinion in the *Dobbs v. Jackson Women's Health Organization* indicating Justice Samuel Alito as author and a presumed majority of the justices ready to overturn *Roe v. Wade*. I was as shocked as many other court observers, knowing how difficult it was to manage a verbal leak like the one I was involved with in the *Hobby Lobby* matter, as compared to this leak of an actual draft document. Still, I initially thought my account was no longer relevant due to the passage of time and kept any conversation about it to myself and my closest circle of conversation partners.

Then, in the first week of July, writer Kara Voght of Rolling Stone magazine contacted me. She told me she was on assignment at the Court and overheard my former associate at Faith and Action, Peggy Nienaber, lately of Faith and Liberty and working similarly to how she had during her years in my employ, talking to someone on a mobile device and indicating she prayed with Justices inside the Supreme Court. Ms. Voght asked me what I knew about Peggy's claim. I confirmed that it was true, at least during the years Peggy was active with me at the Court, but I deliberately did not speak about the Hobby Lobby leak. Instead, I wrote a critical reflection on both Operation Higher Court and the related *Hobby Lobby* leak. I considered either posting the essay to my blog at revrobschenck.com or submitting it to a major journal as an OpEd. However, within a few days, I decided to place a hold on my plans to publish anything about Operation Higher Court and, most especially, the leak. Subsequently, I shared my piece with two friends I thought could offer sound advice on whether there was any redemptive value in my reporting the previous *Hobby Lobby* leak. Shortly afterward, I received calls from two reporters from Politico and the New York Times seeking confirmation on my claims about the *Hobby Lobby* leak. I spoke to both individuals off the record, explaining that I did not want to publicize the matter but preferred to keep it private.

I then revived an unfinished letter to Chief Justice John Roberts that I had drafted a month earlier. In it, I detailed the *Hobby Lobby* leak and suggested it may have a bearing on his investigation of the *Dobbs* leak. When I started writing it, foremost on my mind was the possibility of a clerk or other employee unfairly taking the blame for the *Dobbs* episode and suffering draconian punishment. Yet, inequitably, a Justice would face no such consequence for a similar breach. I completed the letter in early July and mailed it on or about July 7. While I waited for a response to my letter, my concerns about the implications of both leaks grew.

At the end of my internal deliberations, and in the absence of a response to my letter to the Chief Justice, I decided to go public. I resolved it was in the best interests of the country, the Court, and the integrity of Christian work in Washington to tell what I knew of the leak and my activities related to Operation Higher Court. I concluded it would be much better to work exclusively with one reputable journal that could tell the whole story accurately than to discount it by spreading it across multiple platforms. The result was the story published by the New York Times on November 19, 2022. I stand by all facts I gave to authors Jodi Kantor and Jo Becker, and how they reported them with one caveat. I only take issue with how the story characterizes the aggregate amount of Faith and Action's annual revenues between 2000-2018 as "more than $30 million." The total amount, spread across that period, equates to an average of $1.7 million per year, a relatively modest amount on which to operate a Washington-based organization on the scale of Faith and Action. Each of those years, Faith and Action operated a staff of five employees, a 2000-square-foot fully maintained century-old facility, several significant public events, fundraising and communications platforms for 50,000 active donors, and an average of three million paper and digital contacts, not to mention occasional staff travel, frequent guest entertainment costs, and fees related to state and federal regulatory compliance, accounting, legal, and auditing services. We were proud of how far we could stretch a donor dollar and were always chasing the next donation so we could meet the next month’s expenses.

At my age and station in life, and after a nearly 13-year spiritual, intellectual, and relational journey of self-examination, self-doubt, and sometimes painful reflection and even regret, I have come to see myself as a penitent pilgrim. After a 35-year sojourn inside the world of highly politicized religion, a great deal of which dismissed the deepest needs, real circumstances, and

both invisible and visible human suffering, I have recalibrated my understanding of what constitutes true religion. One translation of a passage in what was one of the most highly contested additions to the New Testament canon, the Letter of James, admonishes, “Pure and genuine religion in the sight of God the Father means caring for orphans and widows in their distress and refusing to let the world corrupt you.” (James 1:27 ASV) James also warns, “For if anyone is a hearer of the word and not a doer, he is like a man who looks at his natural face in a mirror; for once he has looked at himself and gone away, he has immediately forgotten what kind of person he was.” (James 1:23 NASB) God-willing, this last third of my life will be a time for me to concentrate on practicing pure and genuine religion, and to eschew the sanctimonious certitude and callous judgement and exclusion of others that I did too much of for too long. I humbly apologize to those on this committee, and the members of the Court, and those among its employees, as well as others at the Supreme Court Historical Society, and in other places that I have failed in this regard. Most of all, I beg the pardon of Gayle and Don Wright, and the other stealth missionaries for whom I did not always model the Jesus who saved us all. Amen.

Chair NADLER. Thank you, Reverend Schenck.

Professor Fredrickson, you are now recognized for five minutes.

TESTIMONY OF CAROLINE FREDRICKSON

Ms. FREDRICKSON. Thank you, Mr. Chair, and thank you to the Committee for the opportunity to appear before you today in these very important hearings.

Today we're here to discuss whether and how Congress can address the perception and reality of ethics violations and conflicts of interest among Supreme Court Justices.

The Constitution says very little about the courts in Article III and critically leaves much of the detail to Congress to fill in.

Up until this point, however, Congress has not exercised this power to impose enforceable ethics obligations on the Supreme Court, although it has done so for the lower Federal courts.

For a variety of reasons, including the perception of inappropriate political and ethical behavior, critics have suggested that the Supreme Court too must have a code of conduct that would mandate transparency and accountability and require recusal in cases where there is an actual or potential conflict of interest.

Some believe that these perceptions have led to an historic drop in public confidence in the Supreme Court. Currently, only 16 percent of adults believe the Justices do a good or excellent job of avoiding imposing their personal political views in their decisions.

Currently, the Justices are the only Members of the Article III Federal Judiciary not subject to a written code of conduct. Since 1973, other judges have been required to adhere to a code that was drafted and has been revised by the United States Judicial Conference.

Beyond the symbolic value of the Court publicly stating its commitment to ethics through a written code, having something transparent and public promotes accountability and allows the public to assess whether the Court is holding itself to an appropriate standard.

Since the Court has failed to act, Congress can step in to enact a code for the Supreme Court, either by directing the Court to draft one, applying the current one to the Justices, or by writing a code itself.

This Committee has chosen the first option. On May 11, the House Judiciary Committee passed the Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R. 7647, which would require the Supreme Court to create a code of conduct that would apply to Justices and their employees, ensuring that Justices cannot pick and choose their ethical obligations without being bound by a single uniform code.

The bill contains the following provisions among others: A code of conduct; disclosure standards for gifts, travel, and income received by the Justices; mandatory recusal in cases where a party has lobbied or spent significant sums regarding a Justice or judge's confirmation, and when a party has given gifts, travel, and/or income to a Justice or family members within six years of case assignment; a requirement that Justices be fully aware of family interests that could be significantly affected by cases before them;

and a requirement for the Court to adopt a mechanism to review a recusal motion and post online summary explanations.

As Chair Nadler stated at the time of Committee passage, the Supreme Court is one of our Nation's most vital institutions, and its fidelity to equal and impartial justice, as well as the public's faith in the integrity of the Judiciary, are foundational to maintaining the Rule of Law.

The Brennan Center for Justice, where I am a senior fellow, has urged passage of this law, as have many other organizations dedicated to an independent Judiciary and impartial justice.

On May 13, 2022, President Biden signed the Courthouse Ethics and Transparency Act. That law updated the Ethics in Government Act of 1978 to require online posting by Federal judges of annual financial disclosures within 90 days of the deadline, prompted by a *Wall Street Journal* story detailing how many judges had, in fact, flouted the act.

While the Courthouse Ethics Act will help enormously in making the Federal Judiciary more transparent and accountable, it does not go far enough, and that is why this Committee's Bill, H.R. 7647, remains essential.

A bedrock aspect of Rule of Law in a democracy is an independent Judiciary. Chief Justice Roberts underscored this vital need when he wrote to the Nation's Federal judges "to reflect on our duty to judge without fear or favor, deciding each matter with humility, integrity, and dispatch." He called on them, quote, "to resolve to do our best to maintain the public's trust that we are faithfully discharging our solemn obligation to equal justice under law."

There would be no better way to maintain—or perhaps, unfortunately, to regain—that public trust than embracing the call for a code of conduct and showing the American people that the Court is indeed dispensing equal justice under law.

Thank you, Mr. Chair.

[The statement of Ms. Fredrickson follows:]

TESTIMONY OF CAROLINE FREDRICKSON
BEFORE THE COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
DECEMBER 8, 2022

Thank you very much for the opportunity to appear before you in these hearings on Supreme Court ethics. My name is Caroline Fredrickson. I am a Visiting Professor from Practice at Georgetown Law and a Senior Fellow at the Brennan Center for Justice. Prior to joining the Law School, I was President of the American Constitution Society. In all these positions, I have written and spoken on many legal and constitutional issues, including judicial ethics. Prior to joining ACS, I served as the Director of the ACLU's Washington Legislative Office. I've also served as the Chief of Staff to Senator Maria Cantwell of Washington, Deputy Chief of Staff to then-Senate Democratic Leader Tom Daschle of South Dakota, and Special Assistant to the President for Legislative Affairs.

I. Addressing the Appearance and Reality of Supreme Court Ethics Violations

Today we are here to discuss whether and how Congress can address the perception and reality of ethics violations and conflicts of interest among Supreme Court justices. Article III of the United States Constitution states "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Constitution, thus, actually says very little about the courts and, critically, leaves much of the detail to Congress to fill in. Up until this point, Congress has not exercised this power to impose enforceable ethics obligations on the Supreme Court, although it has done so for the lower federal courts.

For a variety of reasons, including the perception of inappropriate political and ethical behavior, critics have suggested that the Supreme Court too must have a code of conduct that would mandate transparency and accountability and require recusal in cases where there is an actual or potential conflict of interest. Some believe these perceptions have led to an historic drop in public confidence in the Supreme Court. Currently, only 16 percent of adults believe the

justices do a good or excellent job of avoiding imposing their personal political views in their decisions.[i]

Currently, the Justices of the U.S. Supreme Court are the only members of the Article III federal judiciary not subject to a written code of conduct. Since 1973, Article III judges have been required to adhere to a code that was drafted and has been revised by the United States Judicial Conference. That Code, however, does not apply to the Justices of the Supreme Court nor do the complaint and disciplinary procedures that cover other Article III judges. Under the Judicial Conduct and Disability Act of 1980, any individual may bring a complaint against a federal judge if the judge "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or the judge "is unable to discharge all the duties of office by reason of mental or physical disability."[ii] Ethics violations may be the subject of a complaint.[iii] Although Justices by law must recuse themselves in certain situations, as must lower federal court judges, there is no review of such decisions by the Justices.

Chief Justice Roberts, in response to critics, stated in 2011 that "All Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since . . . the Code 'is designed to provide guidance to judges.'"[iv] More recently, Justice Elena Kagan reiterated this position in a 2019 appropriations hearing.

Such claims, however, have been treated skeptically by many observers, particularly in light of events in recent years and months. First, in May, 2022, a draft of the *Dobbs* opinion overturning *Roe v. Wade* was leaked to the press. And this November, a story about another alleged leak, involving the 2014 *Hobby Lobby* case, appeared in *The New York Times* along with a description of efforts to influence the Justices to rule against reproductive rights. Critics have also questioned Justice Clarence Thomas's refusal to recuse himself without explanation from hearing cases involving efforts to overturn the 2020 election in light of his wife's involvement in such efforts.[v] But even prior to the 2020 election cases and the leaks, some justices have seemed to violate the code's provisions by attending fundraising dinners for outside

organizations or by making critical comments about individuals running for office, among other examples.[vi] As a result, fewer people believe in the impartiality of the Supreme Court and calls for a written code are growing louder. Beyond the symbolic value of the Court publicly stating its commitment to ethics through a written code, having something transparent and public promotes accountability and allows the public to assess whether the court is holding itself to an appropriate standard. As Alexander Hamilton wrote in Federalist 78, the judiciary, with "no influence over either the sword or the purse," is the "least dangerous branch"[vii] and thus depends on public confidence to enforce its rulings – a loss of respect for its impartiality raises great dangers in a democracy.

II. Reform Proposals

These concerns were among those that prompted President Joseph R. Biden to issue an April 9, 2021 executive order establishing a Commission on the Supreme Court of the United States. I served on this Commission. The Order charged the Commission with producing a report for the President to address three sets of questions. First, the Report was to include "[a]n account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and about the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court."[viii] Second, the Report was to examine the "historical background of other periods in the nation's history when the Supreme Court's role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform."[ix] Third, the Report was to provide an analysis of the principal arguments for and against particular proposals to reform the Supreme Court, "including an appraisal of [their] merits and legality."[x] In this last section, we examined ethics proposals. The Commission heard testimony on a broad range of issues, including the Court's lack of ethics rules and whether the Justices should also be subject to discipline for violating a code.

The Commission and others who have considered how to promote ethics as well as to address the public loss of confidence see at least three options: 1) the Court could voluntarily adopt a code; 2) Congress could require the Court to adopt a code for the Court; or 3) Congress could impose a code directly.[xi] There is no need for wholly novel ethics provisions because, under each approach, the code could be a near-carbon copy of the one that already applies to other federal judges. The Court or Congress, however, could also create a code that is tailored specifically to the Supreme Court.

In the past, the Court has moved to adopt similar types of rules. For example, in 1991, the Court imposed ethical regulations on the Justices that had been adopted by the Judicial Conference under the Ethics Reform Act of 1989.[xii] These rules apply to receive gifts, honoraria, and outside income. Similarly adopting the existing ethics code would enable it to go into effect immediately and would have the added benefit of mirroring the rules that apply to other federal judges. Of course, the Court could also create something tailored to the justices that could include rules applicable to the specific circumstances facing Justices, such as the fact that a recusal does not allow for the same replacement of one judge by another as can happen in the lower courts. Moreover, the public role of many Justices might indicate the need for different rules for speaking engagements and participation in organizational activities.[xiii] Alicia Bannon and Johanna Kalb, for example, in a paper for the Brennan Center for Justice, recommend that the Court "could adopt a more stringent rule prohibiting their ownership of individual stocks. This would substantially reduce the number of recusals based on financial conflicts of interest and therefore the number of cases decided by less than the full court."[xiv]

In the absence of Court action, Congress could enact a code for the Supreme Court either by directing the Judicial Conference to draft one or applying the current one to the Justices, or by writing a code itself. As legal ethics scholar Amanda Frost has noted, Congress has required the Court to abide by rules similar to a code of conduct[xv] such as swearing to "administer justice without respect to persons, and do equal right to the poor and to the rich . . . ."[xvi]

The bill contains the following provisions:

- A code of conduct for justices and employees created by the Court;
- Disclosure standards for gifts, travel and income received by the Justices that at a minimum, mirror congressional standards;
- Mandatory recusal in cases when a party has lobbied or spent significant sums either for or against a Justice or judges' confirmation and when a party has given gifts, travel and/or income to a Justice or judge or family members within six years of case assignment;
- A requirement that Justices and judges be fully aware of family financial interests and interests that could be significantly affected by cases before them;
- A requirement for Court to adopt a mechanism to review a recusal motion and post online summary explanations of recusal decisions;
- A requirement that the Court promulgate a rule for parties and amici to provide a list of lobbying or support for or against Justices' confirmation and gifts, income, or reimbursements made to the Justices within two years of case assignment; and
- An authorization for courts to block the filing of amicus briefs that would require a judge to recuse.

As Chairman Nadler stated at the time of Committee passage, "The Supreme Court is one of the nation's most vital institutions and its fidelity to equal and impartial justice, as well as the public's faith in the integrity of the judiciary, are foundational to maintaining the rule of law. We expect the justices of our nation's highest court to hold themselves to the highest standards of ethical conduct, but, in fact, their conduct too often falls below the standards that most other government officials are required to follow. This important legislation will address the growing and persistent ethics crisis at our nation's highest court by requiring the Supreme Court to promulgate an express code of conduct that would apply to both the justices and their employees."[xx] The Brennan Center for Justice, where I am a Senior Fellow, has urged its

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passage, as have many other organizations dedicated to an independent judiciary and impartial justice.

On May 13, 2022, President Biden signed the Courthouse Ethics and Transparency Act.[xxi] That law updated the Ethics in Government Act of 1978 to require online posting by federal judges of their annual financial disclosures within 90 days of the annual deadline -- basically by mid-August each year. In addition, judges and Justices must also file a report within 45 days of stock purchases and sales greater than $1,000, which also must be posted online. It is worth underscoring that this legislation was prompted by a Wall Street Journal article, based on several years of financial disclosure data collected by the Free Law Project, which showed that between 2010 and 2018 131 federal judges heard 685 cases despite having a financial stake in a party. Since the publication of the September 2021 report, the Journal updated these numbers, finding that there were in fact 152 judges who heard over 1,000 cases where they had financial interests. [xxii]

While the Courthouse Ethics Act will help enormously in making the federal judiciary more transparent and accountable, it does not go far enough. That is why this Committee's bill, H.R. 7647, remains essential.

IV. Conclusion

A bedrock aspect of rule of law in a democracy is an independent judiciary. This independence has importance both as a symbol of impartial justice and as the reality of the fair treatment of parties. Judicial independence is truly essential to justice for each of us because, as Alexander Hamilton said in Federalist 78, "[N]o man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today." Thus, all Americans benefit when judges – and especially Justices – are truly free of financial entanglements and indifferent to political or policy pressures as any one of us may need a fair and impartial court to hear a future claim. Chief Justice Roberts underscored this obligation when he wrote to the nation's federal judges to "reflect on our duty to judge without fear or favor, deciding each matter with humility, integrity, and dispatch" and calling on them "resolve to do our best to maintain the

public's trust that we are faithfully discharging our solemn obligation to equal justice under law."[xxiii]

There would be no better way to maintain – indeed, perhaps the better word is "regain" – that public trust than embracing the call for a code of conduct and showing the American people that the Court is indeed dispensing equal justice under law.

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[i] Alicia Bannon, *The Real Supreme Court News Isn't the Alleged Alito Leak,* The Brennan Center for Justice (Nov. 22, 2022), https://www.brennancenter.org/our-work/analysis-opinion/real-supreme-court-news-isnt-alleged-alito-leak.
[ii] 28 U.S.C. § 351(a).
[iii] *Id.* § 351(d).
[iv] 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.
[v] Glenn Fine, *The Supreme Court Needs Real Oversight,* The Atlantic (Dec. 5, 2022) https://www.theatlantic.com/ideas/archive/2022/12/supreme-court-ginni-thomas-january-6-ethics-oversight/672357/.
[vi] *See e.g.*, Andrew Rosenthal, *Step Right Up. Buy Dinner with a Justice*, N.Y. TIMES (Nov. 10, 2011, 4:30 PM), https://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice; Editorial Board, *Justice Ginsburg's Inappropriate Comments on Donald Trump*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/opinions/justice-ginsburgs-inappropriate-comments-on-donald-trump/2016/07/12/981df404-4862-11e6-bdb9-701687974517_story.html.
[vii] "The Federalist No. 78, [28 May 1788]," Founders Online, National Archives, https://founders.archives.gov/documents/Hamilton/01-04-02-0241.
[viii] Exec. Order No. 14023, 86 Fed. Reg. 19,569 (Apr. 14, 2021)
[ix] *Id*.
[x] *Id*.
[xi] This latter approach has raised more concerns regarding judicial independence. *See, e.g.,* Congressional Research Service, A Code of Conduct for the Supreme Court?" (April 6, 2022) https://sgp.fas.org/crs/misc/LSB10255.pdf.
[xii] 1991 SUPREME COURT INTERNAL ETHICS RESOLUTION 1 (1991), https://www.documentcloud.org/documents/296686-1991-supreme-court-internal-ethics-resolution.html.
[xiii] The Code of Conduct Committee of the Judicial Conference produced a draft opinion in 2020 recommending barring membership in the Federalist Society and the American Constitution Society under the code. COMM. ON CODES OF CONDUCT, ADVISORY OPINION NO. 117 (EXPOSURE DRAFT): JUDGES' INVOLVEMENT WITH THE AMERICAN CONSTITUTION SOCIETY, THE FEDERALIST SOCIETY, AND THE AMERICAN BAR ASSOCIATION (2020). Unfortunately, the Conference did not move forward on this proposal because of push-back from some members of the judiciary.
[xiv] Alicia Bannon and Johanna Kolb, *Supreme Court Ethics Reform* (Sept. 24, 2019), https://www.brennancenter.org/our-work/research-reports/supreme-court-ethics-reform.
[xv] Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 460-61 (2013).
[xvi] 28 U.S.C. § 453.
[xvii] 28 U.S.C. § 455(a).
[xviii] *Id.* § 455(1)-(4).
[xix] SUP. CT. R. 22(4).
[xx] House Judiciary Committee, Press Release, *House Judiciary Committee Passes Supreme Court Ethics Legislation* (May 11, 2022) https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4936.
[xxi] The White House Briefing Room, *Bills Signed* (May 13, 2022).https://www.whitehouse.gov/briefing-room/legislation/2022/05/13/bills-signed-s-812-and-s-3059/
[xxii] James V. Grimaldi, Coulter Jones and Joe Palazzolo, *131 Federal Judges Broke the Law,* The Wall Street Journal (Sept. 28, 2021) https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421.
[xxiii] Chief Justice John Roberts' 2019 Annual Report on the Federal Judiciary (Dec. 31, 2019) https://www.washingtonpost.com/context/read-chief-justice-john-g-roberts-annual-report-on-the-federal-judiciary/c35a62ae-9242-463c-ae70-9092c569ee8b/?itid=lk_inline_manual_3.

Chair NADLER. Thank you, Professor Fredrickson.

Mr. Paoletta, you are now recognized for five minutes.

TESTIMONY OF MARK R. PAOLETTA

Mr. PAOLETTA. Chair Nadler, Ranking Member Jordan, and Members of the Committee, thank you for this opportunity to testify.

Today's hearing is another in a concerted effort by congressional Democrats and their media allies to undermine the legitimacy of the Supreme Court now that the Court finally has a working originalist majority.

You don't like the opinions the Court is handing down, such as *Dobbs* and *Bruen*, so you are smearing the Court to encourage the public to question its legitimacy and rulings.

This year we have seen political attacks on Chief Justice Roberts, Justices Thomas, Barrett, Gorsuch, and now Justice Alito. This political assault on the Court is a dangerous game, as evidenced by the attempted assassination on Justice Kavanaugh and the need for round-the-clock security for the Justices.

My written statement addresses why the allegations against Justice Alito are unfounded, why the so-called Operation Higher Court is an absurd and classic grift, and why the Justices' conduct does not raise Judicial ethics concerns, and certainly not compared to the behavior of the late Justice Ruth Bader Ginsburg.

I want to focus the rest of my oral statement on Mr. Schenck's credibility, or lack thereof.

The Committee has convened a hearing to listen to allegations from a man who has built his entire career on deception and deceit. He admits to telling, in his words, a fair number of consequential lies. In fact, Mr. Schenck has been found by a Federal judge to have lied repeatedly under oath.

Mr. Schenck rewrites history to suit his needs. In fact, even today he says in his 2018 memoir, "Costly Grace," he wrote that Operation Higher Power's (sic) goal was to convert Justices to a pro-life position.

> We knew we were stuck with Members of the Federal bench. They were appointed for life. So why not convert them while in office?

In peddling his story today, Mr. Schenck says, according to *The New York Times*—and his testimony just now—his aim was not to change minds but rather to stiffen the resolve of the Court's conservatives in taking uncompromising stances that could eventually lead to the reversal of *Roe*.

He rewrites history now, and not his first time, that his conduct is getting more scrutiny.

To even describe this project is to mock it. He would send these stealth missionaries to persuade the Justices with Biblical references, supposedly strengthening their resolve. It has a somewhat Manchurian Candidate feel to it where covert agents say code words to "activate" a Justice.

Aside from the pure dishonesty of this campaign, does anyone actually believe that Justices Scalia, Thomas, and Alito need any converting or bucking up of their views of *Roe* v. *Wade* that it was wrongly decided and needed to be overturned?

Justices Thomas and Scalia had already voted to overturn *Roe* in *Casey* in 1992. Justice Alito, when he was at the Department of Justice, had written in 1985 that the Constitution, quote, "does not protect a right to an abortion," years before this Schenck operation began.

Mr. Schenck preyed on the good will of well-intentioned people who care about pro-life issues to contribute $30 million to him. Schenck's entire project was a grift and had zero impact on these Justices or any Justice in their votes or opinions.

Today's hearing concerns Mr. Schenck's dubious claim that in June 2014, during a dinner at their home, Justice Alito or his wife disclosed to two of Mr. Schenck's donors the result and author of the *Hobby Lobby* decision three weeks before it was issued by the Court.

Of course, Mr. Schenck was not at this dinner himself but rather claims he was told by one of the donors, the participant, the next day.

Gayle Wright, who was at this dinner, denies that Justice Alito or his wife ever disclosed this information. Justice Alito also denies that he or his wife disclosed such information. Mr. Schenck manipulates vague emails to spin a tail, but they don't prove anything.

We are left with relying on the credibility of Mr. Schenck's word, and he is not a reliable narrator of the truth. He wants us to believe he has changed and put that deceptive and lying self behind him.

While lots of people change their views on a topic, being a deceiver and a liar is a separate matter and changing that lying habit is harder.

Mr. Schenck is and always has been chasing the money. In the old days he conned wealthy conservative individuals. His new targets are progressive funders like Abigail Disney, who provided the seed money to start his new organization several years ago.

Based on his recent IRS filings, he's running low on revenue, so he's decided to amp up his stories from his dark days. We have seen this show before.

Committee Democrats and their allies argue that changes to the Court are necessary because recent polling—just heard this today—that show the Supreme Court's approval rating is at 40 percent.

Well, perhaps Congress should look in the mirror. What does it say that Congress' approval rating, under Democrat control, is only at 21 percent, with a 75 percent disapproval rating. Perhaps Congress should make changes to itself before meddling with the Supreme Court.

This Committee is so desperate to undermine the credibility of the Supreme Court and its conservative Justices that it showcases a con man with a known record of lying and deception and zero credibility. In this process the Committee is helping to smear an honorable Justice and a good man. These attacks must end.

I'd be happy to answer any questions.

[The statement of Mr. Paoletta follows:]

Mark R. Paoletta
Partner, Schaerr Jaffe LLP

Written Testimony

House Committee on the Judiciary

Hearing on
UNDUE INFLUENCE: "OPERATION HIGHER COURT" AND POLITICKING AT SCOTUS
December 8, 2022

Chairman Nadler, Ranking Member Jordan, and Members of the Committee,

Thank you for this opportunity to testify at today's hearing, "Undue Influence: 'Operation Higher Court' and Politicking at SCOTUS." Unfortunately, today's hearing is another in a concerted effort by Congressional Democrats and their media allies to undermine the legitimacy of the Supreme Court. As I testified in April at a Judiciary subcommittee hearing about Supreme Court ethics:

> If confidence in the Court is lacking, it is not due to issues of ethics or recusals. Rather, confidence in the Court is undermined by the coordinated campaign by some Democrats and their allies in the corporate media to smear conservative Justices with the *goal* of delegitimizing the Court. Some liberals fear that the Court finally has a working originalist majority that may sweep away several liberal precedents that cannot stand up to more rigorous constitutional scrutiny. And in this effort, Democrats and the media are trying to threaten, intimidate, destroy, and remove any Justice who may constitute this conservative working majority.

Since then, the Supreme Court has issued several significant decisions that have used an originalist approach to applying the Constitution, including the *Bruen* decision, which strengthened Second Amendment rights consistent with the original meaning of the Constitution, and the *Dobbs* opinion, which overturned *Roe v. Wade* in finding that there was not a constitutional right to abortion.

Today the committee has convened a hearing to listen to allegations from a man, Mr. Rob Schenck, who built his career on deception and deceit—he admits to telling "a fair number of consequential lies." As first reported in a November 19 *New York Times* story, Mr. Schenck claims that Justice Alito or his wife leaked the results and author of the *Hobby Lobby* decision to two of his allies three weeks before the decision was announced in 2014. There is no credible basis for this story, but it is consistent with a man who has an obsession with self-promotion and deception. A little background on this specific allegation is necessary.

Mr. Schenck's Allegation is Not Credible

According to Mr. Schenck, in 2000, he began his so-called "Operation Higher Court" project, which he claims was designed to lobby Justices to overturn *Roe v. Wade*. He claims he encouraged wealthy donors to his organization to contribute to the Supreme Court Historical Society in order to gain "access" to the Justices at various Court functions. He allegedly coached these donors on what to say to Justices to encourage them to vote a certain way.

Mr. Schenck claims that he was told by one of his donors (Gayle Wright) that she and her husband Donald would be dining with Justice Alito and his wife at the Justice's home on June 3, 2014. Mr. Schenck claims that she offered to try to find out the status of the then-pending *Hobby Lobby* case. Mrs. Wright emailed him the next day to say she had information she wanted to share.

Mr. Schenck claims he was told in an ensuing call with Mrs. Wright that she learned the result of the then-pending *Hobby Lobby* decision and that Justice Alito would write the majority opinion. But there are no contemporaneous notes of this call. In Mr. Schenck's letter to Chief Justice Roberts dated June 7, 2022 (but according to Mr. Schenck not sent until July 7th), he erroneously claims that Mrs. Wright's email confirmed that she had indeed gotten this information about the case. But that is wrong. All she wrote is, "Rob, if you want some interesting news please call. No emails." Mr. Schenck looks like he is playing fast and loose with the facts, particularly considering that *no one* else involved agrees with Mr. Schenck's retelling.

Indeed, the other party to the call—Gayle Wright—vehemently disputed Schenck's allegation. (Donald Wright passed away in 2020). According to a CNN story, "Wright vehemently denied Schenck's claims in an interview with CNN on Saturday. 'This whole thing is unbelievably misconstrued,' she said, adding that Alito would never have discussed a specific case and she would never have asked about one. 'Cases are never discussed, everybody knows that,' she said." She added that Schenck's allegations are "patently not true."

In responding to a question about the email she sent to Mr. Schenck, Mrs. Wright added that she might have wanted to share about her becoming ill at the dinner and Justice Alito himself driving her and her husband back to their hotel. To Mrs. Wright, this event could have felt like important news—that a Supreme Court Justice had driven her back to her hotel room. It's a story most would tell for the rest of their lives. In her response, Mrs. Wright does not even appear to confirm that she and Mr. Schenck spoke.

In the *New York Times* story, Mrs. Wright stated, "Being a friend or having a friendly relationship with a justice, you know that they don't ever tell you about cases. They aren't allowed to," Mrs. Wright said. "Nor would I ask. There has never been a time in all my years that a justice or a justice's spouse told me anything about a decision."

Justice Alito also denied the claim, issuing a statement that the "allegation that the Wrights were told the outcome of the decision in the *Hobby Lobby* case, or the authorship of the opinion of the Court, by me or my wife, is completely false." Justice Alito added in another statement: "My

wife and I became acquainted with the Wrights some years ago because of their strong support for the Supreme Court Historical Society, and since then, we have had a casual and purely social relationship. I never detected any effort on the part of the Wrights to obtain confidential information or to influence anything that I did in either an official or private capacity, and I would have strongly objected if they had done so."

So, what evidence do we have to support these far-fetched accusations? Some vague emails. The *Times* suggests that these emails show insider knowledge, but they prove nothing of the sort. The *Times* even has to admit that Schenck's story has some "gaps." In fact, any educated observer would suspect, given the composition of the Court and the questions asked at oral argument, that the Court would likely rule in Hobby Lobby's favor to protect its religious freedoms as an employer.

Mr. Schenck's cryptic comments to others at the time reveal a man who is boasting of some type of insider information where none exists. With denials from the actual participants to the call, we are left with the word of Mr. Schenck, who even a left-wing legal reporter described as an "unreliable whistleblower." But this wasn't Mr. Schenck's only delusion of grandeur.

Mr. Schenck Has a Record of Deception and Lies

When he explains "Operation Higher Court," its despicable nature is only outdone by its absurdity. Back in 2018, Mr. Schenck claims in his book *Costly Grace* that his project's goal was to "convert" Justices to a pro-life position:

> Many similar organizations to ours were lobbying Congress or working with the White House on policy, so Paul and I decided our ultimate goal would be to inform the consciences of those in the judicial branch. There were no pro-life groups directly approaching the judges and justices who shaped abortion law simply by their precedent-setting decisions. We knew we were stuck with members of the federal bench—they were appointed for life—so why not convert them while in office?

Now, in peddling this story, Mr. Schenck told the *New York Times*, "his aim was not to change minds, but rather to stiffen the resolve of the court's conservatives in taking uncompromising stances that could eventually lead to a reversal of *Roe*." Mr. Schenck backpedals on his outlandish goal that he would "convert" Justices now that his story is facing much more scrutiny.

Mr. Schenck is well-established as an unreliable narrator of the truth. In fact, a federal judge found that his testimony under oath was not truthful in a court proceeding. In a hearing on a contempt of court violation against his identical twin brother, Paul Schenck, for blocking access to an abortion clinic, a judge found:

> At the hearing, the Schencks insisted that they were not present at 1241 Main Street on December 29, 1990 as part of Project Rescue. Rather, they contend that

> they were there only to evangelize and preach. *The Court finds, however, that their testimony in this regard is not credible.*

Joint Appendix at *127AA-128AA, *Schenck v. Pro-Choice Network of Western New York* (1996) (No. 95-1065), 1996 WL 33414127 (emphasis added).

> First, *the Court finds the Schencks' inability to recollect the incident to be totally incredible*. The Court cannot believe that anybody would forget such an incident, especially after being shown a videotape of it. This was not a normal everyday occurrence, *even for the Schencks who testified that they are regularly involved in this type of activity*. It was something that anybody would remember, particularly after seeing the videotape.

Id. at *132AA (emphasis added).

Further, Mr. Schenck's entire "Operation Higher Court" was based on deception. He supposedly would send these "stealth missionaries" to Justices to say biblical phrases to strengthen the Justices' resolve to vote a certain way or write a strong opinion. To even describe this plan is to mock it—it almost has a somewhat *Manchurian Candidate* feel to it, where covert agents say certain code words to activate a Justice.

Aside from the pure dishonesty of encouraging people to covertly seek to persuade a Justice to vote a certain way and report back on various tidbits of information gathered in these discussions, does anyone actually believe that Justices Scalia, Thomas, or Alito needed any converting or bucking up on their views that *Roe v. Wade* was wrongly decided and needed to be overturned? Scalia and Thomas had already voted to strike *Roe* down in *Casey* in 1992, and Justice Alito had written in 1985 that the Constitution "does not protect a right to an abortion."

None of these men could be described as being faint of heart on these issues.

Mr. Schenck now attempts to disavow this ludicrous project in his desperate attempt to reinvent himself. He wants us to believe his story of this alleged leak, but he is someone who lies and deceives to further his own ends. And he is doing that here today. Mr. Schenck is not a credible witness. It is one thing to change your views on issues. It's another to lie in the service of those views. You don't get your credibility back just by changing sides.

Mr. Schenck is a con man, who preyed on the goodwill of well-intentioned people who cared about pro-life issues to get them to give him $30 million to engage in a project that had zero impact on these three Justices or any other Justice in their votes or opinions.

Double Standards on "Politicking" at the Supreme Court

The Democrats and their allies on the Left have driven a narrative that it is unethical or troubling for Justices to have dinners or interactions with individuals who believe passionately in an issue or who are wealthy donors to organizations. But contrary to the Democrats' and their media allies' current representations, these types of interactions are consistent with the judicial ethics

code, have been going on since the inception of the Court, and the Democrats and their media allies have been perfectly fine when liberal Justices do this.

For example, Justice Ruth Bader Ginsburg served on the board of the National Organization of Women (NOW) during the 1970s and on NOW's advisory group for legal education, but she never recused from the many cases in which NOW's sister organization, NOW Legal Defense and Education Fund (NOW LDEF), filed a brief.

Justice Ginsburg also allowed NOW LDEF to name a lecture series after her, and she in fact gave remarks in 2004 at the Justice Ruth Bader Ginsburg Distinguished Lectures Series on Women and the Law. Her remarks were delivered just two weeks after she ruled in favor of a position advocated by NOW LDEF in an amicus brief. In addition to being pro-abortion, NOW LDEF, according to one news report, "urged the high court to uphold affirmative action in University of Michigan cases, to endorse gay rights in a Texas sodomy case, and to preserve the Family Medical Leave Act in a Nevada case" in the year leading up to Justice Ginsburg's remarks. When asked about her speaking before a pro-abortion legal advocacy group, Ginsburg replied: "I think and thought and still think it's a lovely thing. Let the lecture speak for itself."

Ginsburg's closeness with this group also was demonstrated when she donated a signed copy of her *VMI* opinion (ordering VMI to admit women to the all-male school) to the NOW Political Action Committee to be auctioned at a NOW fundraiser in 1997. No other Justice in modern times has ever engaged in such conduct with a political and legal advocacy group, but there was very little concern expressed about this conduct, and certainly not by any Democrat or most of the liberal press.

I am not aware of a single Congressional Democrat raising concerns about her impartiality when she appeared before that advocacy group or helped raise funds for them. But Democrats and their media allies will weaponize allegations of impartiality against conservative Justices to undermine their integrity and the decisions they issue.

The Justices should not be sealed off from the outside world—that is neither good for the institution nor the law. Democrats, and in particular Senator Sheldon Whitehouse, and their media allies have criticized several Justices over the years for speaking at Federalist Society events, including the annual black-tie gala event. But liberal Justices, such as Justice Sonia Sotomayor, have spoken multiple times at the American Constitution Society, the liberal would-be counterpart to the Federalist Society. There is nothing wrong with this; in fact, the Judicial Code of Ethics expressly permits judges to "engage in extrajudicial activities, including law-related pursuits and . . . educational . . . activities, and may speak, write, lecture and teach on both law-related and nonlegal subjects."

Justices having meals and other interactions with Mr. Schenck's so-called "stealth missionaries" also is not problematic. It's far-fetched to believe that the Justices had any idea that these individuals had any ulterior motive and were reporting back information to Mr. Schenck, assuming this is even true. The Justices were being nice people. The Justices often spend time with groups of students, or outside groups in conference rooms or in their chambers at the Court, or at gatherings outside the Court, and meet hundreds of people each year in

settings like this. It is a thrill for many Americans, both wealthy and of modest means, to meet and engage in conversations at meetings, receptions, or dinners with the Justices.

Some of these relationships developed into a friendship at some level. Here, the Wrights had donated to an institution that helped support the mission of the Supreme Court as an institution and developed a social relationship with the Alitos. What's wrong with the Alitos sharing a meal with them? The relevant provision of the Judicial Conference Gift Regulations permits judges to accept "ordinary social hospitality and appropriate gifts from relatives and friends."

The Judicial Conference Gift Regulations also provide that "[a] judicial officer or employee is not permitted to accept a gift from anyone who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties."

The Wrights did not fall into any of these categories. They owned a real estate business in Ohio, did not have any business before the Court, and there was no reason to believe they ever would. A passionate interest in pro-life issues or any other cause or financially supporting the Supreme Court Historical Society does not constitute an interest for gift purposes or recusal.

But one left-wing reporter, Dahlia Lithwick of *Slate*, wrote, "The fact that some of the justices believe that 'casual' and 'social' relationships with lobbyists, activists, and interested parties who have business before the court are appropriate and acceptable is the problem, because it means they cannot be trusted to avoid such contacts." But these donors did *not* have business before the Court. They were not parties to any litigation. They may care passionately about an issue, but that is no reason for Justices to wall themselves off from such relationships. Most people have passionate beliefs. That hardly makes them anathema as dinner companions.

Does anyone seriously believe that these donors had any impact on the decisions or opinions of any of these Justices? Sure, it's troubling that Mr. Schenck appears to have been running a dishonest and useless grift, but he's the problem, not the Justices.

But the Democrats and their media allies are perfectly fine with Democrats accepting very luxurious hospitality from friends. President Biden and his family recently stayed at billionaire David Rubenstein's home in Nantucket. He did so last year too and did not disclose this on his financial disclosure form. President Obama and his family repeatedly stayed at a billionaire's estate on Martha's Vineyard during his Presidency and never listed his visit on his financial disclosure form. The law permits them to accept and not disclose these types of personal hospitality stays.

Are the Democrats and their allies worried that these Presidents are staying at billionaires' homes and meeting privately with their hosts, even though these individuals' companies undoubtedly have business before the executive branch? For the cynics out there, it's a lot easier for a President to dole out benefits to his hosts (setting up a key meeting, putting in a good word to his appointees about a rule) than it is for one of nine members of the Supreme Court to do anything to benefit a similarly situated person.

Ms. Lithwick also seems uninterested that NPR reporter Nina Totenberg, as set forth in her new book *Dinners with Ruth*, regularly "wined and dined" liberal Justice Ginsburg at her home on a weekly basis. Would anyone dispute that Ms. Totenberg has a professional interest in matters before the Court? In fact, her whole job is to cover the Justices, including Justice Ginsburg, and report on decisions. In Totenberg's book, she writes that "[t]hroughout [Ginsburg's] final years . . . [w]e shared so many small dinners together that Saturdays became 'reserved for Ruth.'" Ruth Ginsburg never listed any of these dinners on her financial disclosure form. That is entirely permissible, but Lithwick and the rest of the liberal press complaining about conservative Justices accepting hospitality reeks of hypocrisy. Rules for thee, not for me.

There are many more interesting items in this book, including Totenberg disclosing that Justice Ginsburg attended a Woman's National Democratic Club event where she was honored by this partisan group, and Totenberg emceed the event. I am certain that if Justice Amy Barrett were honored by the Woman's National Republican Club, it would be front-page news with ethics professors discussing that the Court is broken. I have read a fair bit about Justice Ginsburg's activities, and I am only learning now about this event in Ms. Totenberg's new book, and after Justice Ginsburg has passed.

The Left's further obsession with dark money or lack of transparency seems to end when a liberal Justice is involved. For example, according to news reports, on the day of Justice Jackson's investiture ceremony, the Library of Congress hosted a "massive event, featuring performances by several musicians and groups." In response to a request from Fox News, the Library issued a statement: "It is a private event and is privately funded." I have no reason to believe there is anything inappropriate about the funding for this event, but it does appear that the liberal media and Democrats on this Committee are not interested in finding out whether any funders for this event have business before the Court.

There is a similar double standard when it comes to leaks. There have been previous leaks of Supreme Court and other lower court decisions, but I am unaware of Congress holding a hearing on any of those leaks. The leak of the *Dobbs* decision was despicable and whoever leaked it should be held accountable. The *Roe v. Wade* decision was leaked by a clerk who worked for a Justice who voted in favor of *Roe*, and an article was published with the leaked results before the decision was issued.

During the confirmation of Justice Thomas, the contents of *Lamprecht v. FCC*, a then-pending D.C. Circuit case regarding a gender-based set-aside program for FCC licenses, were deliberately leaked in an effort to derail his confirmation. That leak was a despicable act, yet there was no outrage by any Democrat at the time, or desire to investigate this clearly unethical and partisan act. In fact, Democrats and their allies in the press used it to further attack Thomas.

When Congressional Democrats raise the fact that the Court's public approval is at its lowest point ever (40% approve, 58% disapprove), and therefore changes should be made to the Court, I recommend that Democrats look in the mirror. Congress' public approval under Democrat control is at a lowly 21% and its disapproval rating is a stunning 75%. Perhaps some changes should be made to Congress before Congress starts meddling with the Court.

This hearing is just another attempt to undermine the Supreme Court now that it is no longer acting as a super legislature imposing progressive policies. This hearing has allowed a non-credible witness to make baseless and malicious allegations and smear the good name of an honorable Justice and his wife. These attacks on the Court must end.

Chair NADLER. Thank you, Mr. Paoletta.

Mr. Sherman, you are now recognized for five minutes.

TESTIMONY OF DONALD K. SHERMAN

Mr. SHERMAN. Mr. Chair, Mr. Ranking Member, and Members of the Committee, thank you for the opportunity to appear before you to address the ongoing ethical crisis at the Supreme Court.

My organization, Citizens for Responsibility and Ethics in Washington, is a nonpartisan, nonprofit organization committed to ensuring ethics and transparency in government institutions.

I understand that this hearing has been called, in part, to discuss Reverend Schenck's shocking allegations of a leak and undue influence at the Supreme Court.

However, I want to be clear about the scope of my testimony today. I have no information about the veracity of Reverend Schenck's leak allegations and won't comment as to his character.

Here is what I do know. The Supreme Court is facing a grave threat to its legitimacy. Its opaque and unpredictable ethical honor system has failed. The Court is sliding from scandal to scandal with a response that suggests it is either too oblivious to understand this danger or too arrogant to address it.

Meanwhile, polls show public confidence in the Court at an all-time low.

As someone who has conducted numerous government ethics and oversight investigations, it's shocking to reflect on how few methods of transparency and accountability apply to the Federal courts.

Federal judges are unelected and afforded life tenure. Supreme Court Justices have no inspector general, are not subject to FOIA, lobbying disclosures, or visitor logs, and are exempt from the Federal criminal conflict of interest statute.

The Court lacks basic oversight mechanisms, including those applicable to lower court judges, and still refuses to create a binding code of conduct.

Ethics is not a partisan issue. America is losing faith in an institution whose credibility is its currency—and for good reason.

Justices across the ideological spectrum have participated in cases in which they have a financial interest or that directly impact their spouse. Influence seekers are cozying up to Justices at Black tie galas. Months after the *Dobbs* leak, there are now allegations that a Justice leaked details of a different opinion to wealthy activists recruited to buy access to him.

These scandals are just the latest examples of the Judiciary's larger systemic ethical failure. For decades, Justices have tested the limits of the system's weak norms. Activists and advocates, regardless of motivation or ideology, have exploited loopholes in the Court's ethics regime to obtain access to and potentially influence individual Justices.

That is the undisputed truth at the bottom of Reverend Schenck's allegations, that the Alitos became friends with the Wrights because Reverend Schenck recruited and groomed the Wrights to do so.

Although other Justices rejected similar overtures, the Supreme Court's nonexistent ethics regime could do nothing to stop it.

Even more troubling, neither this body, nor the public, know what rules or process exist to investigate Reverend Schenck's allegations, the *Dobbs* leak, or other ethics issues. The Court appears to have none, yet has chaffed against oversight from any other branch.

Imagine, for example, if in response to a congressional letter or IG inquiry an agency simply responded, "Well, the subjects of the investigation said they didn't do." Congress and the public would be rightly outraged.

That's essentially what the Court's lawyer told Chairs Whitehouse and Johnson last month. It's both obtuse and untenable.

In my written testimony, I outline several steps that Congress can take under the Constitution to help fix these ethics problems and rebuild public faith in the Court. I do not have the time to discuss all of them right now, so I will focus on the one that's most relevant to this hearing.

The Supreme Court needs a public, binding code of conduct. If the Court does not adopt its own, then Congress should require the Court to develop one. That code needs to have significant limitations on the types and amounts of gifts that Justices are allowed to accept and on their participation in outside events or speeches with politically aligned organizations, among others.

The code also needs to include a clear standard for recusal and require Justices to make those recusal determinations public.

One of the central lessons of Operation Higher Court is how easy it is for the wealthy and connected to buy access to our Justices.

Reasonable people can and should question how that access undermines the credibility of an institution tasked with providing equal justice under law.

Although Reverend Schenck is in the proverbial hot seat today, the arrogance and benign neglect of the Supreme Court are the actual reasons these scandals persist.

In closing, the people have given Supreme Court Justices the power to expand or take away our fundamental rights and even to decide matters of life and death. In exchange, we merely demand that members of the highest court be held to the highest ethical standards.

If the Court continues to reject those calls, then Congress must step in and mandate reform.

While the Supreme Court may interpret and even strike down our laws, it is not above them.

Thank you for the opportunity to testify on this important topic. I look forward to your questions.

[The statement of Mr. Sherman follows:]

TESTIMONY BEFORE
THE HOUSE COMMITTEE ON THE JUDICIARY
HEARING ON
"UNDUE INFLUENCE: OPERATION HIGHER COURT AND POLITICKING AT SCOTUS"

DECEMBER 8, 2022

DONALD K. SHERMAN
SENIOR VICE PRESIDENT AND CHIEF COUNSEL
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (CREW)

Mr. Chairman, Mr. Ranking Member, and members of the Committee, thank you for the opportunity to appear before you today to address the ongoing ethical crisis at the Supreme Court and throughout the federal judiciary. I commend the Committee for holding this hearing, and the Subcommittee on the Courts for holding related hearings this past April,[1] and in October of 2021.[2] They are all long overdue, but like many Americans, I am appalled, but not shocked that they are needed.

My organization, Citizens for Responsibility and Ethics in Washington (or CREW), is a non-partisan non-profit organization committed to ensuring the integrity of our government institutions and promoting ethical governance. I am here on behalf of CREW to encourage you to take action to fix the systemic problems that have given rise to the Supreme Court's crisis of institutional legitimacy.

Before I begin, I would like to applaud members of the Committee and Congress for passing into law the Courthouse Ethics and Transparency Act, which will bring more transparency and accountability to the current judicial ethics regime. And I would also like to thank the Committee for passing the important Supreme Court Ethics, Recusal, and Transparency Act. The Act would require the Court to develop a truly binding code of conduct, bringing transparency to a branch of government that has long operated in shadow. It is precisely the type of bold action necessary to rebuild public confidence in the Supreme Court.

I also want to be entirely clear about the scope of my testimony today. I understand that some of this hearing will include a discussion of Mr. Schenck's shocking allegations that Justice Alito leaked information about the Court's decision in *Burwell v. Hobby Lobby* to wealthy benefactors to Schenck's organization weeks before its public release, and his sadly familiar descriptions of

[1] Hearing on *Building Confidence in the Supreme Court Through Ethics and Recusal Reforms*, Before the Subcomm. On Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary, Apr. 27, 2022.
[2] Hearing on *Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules*, Before the Subcomm. On Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary, Oct. 26, 2021.

corruption, undue influence, and ethical malpractice at the Supreme Court.[3] I applaud him for coming forward: blowing the whistle on corruption at the highest levels of our government is a courageous act. With that said, I am not here to testify to the veracity of Mr. Schenck's allegations or the content of his character. Activists like Mr. Schenck do not take an oath to uphold and defend the United States Constitution. Supreme Court Justices do. My purpose here is to help ensure that the Supreme Court Justices, and if necessary, the members of this body, address the ethical loopholes and failures that have led to the many scandals besmirching the federal judiciary in recent years, including this most recent one.

As a result of the Court's derelict ethics regime, Mr. Schenck and his numerous wealthy confidants and benefactors were able to buy unparalleled access to the Supreme Court. It is not in dispute that Mr. Schenck, like many before and many since, was consciously able to exploit the Court's unspoken, unenforced, and functionally nonexistent ethics code. And it is not in dispute that Justices of the Supreme Court have been more than happy to accept trips and gifts from these wealthy activists, like dinners and hunting trips, some requiring cross-country travel.

I cannot say that these actions actually have an impact on the Justices' decision making or that they lead to different outcomes in close cases. But I can say that when people buy this level of access, it creates among the American people the powerful impression that they are buying influence. And that, in turn, feeds into the crises of confidence and legitimacy that threaten the very foundations of the judiciary.

As has the Court's cavalier and dismissive attitude towards these numerous and compounding scandals.[4] Last year, the *Wall Street Journal* revealed that the judiciary suffered from a systemic inability to track judges' financial conflicts of interest, a disastrous failure that had resulted in more than one hundred federal judges, and several Supreme Court Justices,[5] presiding over cases in which they had a personal financial interest in one of the parties.[6] Despite these explosive

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[3] Jodi Kantor and Jo Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach," *New York Times*, Nov. 19, 2022, https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html.

[4] Senator Sheldon Whitehouse (D-RI) and Rep. Hank Johnson (D-GA) noted that the Supreme Court's dismissive response to their letter, "did not substantively answer any of our questions" and was "an embodiment of the problems at the court around ethics issues." Jodi Kantor and Jo Becker, "Supreme Court Defends Alito After Breach Allegation," *New York Times*, Nov. 28, 2022, https://www.nytimes.com/2022/11/28/us/supreme-court-breach-alito.html. *See* Letter from Sen. Whitehouse and Rep. Johnson to Chief Justice Roberts and Ethan V. Torrey, Nov. 20, 2022, https://www.documentcloud.org/documents/23315037-2022-11-20-letter-to-scotus-operation-higher-court-follow-up .

[5] *See* "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests," *Fix The Court*, Dec. 5, 2022, https://fixthecourt.com/2022/12/recent-times-Justice-failed-recuse-despite-clear-conflict-interest/.

[6] *See* James V. Grimaldi, Coulter Jones and Joe Palazzolo, "131 Federal Judges Broke the Law by Hearing Cases Where They Had A Financial Interest," *Wall St. Journal*, Sep. 28, 2021, https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421; Coulter Jones, Joe Palazzolo and James V. Grimaldi, "Federal Judges or Their Brokers Traded

findings, Justice Roberts dismissed the scandal, blaming "[a] small number," of judges for "unintentional" and "isolated violations" that, he implied, had never affected "the judge's consideration of a case" or "actually financially benefited the judge."[7] Then, when Justice Clarence Thomas compromised the Court's independence and impartiality by deciding to hear cases in which his wife's conduct and communications were relevant to the dispute before the court, the Court was completely silent. And in response to Mr. Schenck's stunning allegations, the Court issued a terse and indifferent letter, saying "[t]here is nothing to suggest that Justice Alito's actions violated ethics standards."[8] The Court appears unwilling or unable to take the threat to its legitimacy seriously.

The willful blindness is disturbing. The judiciary is built on a foundation of public trust: it does not have the power of the purse or the authority to enforce the laws that it interprets. Credibility is its currency. If that falls away then the entire institution crumbles.

And that foundation of its credibility is eroding. Americans' trust and confidence in the entire judicial branch is at the lowest level since *Gallup* began polling the question in 1972.[9] That number has dropped twenty points in the last two years, just as these scandals exploded into public view. The same is true for Americans' confidence in the Supreme Court, which is also at the lowest level since *Gallup* began polling the question nearly 50 years ago.[10] And more Americans disapprove of the Supreme Court than at any time since polling began.[11]

The Court's recent ethical scandals are unforced errors that have helped decimate public confidence and trust in the federal judiciary. But these events and allegations were predictable, if not inevitable, given the Court's broken and in some cases nonexistent ethics system. The judicial ethics regime, such as it is, is a mishmash of vague, inadequate rules and loose self-monitoring. Some might say that the system has failed, but the reality is even worse: it was not designed to succeed.

In particular, the Supreme Court's unspoken ethical honor system would be untenable even if it wasn't clearly broken. As we have seen, Supreme Court Justices have repeatedly engaged in

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Stocks of Litigants During Cases," *Wall St. Journal*, Oct. 15, 2021, https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192.

[7] Chief Justice John G. Roberts, Jr., "2021 Year-End Report on Federal the Judiciary," Dec. 31, 2021, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[8] Ethan V. Torrey, Letter to Sen. Sheldon Whitehouse and Rep. Hank Johnson, Nov. 28, 2022, https://int.nyt.com/data/documenttools/letter-from-scotus-counsel/e3dd2fbf4eda3dd0/full.pdf.

[9] Jeffrey M. Jones, "Supreme Court Trust, Job Approval at Historical Lows," *Gallup*, Sep. 29, 2022, https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx.

[10] Jeffrey M. Jones, "Confidence in U.S. Supreme Court Sinks to Historic Low," *Gallup*, Jun. 23, 2022, https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

[11] Jeffrey M. Jones, "Approval of U.S. Supreme Court Down to 40%, A New Low," *Gallup*, Sep. 23, 2021, https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx.

conduct that causes the public to question their impartiality--from flying around the country for hunting trips and having expensive dinners with wealthy benefactors, to ruling on cases that directly involve their spouses or their financial interests.[12] Now, there are allegations that one of the Justices leaked details about a pending decision to activists and benefactors of the Court.[13]

One reason for these repeated scandals is that Supreme Court Justices are the arbiters of their own recusal decisions and their numerous other ethical obligations. Under the current rules, Justices routinely make inconsistent decisions regarding what type of financial or personal conflict requires recusal, or the propriety of accepting overtures, meeting requests, and other entreaties from activists like Mr. Schenck. Given the lack of transparency regarding the Justices' decisions, we don't even know the full scope of the problem.

Federal judges have the power to make and unmake our laws, to uphold or overturn our civil rights. The nine Justices of the Supreme Court issue final judgment on matters of life and death, educational equity, voting access, reproductive health, separation of powers, the rule of law and countless other issues that have significant impact on individual litigants, millions of Americans and the institutions of our society. Not only do we repose in them this awesome power, we also give them the singular privilege of lifetime tenure. In return, we demand only that they conduct themselves according to the standards of ethical conduct that their position of immense trust demands.

We have now witnessed a series of separate but related ethical failures that vividly demonstrate that the federal judiciary has not lived up to its end of the bargain. And to be entirely clear: these scandals are only the latest manifestation of the judicial ethics regime's systemic failure. For decades, judges and Justices have routinely and publicly tested the limits of the system's absurdly weak rules, while activists and advocates, regardless of motivation or ideology, have found troubling ways to exploit every gap they can find. And although Mr. Schenck, the architect of Operation Higher Court, whose efforts to directly influence Supreme Court Justices have been publicly known for more than two decades, is in the proverbial hot seat today, the arrogance of the Supreme Court and the benign neglect of Congress are why the highest court in the land has the lowest bar for ethical compliance and accountability. The threat to the legitimacy of the judiciary stems from the Supreme Court's total failure to live up to even the most basic ethical requirements.

Since the Supreme Court and the federal judiciary cannot or will not effectively regulate itself, Congress must step in. There are a number of actions, some of which are included in CREW's

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[12] *See* "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests," *Fix The Court*, Dec. 5, 2022, https://fixthecourt.com/2022/12/recent-times-Justice-failed-recuse-despite-clear-conflict-interest/.

[13] Jodi Kantor and Jo Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach," *New York Times*, Nov. 19, 2022, https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html.

statement for the record to Chairman Johnson's subcommittee in October 2021,[14] as well as my testimony to the Subcommittee in April,[15] that Congress can take under the Constitution to respond to this crisis--each of which will help rebuild public confidence in the judiciary. And while Congress cannot solve this problem by itself, these necessary steps can help to ensure that the judicial branch is held to the high ethical standard their positions demand.

1. Gifts

The failure at the heart of the current scandal is the extent to which wealthy people or well-funded activists are able to purchase access to Supreme Court Justices. The most obvious manifestation of this failure is the Court's attitude towards gifts, including, for example, the swanky meals and the stays at wealthy benefactors' vacation houses that were part of Mr. Schenck's lobbying campaigns.[16] Activists and organizations have been pushing the boundaries of the definition of gift for decades, a practice that is particularly evident in the 258 privately funded trips to places like Hawaii and Ireland that the late Justice Antonin Scalia took from 2004 to 2014.[17]

Despite having life tenure, Justices appear to be less constrained by ethical considerations than other government officials.[18] The absence of clear standards governing the solicitation or acceptance of gifts makes Justices particularly susceptible to conflicts of interest when they or their spouses accept expensive gifts. These concerns are pronounced when the gifts are coming

[14] Statement of Noah Bookbinder, Hearing on *Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules*, Before the Subcomm. On Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary, Oct. 26, 2021, https://www.citizensforethics.org/wp-content/uploads/2021/11/CREW-Statement-for-the-Record.pdf.

[15] Testimony of Donald Sherman, Hearing on *Building Confidence in the Supreme Court Through Ethics and Recusal Reforms*, Before the Subcomm. On Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary, Apr. 27, 2022, https://www.citizensforethics.org/wp-content/uploads/2022/04/Sherman-HJC-Oral-Testimony-Draft.pdf.

[16] Jodi Kantor and Jo Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach," *New York Times*, Nov. 19, 2022, https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html. *See also* Peter S. Canellos and Josh Gerstein, "'Operation Higher Court': Inside the religious right's efforts to wine and dine Supreme Court Justices," *Politico*, Jul. 8, 2022, https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739; *and* Kara Voght and Tim Dickinson, "SCOTUS Justices 'Prayed With' Her — Then Cited Her Bosses to End Roe," *Rolling Stone*, Jul. 6, 2022, https://www.rollingstone.com/politics/politics-features/roe-supreme-court-Justices-1378046/.

[17] Eric Lipton, "Scalia Took Dozens of Trips Funded by Private Sponsors," *New York Times*, Feb. 26, 2016, https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html?partner=rss&emc=rss&_r=0.

[18] Executive branch officials are cautioned by the *Standards for Ethical Conduct for Employees of the Executive Branch* to decline otherwise permissible gifts when a reasonable person would question their integrity or impartiality as a result of accepting the gift. 5 C.F.R. § 2635.201(b). For example, when considering whether to accept an otherwise permissible gift, executive branch officials are instructed to consider whether: the gift has a high market value; the timing of the gift creates the appearance that the donor is seeking to influence an official action; acceptance of the gift would provide the donor with significantly disproportionate access; and the gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. *Id.*

from donors whose interests are publicly aligned with certain political or ideological causes.[19] Under these circumstances, a reasonable person would question whether a Justice who is the recipient of expensive gifts has the requisite impartiality to hear cases that would impact the political or ideological causes supported by the donor.

Like lower court judges, Justices are barred by 5 U.S.C. § 7353 from soliciting or accepting gifts from anyone who is seeking official action from, or doing business before, their court, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's official duties.[20] However, Justices, unlike other federal judges, are not technically subject to the *Judicial Conference Regulations on Gifts*, which implement Section 7535.[21] Instead, members of the Court have agreed to follow the Judicial Conference gift regulations as a matter of internal practice,[22] with the Chief Justice being delegated administrative and enforcement authority under 5 U.S.C. § 7353 for officers and employees of the Supreme Court.[23] The Justices, like other federal judges, also consult a wide variety of other authorities to help them resolve specific ethical issues, such as judicial opinions, treatises, scholarly articles, and disciplinary decisions, and seek advice from the Court's Legal Office, from the Judicial Conference's Committee on Codes of Conduct, and from their colleagues.[24]

While most judges would be expected to recuse when an expensive gift would cause a reasonable person to question their impartiality in a case, Chief Justice John Roberts noted in his *2011 Annual Report on the Federal Judiciary* that some of the general principles for recusals that apply to lower court federal judges differ due to the unique circumstances of the Supreme Court.[25]

> Lower court judges can freely substitute for one another. If an appeals court or district court judge withdraws from a case, there is another federal judge who can serve in that

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[19] *See* Mike McIntire, "Friendship of Justice and Magnate Puts Focus on Ethics," *New York Times*, June 18, 2011, https://www.nytimes.com/2011/06/19/us/politics/19thomas.html. For example, one donor reportedly helped finance a library project dedicated to a Justice, presented him with a $19,000 Bible that belonged to Frederick Douglass, gave him a $6,484 bronze bust of Frederick Douglass, and reportedly provided $500,000 for his spouse to start a Tea Party-related group and also spent time together at gatherings of prominent Republicans and businesspeople at the donor's Adirondacks estate and his camp in East Texas. *Id.*; Richard A. Serrano and David G. Savage, "Justice Thomas Reports Wealth of Gifts," *Los Angeles Times*, Dec. 31, 2004, https://www.latimes.com/archives/la-xpm-2004-dec-31-na-gifts31-story.html; Justice Clarence Thomas, Public Financial Disclosure Report, part V, item 1, May 15, 2016, https://www.opensecrets.org/personal-finances/search?q=thomas&type=person.

[20] 5 U.S.C. § 7353 similarly applies to executive branch officials and members of Congress.

[21] Judicial Conference Regulations on Gifts, § 620.20.

[22] Joanna R. Lampe, "A Code of Conduct for the Supreme Court? Legal Questions and Considerations," Congressional Research Service, Apr. 6, 2022, https://sgp.fas.org/crs/misc/LSB10255.pdf.

[23] *Id.* at § 620.65.

[24] Chief Justice John G. Roberts, "2011 Year-End Report on the Federal Judiciary," Dec. 31, 2011, https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.

[25] 2011 Year-End Report on the Federal Judiciary.

> recused judge's place. But the Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership. A Justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case.[26]

Because of these heightened recusal concerns, the Supreme Court's current ethical framework does not adequately address conflicts of interest that arise from expensive gifts and must be made more rigorous. If, as Chief Justice Roberts argues, recusals for ethics reasons are disfavored, the obvious response should be to increase the level of mandatory ethical guidelines that Justices must meet in order to avoid potential conflict or recusal concerns. Instead, Chief Justice Roberts has ignored calls for stronger ethical rules. A Supreme Court Code of Conduct is necessary to clarify and make publicly available the standards for soliciting and accepting gifts, including those based on *bona fide* personal friendships.

In the absence of evidence that a Justice has a pre-existing personal friendship with a donor where they would exchange gifts of comparable value, a Supreme Court Code of Conduct should require the Justice to decline expensive gifts.

Specifically, the Code of Conduct should contain a clear bar on accepting expensive gifts to avoid any impression that a member of the Court could be unduly influenced in their decision making by donors motivated by a particular political or ideological cause. In the absence of a clear prohibition, the Supreme Court must mandate a broad standard of recusal to avoid compromising public trust in the integrity of the Court's decision-making process. Relatedly, the Code of Conduct should also enhance the Justices' public financial disclosure requirements, so that donations in support of a spouse's or dependent child's non-profit endeavors that give rise to similar potential conflicts of interest can be appropriately identified and addressed through recusal.[27]

2. Outside Speaking Engagements and Other Events

A Supreme Court Code of Conduct is also necessary to help address the potential ethical concerns that arise from Justices' participation in certain outside speaking engagements and other nonpublic events.[28] For example, recent reports have been critical of Justices who speak at

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[26] *Id.*

[27] Danny Hakim and Jo Becker, "The Long Crusade of Clarence and Ginni Thomas," *New York Times*, Feb. 22, 2022, https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html.

[28] In 2020, the Judicial Conference proposed, and ultimately failed to adopt, an ethics opinion that would have told federal judges that they could not be members of the American Constitution Society, the Federalist Society, or the American Bar Association, because membership in those organizations would, for example, "frustrate the public's trust in the integrity and independence of the judiciary." *See* https://eppc.org/wp-content/uploads/2020/01/Guide-Vol02B-Ch02-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf;

conferences that bar news media from covering their speeches, or who attend black-tie galas for partisan judicial activist organizations.[29] When these events are sponsored by organizations whose members are strongly associated with a particular ideology or prominently feature politicians of a particular political party rather than a spectrum of views,[30] they give rise to questions about preferential treatment, loss of impartiality, partisanship, and undue influence. Concerns about undue influence are further magnified when the organization is viewed as having close ties to and extraordinary influence over several members of the Supreme Court, including by getting them to "accept legal arguments that were previously outside the mainstream."[31]

Unfortunately, as Mr. Schenck's testimony helps demonstrate, questions of undue influence also occur when Justices attend high-dollar fundraising events for nonprofit institutions--and in particular the Supreme Court Historical Society. The Historical Society was a key element in Mr. Schenck's strategy, and he counseled his ideological and financial benefactors to become patrons.[32] In a 2008 briefing document he encouraged wealthy recruits attending the Historical Society's annual gala to "boldly approach" Justices, who, he said, would likely have their guard down and be more willing to engage.[33] It has become clear that dedicated and well-funded activists will use any opportunity to buy access to Justices; and it is also increasingly clear that this type of access-purchasing is not limited to events sponsored by partisan institutions. When the wealthy, the well-connected, and the well-funded purchase unparalleled access to the people who have the power to shape our country's laws, the public is left to wonder whether their ostensibly independent high court is truly operating independently. This is more evidence that a Supreme Court Code of Conduct is necessary to restore public confidence in the independence of the judiciary.

Since Justices are not subject to the *Code of Conduct for United States Judges*,[34] they are seemingly less constrained in terms of their outside speaking engagements and commitments. A Supreme Court Code of Conduct should establish common sense guidelines for minimizing conflict and appearance issues arising from outside speaking engagements. For example, Justices

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see also, https://www.abajournal.com/news/article/us-judiciary-drops-draft-opinion-telling-judges-they-cant-be-federalist-society-members. Recently, Justices Alito, Barrett, Gorsuch, and Kavanaugh, attended a Federalist Society gala where Justice Alito at various points praised the influence the society has had on the legal landscape, finally saying, "And boy, is your work needed today." *See* https://www.nbcnews.com/politics/supreme-court/abortion-ruling-author-alito-gets-standing-ovation-conservative-legal-rcna56696.

[29] Nathan T. Carrington and Logan Strother, "Gorsuch is scheduled to speak to the right-wing Federalist Society. Americans find such speeches inappropriate," *Washington Post*, Feb. 4, 2022, https://www.washingtonpost.com/politics/2022/02/04/gorsuch-federalist-society-republicans/.

[30] *Id.*

[31] *Id.*

[32] Jodi Kantor and Jo Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach," *New York Times*, Nov. 19, 2022, https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html.

[33] *Id.*

[34] Code of Conduct.

should be prohibited from being members of organizations with clear partisan political or judicial biases, be advised to avoid allegations of preferential treatment by making their speeches publicly available in real time, speaking at widely-attended events only when they are open to the press, and accepting speaking invitations from a variety of similarly-situated organizations to ensure balanced exposure to different legal issues and judicial philosophies. But, under no circumstances should a Justice accept speaking invitations from current litigants or those with a history of practicing before the Court.

A Supreme Court Code of Conduct must also take steps to limit the potential for, and the appearance of, undue influence that arises when individuals are allowed to purchase access to Justices. In particular, a Code of Conduct should, with limited exceptions, prohibit participation in events that sell access to the Justices to raise money. It should also help ensure that Justices avoid perceptions of partisan political endorsements by creating guidelines that would substantially limit or even prohibit Justices from participating in conferences or other public events that prominently feature politicians from a particular political party.

3. Recusal Transparency

A Supreme Court Code of Conduct should address the public's right to know when and why a Justice chooses to recuse or not to recuse from a case. In particular, a Court Code of Conduct needs to ensure that recusal decisions are made in writing and on the record, even if a Justice considers recusal but ultimately participates in the matter. Public confidence in the integrity of the courts is best served by recusal decisions that articulate why a Justice has decided to participate or not to participate in a matter. That transparency would have ripple effects: it would help establish precedent and consistency for recusal, and it would allow the public--and litigants before the Court--to understand the scope of a Justice's conflicts.

Additionally, a Code of Conduct should create clear and public rules explaining and implementing the federal disqualification statute, 28 U.S.C. § 455.

The Disqualification Statute: 28 U.S.C. § 455

Congress passed the governing statute for disqualification of a Justice, judge, or magistrate judge, 28 U.S.C. § 455, to require all federal judges, including members of the Supreme Court, to recuse themselves from any judicial proceedings in which their impartiality might reasonably be questioned.[35] In addition, a judge must recuse when he knows that his spouse has "any . . . interest that could be substantially affected by the outcome of the proceeding."[36]

[35] 28 U.S.C. § 455(a).
[36] 28 U.S.C. § 455(b)(4).

However, there is no way to enforce Section 455 at the Supreme Court: under the Court's current ethical framework, individual Justices decide for themselves whether recusal is warranted under Section 455.[37] Justices will often recuse from a case without any explanation--these nonpublic recusals reportedly occur in approximately 200 matters each year.[38] In fact, it is unclear if the other Justices are aware of the reasons for their colleagues' recusal deliberations or decisions. This lack of transparency harms individual litigants who expect their cases to have a fair hearing before the full court, and it harms the public's perception of the high court. Moreover, these nonpublic decisions don't just impact a single case: they leave the public to wonder whether there are other similar cases where the Justice should have recused--but chose not to.

For executive branch employees, who are subject to a similar recusal standard by virtue of the executive branch's standards of ethical conduct, the integrity of the agency's decision-making process is protected by requiring employees who are dealing with appearance issues to consult with an agency's ethics official.[39] In determining whether an employee should participate in a specific matter, the agency's ethics official weighs the appearance concerns against the interests of the Government in the employee's participation, while taking into account all relevant circumstances and a list of factors.[40]

All of this underscores the need for the Supreme Court to adopt a Code of Conduct with formal and transparent recusal processes.

In this regard, there are existing models used by the Supreme Court that may be instructive when considering processes to include in a Supreme Court Code of Conduct to help the Court preserve its impartiality.[41] In the absence of a similar process for members of the Court, Justices will continue to make these decisions for themselves on a seemingly ad hoc, opaque, and unregulated basis, and the Supreme Court will likely continue to be viewed by the public as largely unaccountable and increasingly "politicized."[42]

4. Spousal Conflicts of Interest

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[37] *See* Chief Justice John G. Roberts, "2011 Year-End Report on the Judiciary," Dec. 31, 2011, https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.
[38] https://fixthecourt.com/wp-content/uploads/2018/05/Recusal-report-2018-updated.pdf
[39] 5 C.F.R. § 2635.502.
[40] *Id.*
[41] For example, in 1991 the Court adopted a resolution that requires a Justice who "desires to receive compensation for teaching [to] obtain the prior approval of the Chief Justice. Should the Chief Justice deny approval, the request may be renewed to the Court and granted by it. If the Chief Justice desires to receive compensation for teaching, he must obtain the prior approval of the Court." U.S. Supreme Court Resolution, Jan. 18, 1991, https://www.citizensforethics.org/wp-content/uploads/2022/03/1991_Resolution.pdf.
[42] Jane Mayer, "Is Ginni Thomas a Threat to the Supreme Court," *New Yorker*, Jan. 31, 2022, https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court.

Recent news reports raise questions about Supreme Court Justices' impartiality and recusal obligations with respect to cases that affect their spouse's political interests and business clients and relate to their advocacy work.[43] In particular, Justice Clarence Thomas has failed to recuse from Supreme Court cases relating to the 2020 election, despite his spouse's active support of then-President Donald J. Trump's unprecedented efforts to overturn the 2020 election and communications with Trump administration officials and state officials about those efforts.[44] Justice Thomas's failure to recuse from cases concerning the 2020 election, and particularly from a matter involving White House communications related to it, not only undermined faith in the Supreme Court's impartiality, it also potentially violated his ethical obligations under 28 U.S.C. § 455.

Spousal Conflicts Arising from Financial Interests

Spousal conflicts are particularly hard to track and enforce because of loopholes in the Ethics in Government Act ("EIGA"). In particular, there are specific circumstances identified in Section 455, such as when a spouse has a financial interest in a subject matter in controversy or in a party to the proceeding,[45] that may never come to light in individual cases. Although EIGA establishes financial disclosure reporting requirements for the Justices and other judicial officers,[46] spousal conflicts of interest based on their clients or outside positions are difficult to identify under EIGA's current reporting regime.[47] Spousal outside positions and clients are not always required to be disclosed. For example, when spousal compensation passes through a limited liability company ("LLC") or similar legal entity, there is currently no requirement to disclose the client who generated the spousal earned income. Only the spouse's LLC or other business entity would need to be reported as the source of spousal earned income.[48] In contrast, if compensation is sent directly to the spouse without passing through an LLC or similar business entity, the client is required to be reported as a source of spousal earned income assuming the $1,000 reporting threshold is met.[49] In the latter case, potential spousal conflicts of interest can be more easily identified.

Spousal Conflicts Arising from Amicus Briefs

[43] Jane Mayer, "Is Ginni Thomas a Threat to the Supreme Court," *New Yorker*, Jan. 31, 2022, https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court; Ed Pilkington, "Who has more influence on supreme court: Clarence Thomas or his activist wife?," *Guardian*, Jan. 6, 2022, https://www.theguardian.com/law/2022/jan/28/clarence-thomas-supreme-court-affirmative-action-case-ginni-thomas
[44] *See* Letter to Chief Justice John G. Roberts, Jr. from Noah Bookbinder, Apr. 1, 2022, https://www.citizensforethics.org/legal-action/legal-complaints/thomas-must-recuse-supreme-court-needs-code-of-conduct/.
[45] 28 U.S.C. § 455 (b)(4).
[46] 5 U.S.C. app. § 101(f)(11).
[47] Spousal uncompensated outside positions are not required to be disclosed. Only spousal positions that result in earned income that exceeds the $1,000 reporting threshold is required to be disclosed. *See* 5 U.S.C. app. §102(e)(1)(A).
[48] 5 U.S.C. app. §102(e)(1)(A).
[49] 5 U.S.C. app. §102(e)(1)(A).

In more and more cases before the Court, third parties submit and Justices refer to amicus briefs that weigh in on controversial issues under consideration.[50] When the views expressed in an amicus brief or by a party cite to public statements or advocacy positions by a Justice's spouse, or when a spouse has ties to an entity that files an amicus brief, obvious questions arise about whether a Justice has the requisite impartiality or appearance of impartiality to participate in that case. For this reason, some spouses have chosen to step back from pursuing legal or advocacy work on controversial issues that will likely end up being decided in cases brought before the Court.[51] Jane Roberts, Chief Justice Roberts' wife, for example, left her lucrative career as a partner at an international law firm to join a legal recruiting business in order to avoid conflicts of interest when her husband was appointed to the Supreme Court.[52] The decision by a spouse to step back may come at a personal cost, however, and for that reason may not be the right choice for every individual. In every circumstance, the Justice must nevertheless assume primary responsibility for protecting the Court's impartiality and take appropriate measures to recuse from cases in which their impartiality could reasonably be questioned due to their spouse's advocacy work and affiliations. When questions about the Court's impartiality are at issue, recusal needs to be the Justices' default position rather than the exception.

For this reason, CREW supports legislative efforts to facilitate the creation of a Supreme Court Code of Conduct that would more fully address recusal requirements that stem from spousal business activities and political advocacy work. The Supreme Court Code of Conduct should also address these issues in the context of the rising use of amicus briefs.

In addition, CREW supports legislative efforts to enhance disclosure requirements so that conflicts of interest stemming from spousal activities can be more readily discerned. For example, these measures should require Justices to annually disclose on their public financial disclosure report their spouse's board and consulting positions and identify any clients from whom their spouse received compensation that exceeded $1,000. The reporting requirement should cover clients that make payments to the spouse's employer, LLC, or other business entity in return for personal services. To be fair, similar reporting requirements would need to be put in place for other public disclosure filers, including elected officials and presidential appointees confirmed by the Senate.

5. Financial Conflicts of Interest

[50] Mayer, *New Yorker*, Jan. 31, 2022.
[51] *Id.*
[52] https://www.abajournal.com/news/article/meet_jane_roberts_chief_Justices_spouse.

Last fall, the *Wall Street Journal* released the results of a sweeping investigation into financial conflicts of interest in the judiciary.[53] The results were stunning. The *Journal* found that at least 131 federal judges violated the law by hearing cases in which they had a financial interest in one of the parties. And 61 judges or their families actively traded shares in a party to an ongoing case. These revelations have caused a wave of appeals, some of which threaten to overturn decisions that could reach into the billions of dollars.[54] This is a practical disaster with individual and systemic implications, compounded by the apparent unwillingness of those at the top of the judicial branch to acknowledge it as such.[55]

The Supreme Court itself is also not immune from financial conflicts of interest. Since 2015, three sitting Justices participated in at least one case in which they had a material financial interest.[56] For example, in 2015, the recently retired Justice Stephen Breyer failed to recuse from a case involving a Federal Energy Regulatory Commission rulemaking in which he had an interest in one of the companies challenging the Commission's final rule.[57] His wife sold their $33,000 stake in the company, Johnson Controls Inc, the day after a journalist inquired about the apparent conflict. These types of conflicts, which occur across the ideological spectrum, unacceptably harm the public's faith in the Court's impartiality. And as long as Supreme Court Justices own individual securities, these conflicts will continue to occur.

With that in mind, there are two policies that can be adopted to stop financial conflicts of interest in the judiciary:

First, Congress should enact a blanket prohibition on all federal judges, their spouses, and their dependent children owning or trading any individual stocks or other financial instruments. This is the best and only comprehensive way that Congress can ensure that federal judges are not

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[53] James V. Grimaldi, Coulter Jones and Joe Palazzolo, "131 Judges Broke the Law by Hearing Cases Where They Had A Financial Interest," *Wall St. Journal*, Sep. 28, 2021, https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421; Coulter Jones, Joe Palazzolo and James V. Grimaldi, "Federal Judges or Their Brokers Traded Stocks of Litigants During Cases," *Wall St. Journal*, Oct. 15, 2021, https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192.

[54] James V. Grimaldi, Joe Palazzolo, and Coulter Jones, "Fallout From Judge's Financial Conflicts Spreads to Appeals Courts," *Wall St. Journal*, Mar. 1, 2022, https://www.wsj.com/articles/fallout-from-judges-financial-conflicts-spreads-to-appeals-courts-11646155384.

[55] Justice Roberts, for example, downplayed the *Journal*'s reporting in his yearly report on the federal judiciary. *See* Gabe Lezra, "Justice Roberts gets it wrong: federal judges' conflicts of interest threaten the entire judiciary," *CREW*, Jan. 2022, https://www.citizensforethics.org/news/analysis/Justice-roberts-gets-it-wrong-federal-judges-conflicts-of-interest-threaten-the-entire-judiciary/.

[56] *Id.*

[57] *Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, 577 U.S. ___ (2016). *See* Greg Stohr, "Supreme Court Justice Hears Case Unaware of Stock Conflict," *Bloomberg*, Oct. 15, 2015, https://www.bloomberg.com/news/articles/2015-10-16/u-s-supreme-court-Justice-hears-case-unaware-of-stock-conflict?sref=PvP0J8mX.

violating their duty to preside over cases as disinterested arbiters of law and fact. By imposing such a ban, Congress would limit the possibility for these conflicts of interest before any violation occurs. A prospective ban on owning or trading individual securities is preferable to a disciplinary rule because members of the federal judiciary are appointed for life, and are removable only for grave constitutional offenses. Impeachment is far too arcane and weighty to ever function as a true check on anything but the most egregious ethical failings.

This requirement would not mean that federal judges would need to take a vow of poverty to serve. There are many ways to invest money that don't come with similar conflict of interest concerns. Diversified mutual or index funds, which do not create such a risk, are Americans' most common investment, whereas only 14% of Americans own individual stocks.[58] Should judges and their close family members wish to continue to have investments in individual securities, they could place their assets in a qualified blind trust[59] and direct the trustee to divest from their current holdings and then reinvest the proceeds in individual stocks as the trustee sees fit.

The Supreme Court is the ultimate guardian of the rule of law in our republic, and the very appearance of a conflict of interest can undermine its credibility. Public confidence that the legal system is fair and impartial is critical to maintaining democratic governance. The framers of our constitution were so acutely aware of the necessity of public trust in our judiciary that they granted Supreme Court Justices lifetime tenure--a privilege that the Constitution grants exclusively to the judiciary.[60] As a result, Justices of the Supreme Court must hold themselves to the highest of ethical standards.

To avoid even the appearance of financial conflicts that might undermine the impartiality of the court and the validity of its judgments, a Supreme Court Code of Conduct should include a comprehensive ban on owning any individual stock, bond, commodity, or other similar financial instruments.

Second, Congress should apply the federal criminal conflict of interest statute, 18 U.S.C. § 208, to the Supreme Court and the entire federal judiciary. The criminal conflict of interest statute protects the public from those who would seek to exploit their position of public trust for private gain. Specifically, it bars executive branch employees from participating in "particular matter[s]" focused on the interests of a discrete and identifiable class of persons or identified parties. In the case of judges and Justices, Section 208 would apply to cases in which a judge or Justice has a

[58] Kim Parker and Richard Fry, "More than half of U.S. households have some investment in the stock market," *Pew Research*, Mar. 25, 2020, https://www.pewresearch.org/fact-tank/2020/03/25/more-than-half-of-u-s-households-have-some-investment-in-the-stock-market/.

[59] A "qualified blind trust" as generally defined in 5 C.F.R. § 2634.402(e).

[60] *See* Federalist 78 (Hamilton), "nothing will contribute so much as [lifetime tenure] to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."

financial interest in one of the parties based on their investment holdings. At present, there is no workable mechanism to hold judges and Justices accountable for violations of their ethical duties short of impeachment. Applying the criminal laws to police this type of conduct would serve as a powerful check on egregious ethical misconduct. The result of these changes would essentially be to "bind [federal judges] to substantially the same rules as the other two branches," as Ranking Member Issa put it during this Subcommittee's hearing in October.[61]

Justices are already required to recuse themselves from any cases in which they have a financial interest in a party to a proceeding.[62] And were an extension of Section 208 to the judiciary to be combined with a ban on ownership and trading of individual stocks and financial instruments, as we recommend, Justices would for only have to adhere to that simple, bright line rule to steer well clear of any trouble. That some federal judges have appeared to treat conflict of interest law as a suggestion rather than a rule is precisely the point: applying Section 208 would add teeth to this now toothless legal regime. The expansion would finally provide a procedural mechanism by which judges and Justices could be held accountable for egregious violations of their ethical duties. And it would also have the benefit of allowing judges and Justices who the public believes have violated their ethical duties to have their day in court.

6. Constitutional Concerns

Congress imposing recusal rules, or a Code of Conduct, on the Supreme Court does not raise serious separation of powers concerns.[63]

Based on its Article III powers, Congress has considerable control over the Supreme Court's structure and its jurisdiction. For example, under the Exceptions Clause of Article III, Congress is specifically empowered to alter the Supreme Court's appellate jurisdiction and even determine what types of cases the Court can and cannot hear.[64] Congress has changed the size of the

[61] October Hearing.
[62] 28 U.S.C. § 455.
[63] Joanna R. Lampe, "A Code of Conduct for the Supreme Court? Legal Questions and Considerations," Congressional Research Service, Apr. 6, 2022 ("Some observers have argued that imposing a code of conduct upon the Supreme Court would amount to an unconstitutional legislative usurpation of judicial authority. . . . On the other hand, some commentators emphasize the ways that Congress may validly act with respect to the Supreme Court, for example through its authority to impeach Justices and decide whether Justices are entitled to salary increases. By extension, according to this argument, requiring the Supreme Court to adopt a code of conduct would constitute a permissible exercise of Congress's authority.")
[64] U.S. Const. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.")

Supreme Court by statute on several occasions.[65] Congress also has the authority to raise Justices' salaries, and, in extraordinary cases, remove Justices via impeachment.[66]

Congress has already enacted legislation that imposes financial disclosure and recusal requirements and gift and outside earned income restrictions on Supreme Court Justices.[67] As Chief Justice Roberts noted, "the Court has never addressed whether Congress may impose those requirements on the Supreme Court," and the Justices "comply with those provisions."[68] CREW believes that imposing these and other ethical requirements on Supreme Court Justices is constitutional, appropriate, and necessary.

Finally, Congress has exercised its Constitutional authority to subject members of the Supreme Court to the nation's criminal laws. Though they interpret and sometimes strike down the law, Supreme Court Justices are not above it. Not only may Congress subject the Supreme Court to criminal laws writ large, Congress can and has subjected the Supreme Court to anti-corruption law: it is illegal for a Supreme Court Justice to take a bribe, for example.[69] In fact, bribery is a similar crime to conflicts of interest under Section 208: in both cases a public official is betraying the public trust in service of their own personal gain.

Conclusion

We are here today because of another serious scandal that has caused the public to once again question the Supreme Court's impartiality--and has consequently deepened the Court's catastrophic crisis of institutional legitimacy. This crisis is not the result of this scandal, or the many that came before it. It is the result of a broken and ineffective judicial ethics regime, a system that has been abused for decades by bad actors, the wealthy and well-connected. It is the result of the Supreme Court's failure, whether willful or not, to stop the abuse and ensure that the public would never question its status as a neutral arbiter of law and fact. This crisis is the foreseeable consequence of the Supreme Court's failure to develop even the most basic code of conduct for its Justices. When the powerful are not held to the highest ethical standards their positions demand, and consequently do not behave ethically, the public will eventually and inevitably question the legitimacy of their power.

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[65] U.S. Const. art. III; Caprice Roberts, "The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Law Resort," 57 Rutgers L. Rev. 107, 166 (June 4, 2005); Joanna R. Lampe, "Court Packing;: Legislative Control over the Size of the Supreme Court," Congressional Research Service, Dec. 14, 2020.
[66] U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.") See Lampe.
[67] Ethics in Government Act of 1978, 5 U.S.C. app. § 101(f)(10); § 109(10); 28 U.S.C. § 455. *See* also *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979) (rejecting a claim by a class of federal judges that the Ethics in Government Act's financial disclosure requirements were unconstitutional as applied to the federal judiciary).
[68] 2011 Year-End Report on the Judiciary.
[69] 18 U.S.C. § 201.

When I testified to the Subcommittee in April, I stressed the importance of Congressional action. Since then, new polling has shown that the crisis of public confidence has only deepened. So I wish to once again stress something that we at CREW have said many times: the Supreme Court has neither the power of the purse nor the authority to enforce the laws that it interprets. Credibility is its currency. And now, the Court's failure to ensure that Justices live up to their most basic ethical requirements is threatening the legitimacy of the entire judiciary.

Public service is a public trust. It is the standard to which we hold all our public servants, from the thousands of dedicated career employees of our federal bureaucracy to the Supreme Court Justices who protect, and sometimes take away, our most fundamental rights. And it is the basis of the bargain that we make with those in whom we repose power: we demand only that they conduct themselves according to the standards of ethical conduct that their position of trust demands. That is a bargain that the Supreme Court has been unwilling to uphold for a long time: we currently subject a low-level career civil servant to a higher standard of ethical conduct than we do the people who tell us whether or not we have the right to privacy, to bodily autonomy, and to vote. Service as a Justice on the United States Supreme Court is also a choice and a privilege. Meeting strict but common sense ethical standards is hardly an undue burden for the select few provided this privilege.

Since the Supreme Court will not hold itself to the highest ethical standards, Congress must step in. We have proposed various actions that you can take under the Constitution to respond to this crisis. Each of them will help address the central problem that you are tasked with solving: that public faith in the integrity of the Supreme Court--and the entire federal judiciary--is plummeting. And without your intervention, that downward spiral will result in a catastrophic loss of institutional legitimacy that has the potential to undermine the rule of law in the United States.

I look forward to answering your questions and working with the Committee moving forward.

Chair NADLER. Thank you very much.

Let me announce to my colleagues that there's a vote on the floor, but we'll keep going as long as we can, consonant with giving everybody a chance to vote, and then we'll reconvene.

I thank all the Witnesses for their testimony.

We'll now proceed under the five-minute rule with questions. I recognize myself for five minutes.

Mr. Sherman, the Executive and Legislative branches are subject to extensive ethics rules much more the Judicial Branch. In your opinion, have those worked? Why is the ease of access and ability to influence the Court, compared to Congress and the Executive Branch, so concerning?

Mr. SHERMAN. Thank you for the question.

While I certainly think that the Executive Branch and the congressional ethics regimes could be strengthened, I think they pale—the Supreme Court's ethics regime pales in comparison.

In fact, the Supreme Court doesn't even have to meet the ethical standards or have an ethical process consistent with what lower court judges have to abide by.

So, it is highly problematic and quite curious why the highest court in our land has the lowest ethical standards even as compared to other Federal judges.

Chair NADLER. Thank you.

Professor Fredrickson, can you tell us what specific prohibitions or guardrails you think must be included in any code which the Justices may adopt?

Ms. FREDRICKSON. Well, thank you for that question.

I think the guardrails that this Committee has included are very significant ones. I think limitations on the ability to accept gifts, very important disclosure rules, and recusal.

Recusal has to be something that actually really implies—applies more forcefully to the Justices, that is, there needs to be a policing mechanism that doesn't exist right now.

Right now, the Justices are the only judges in their own cause. They decide themselves whether to recuse, and there is no oversight mechanism of that.

The Court should be directed, as this Committee's bill would do, to develop its standard and a policing approach, where there would be some review by the Court as a whole.

Chair NADLER. Let me just ask you very quickly. If the Court didn't do that, do you think—would you think it proper for Congress to impose a code?

Ms. FREDRICKSON. I think it would be far more preferable were the Court to do it itself for many reasons, but I do believe that Congress could also do so.

Chair NADLER. Thank you.

Reverend Schenck, what was the purpose of working to embolden conservative Supreme Court Justices, especially when you suspected that they already agreed with you?

Mr. SCHENCK. Thank you, Mr. Chair.

We're all human beings, all cut from the same cord. If there's anything I've learned in 45 years of ordained ministry, it's that we all suffer similarly, we all have similar weaknesses.

When I arrived at the Supreme Court in the late 1990s, at least my fellow conservatives and I had convinced ourselves that the conservative members of the Court were beleaguered. They were disfavored. They were routinely maligned and insulted in the public arena. We thought they needed some shoring up.

We also were concerned that some of them had assured, in their testimony during a confirmation hearing, that *Roe* v. *Wade* was settled law and that maybe, just maybe, other forces could work to intimidate them from coming after *Roe*.

So, we wanted to create a circle of people around them that would encourage them, applaud them, literally thank God for them, and assure them of prayerful support, and by being present, indicate to them that there were many, many Americans who were behind them and hoped that they would render strong, unapologetic, unequivocal opinions that would support the positions important to us.

Chair NADLER. Thank you.

Briefly, can you describe the major differences you faced when conducting outreach to Members of Congress or the Executive Branch versus the Supreme Court? How did that factor into your organization shifting its attention to the Supreme Court?

Mr. SCHENCK. Yes. Well, of course with the other branches there were clear rules in place that limited the way one could interact with the representatives of those branches.

This body, in particular, because we were aware that there were limitations on gifts. For example, when you took someone out to dinner, you had to be careful who can pay for this, and when it came to honoraria for speaking engagements, and so forth.

None of that applied at the Supreme Court. We knew that there was a great deal of liberty and latitude there and made our operation at the Judicial Branch at that level much easier.

Chair NADLER. Thank you. My time is expired.

Mr. Steube.

Mr. STEUBE. Thank you, Mr. Chair. I yield my time to Chair Jordan.

Mr. JORDAN. I thank the gentleman.

Mr. Schenck, did Gayle Wright really tell you that?

Mr. SCHENCK. Yes.

Mr. JORDAN. Justice Alito said he didn't tell her. She said she didn't tell him. You're sure she told you.

Mr. SCHENCK. Absolutely.

Mr. JORDAN. Now, you wrote a book a couple years ago, is that right, 2018—

Mr. SCHENCK. Yes.

Mr. JORDAN. —you wrote a book?

Mr. SCHENCK. Yes.

Mr. JORDAN. I want to read a section from that book. It's the section where you relate you and your family were—attended oral arguments at the Court, you were there in the courtroom, and that directly involved your brother Paul, also a reverend. I just want to read this section. You said,

> With a single wrap of the gavel, Chief Justice William Rehnquist announced, "We'll hear argument first this morning in No. 95–1065, *Reverend Paul Schenck and Dwight Saunders* v. *Pro-Choice Network of Western New*

> *York*." Paul and I winked at each other, knowing we had made history with that "Reverend" in his name. It had been a minor victory when we persuaded the Court that "Reverend" should remain before Paul's name, even though we had been told repeatedly that legal briefs never included such titles.

You thought it was important that, obviously, based on what you said, that you thought it was important that the title "Reverend" be in front of Paul's name. Is that right?

Mr. SCHENCK. Correct.

Mr. JORDAN. Why was that?

Mr. SCHENCK. Because we saw it as a religious liberty matter and that this would make it clear that it fit in that category.

Mr. JORDAN. Did Chief Justice Rehnquist really say that the way I just read it from your book?

Mr. SCHENCK. I can't say that I remember that clearly.

Mr. JORDAN. Well, you're pretty darn specific here. You've got the number, Case No. 95–1065. The very next word says "Reverend" Paul Schenck. You made it a big deal, about it's the first time it's ever happened.

I'm just asking, did it really happen?

Mr. SCHENCK. I wish I could tell—I would have to go back and review that.

Mr. JORDAN. So, it may not have?

Mr. SCHENCK. Possibly not.

Mr. JORDAN. Why do you say possibly not? You were emphatic in your book.

Mr. SCHENCK. I would have to go back and—

Mr. JORDAN. Well, we did go back. We did go back. I got the transcript right here.

> Proceedings, 10:05 a.m., Chief Justice Rehnquist: "We'll hear argument first this morning in No. 95–1065, *Paul Schenck and Dwight Saunders* v. *Pro-Choice Network of Western New York*.

Did you hear it?

Mr. SCHENCK. I did.

Mr. JORDAN. Was there a word missing?

Mr. SCHENCK. Title, "Reverend."

Mr. JORDAN. Yeah. Wasn't in there.

In your book, you said it was a big deal, so much so, that you winked at your brother.

Did you wink at your brother?

Mr. SCHENCK. Yes.

Mr. JORDAN. What did you wink for if it wasn't in the title?

Mr. SCHENCK. Well, it was our case.

Mr. JORDAN. That's not—you said you winked because they included "Reverend" in the title and the transcript says Mr. Rehnquist didn't.

Mr. SCHENCK. Perhaps not.

Mr. JORDAN. Perhaps? Did the court reporter get it wrong? Did he say it and court reporter get it wrong?

Mr. SCHENCK. Well, then—

Mr. JORDAN. Well, we got the audio too. I want to play that for everyone to hear.

[Audio recording played.]

Mr. JORDAN. Reverend, did you hear that?

Mr. SCHENCK. I did.

Mr. JORDAN. Was there a word missing that's different from what you put in your book?

Mr. SCHENCK. A title, yes.

Mr. JORDAN. What was that title?

Mr. SCHENCK. Reverend.

Mr. JORDAN. "Reverend" was not there, right?

Did you wink at your brother?

Mr. SCHENCK. I think I did. In fact, I think I actually—

Mr. JORDAN. Oh, wow.

Mr. SCHENCK. —hooked him.

Mr. JORDAN. So, now you got more details. You got the key detail wrong, what you were writing about in your book, but now you remember an additional detail. You not only winked, but you also elbowed your brother.

Mr. SCHENCK. I think I did.

Mr. JORDAN. Even though the reason for the wink in your writing was the fact that "Reverend" was used in the title, something that never had been done. It wasn't used. We're supposed to believe you today. We're supposed to take your word over Justice Alito's word. We're supposed to take your word over a lady who gave you dollars, donated to your cause, Ms. Gayle Wright.

You're disparaging her name, Justice Alito's name, and the Court, and you have this, which obviously didn't happen. We got the transcript; we got the audio. You made it a big deal in your book.

One thing I've learned: People who mislead folks on small things mislead them on big things. You know what? You can lie in a book, it's not a crime. You can lie to *The New York Times*, that's not a crime.

When you come in front of Congress and you say things that are not true, you're not allowed to do that. You're not supposed to do that. We've seen it. You're not supposed to do that.

I yield back.

Mr. JOHNSON of Georgia. [Presiding.] The gentleman yields back. At this time the time has expired, and so I will therefore recognize myself for five minutes of questions.

Reverend Schenck, I've been in Congress now for 16 years, and never have I witnessed the kind of savage attack that has been levied against you today. I've never seen that or heard that happen before.

Mr. JORDAN. Will the gentleman yield?

Mr. JOHNSON of Georgia. No, I won't.

I'd like to know, sir, I mean, do you have any response to anything that Attorney Paoletta said about you?

Mr. SCHENCK. Yes. Couple of things. One is, I think he alluded to finding that I had made untruthful statements under oath, something like that.

In those days, I was a street activist, and these were—there were a number of criminal proceedings. At that time, we felt we were not—those of us who were activists—were not obligated to incriminate ourselves. It was up to others to prove their accusations against us.

I will say that, activists, like politicians, become hyperbolic. We use inflammatory language for effect.

At this season of my life, when the most important things to me are the love of my family, the hugs of my new grandchild, and really, probably the last third of my professional career—and maybe life—what matters to me is telling the truth, is speaking candidly.

Mr. JOHNSON of Georgia. Let me—

Mr. SCHENCK. That's what I've come here to do.

Mr. JOHNSON of Georgia. Thank you for that.

Let me just say that having looked through your background, having seen that you were born to a father who was Jewish, a mother who was Catholic, she converted to Judaism, but then as you got older, you converted to Christianity, took flack for it from the family, which was—later, they embraced you. You were a man who has stood on principle, even though I have disagreed with many of the positions that you have taken over the years. I don't think it can be said that you are a gentleman who lacks principle and character, and does what you believe and is truthful and honest. So, I want to thank you for being here today.

I want to ask you, what was the relationship between the Supreme Court Historical Society and your efforts with influencing Justices at the Supreme Court or at least bolstering them in their thinking?

Mr. SCHENCK. Mr. Chair, in 1999, my organization acquired a piece of property across the street from the Supreme Court which we thought would give us advantage in accessing the Court, and it did. At that time I discovered the existence of the Supreme Court Historical Society, in particular, that it sponsored an annual dinner inside the Court hosted by the Chief Justice, often attended by most of the other Associate Justices, and that one could join the Society and enjoy access to those events, which I did. I joined the Society, and it became an entry point for our work.

Mr. JOHNSON of Georgia. You actually had donors to raise money for the Supreme Court Historical Society. Is that correct?

Mr. SCHENCK. Yes. I encouraged our people to contribute generously.

Mr. JOHNSON of Georgia. Do you have any idea how much money you were able to raise for the Supreme Court Historical Society and what that money may have been used for?

Mr. SCHENCK. I never actually added it up, but it was considerable. It was certainly—

Mr. JOHNSON of Georgia. Over $1 million?

Mr. SCHENCK. It could have been.

Mr. JOHNSON of Georgia. Professor Fredrickson, can you tell me how my bill, the Supreme Court Ethics Recusal and Transparency Act, would potentially prevent or at least root out influence campaigns like the one that Reverend Schenck has described?

Ms. FREDRICKSON. Yes. Thank you, Mr. Johnson. Thank you for your very fine work on this legislation.

A couple of obvious ways. The disclosure standards for gifts, travel, and income would go to the private dinners and the travel that was described by Reverend Schenck, a mandatory recusal with a policing mechanism for the Court itself to review recusal, motions. I think those things would go very much, both to potentially the

reality of conflicts of interest, but certainly the perception that so many people have that there are ethics problems on the Supreme Court.

Mr. JOHNSON of Georgia. Thank you. My time has expired.

I now recognize the gentleman from Arizona, Representative Biggs, for five minutes.

Mr. BIGGS. Thank you, Mr. Chair.

Mr. Schenck, I have to say, there is something in the law that we call hearsay, and hearsay is inherently unreliable, and we don't allow that in. In your case, you've got hearsay built upon hearsay built upon hearsay. It's inherently unreliable. It's incredible. It's unbelievable. So, we don't let that in. You would have to have three exceptions to the hearsay rule to get that in. You've got none. You've got none.

At the law we call it hearsay, you know what we call it in the world away from law? Gossip, innuendo, deceit, and I have to sell you, it is one of the most pernicious performances I've seen publicly in a long time.

I find it interesting, Mr. Chair, we're having this hearing given the Committee's lack—the Democrats' lack of reaction to the leak of the draft in the *Dobbs* decision. You held zero hearings on it. An assassination threat was made. You slow-walked security legislation for Supreme Court Justices. Today, we're here based on a guy who's telling us a story that someone allegedly told him about somebody allegedly told him. That is a what's pernicious here.

Politico, it's not a friend of Justice Alito. They spent months trying to corroborate your story. They said, quote, "they're unable to locate anyone who heard about the decision directly from either Alito or his wife before its release at the end of June 2014," end of quote.

We're having a hearing today on this topic when the majority have ignored real threats to the Supreme Court over the past year.

For example, following the leak of the draft *Dobbs* decision, daily protests outside the home of Supreme Court Justices were encountered trying to sway or influence the *Dobbs* decision; but we didn't have a hearing on that.

In June, Nicolas Roske was arrested outside the home of Justice Brett Kavanaugh after he admitted that he came from California to Maryland to assassinate Justice Kavanaugh. We didn't have a hearing on that, but we're having a hearing today based on specious defamatory statements.

Mr. Paoletta, thanks for being here today.

You saw the coverage of the constant protests at the Supreme Court earlier, I believe.

Mr. PAOLETTA. Yes.

Mr. BIGGS. What were those protests designed to accomplish do you think?

Mr. PAOLETTA. The protests, beginning in part with Senator Schumer standing on the steps of the Supreme Court, and in my view, physically threatening Justices Kavanaugh and Gorsuch and telling them that if they rule a certain way, they will pay the consequence, they won't know what hit them.

So, we also have to remember it went back to Senator Schumer making that threat on the steps of the Supreme Court about what kind of case? An abortion case.

All of these threats, all of these protests are designed to intimidate the Justices, but even more so, fear for their life. I mean, intimidate them as Justices, but fear for their life, and that is why Justices have around-the-clock security now, which I think is unheard of. It's all caused, right—and let me put it this way. I don't think they're protesting the liberal Justices. Okay. These are all targeted at the conservative Justices and have put their life in danger, all of them.

Mr. BIGGS. The design is to have a long-term impact on the Court and on decisions that come out of the Court.

You might be aware that the Chair of this Committee, Chair Nadler, and several other Members of this Committee are supporting legislation to expand the number of Justices on the Supreme Court. A Member of this Committee tweeted out: The Supreme Court expansion is infrastructure.

Why do you think they want to expand the size of the Supreme Court?

Mr. PAOLETTA. For many, many years, the Supreme Court has basically been a super legislature putting in place sort of policies, and, essentially, laws that they couldn't get enacted through the democratic process.

So, they want to return to those days and increase the court size so that they can get these policies adopted. It's a terrible development in undermining the legitimacy of the Supreme Court.

Mr. BIGGS. You have a Democrat who tweeted out: Republicans stole two Supreme Court seats to have a far-right super majority, and now the Court is ready to strip away our fundamental rights. Expand the Court before it's too late.

That corroborates what your premises.

I just tell you, I'll close, Mr. Sherman, you asked what would happen if agencies didn't respond to letters from Members of Congress. I send 75–100 letters a year. I don't get any responses from this Administration.

Mr. CICILLINE. [Presiding.] The time for the gentleman has expired.

I now recognize myself for five minutes.

I want to begin by thanking the Witnesses for their testimony today.

The Supreme Court, the highest court in our Nation, no longer has the confidence of most Americans. This institution, a historical symbol of integrity and fairness that is meant to be free from politicization, now seems as politicized as Congress itself, and it's no wonder why.

Report after report has detailed that some Justices of our highest court are acting in defiance of the principles of ethics they're meant to uphold. They've accepted tens of thousands of dollars in travel and lodging benefits that don't get reported. They refuse to recuse themselves in cases where they clearly have a conflict of interest. Most recently, we've learned of a Justice potentially catering to a special interest group and giving them advance notice of a pending decision.

Every Member of Congress, and Federal judges throughout our system, except those on the Supreme Court, are subject to a Code of Ethics to govern this kind of behavior. It's bewildering that the Supreme Court Justices are not, and we're clearly seeing the results of that. We have trusted them to police themselves, and clearly, they have failed.

Fortunately, we know how to fix this. We can and must restore faith in our highest court, and we can start by passing the Supreme Court Ethics and Transparency Act, an important court reform package that would do just that.

Now, I want to begin my questions, Reverend Schenck, with you. This campaign which I think to most Americans is just shocking that there was actually a sophisticated effort to influence either by bucking up or strengthening the views or even changing the minds of Justices of the Supreme Court on important issues. This is shocking to me.

In addition to that work, was there also travel with supporters of the higher court campaign with Justices of the Supreme Court, both through vacation destinations, vacation homes? Can you give some examples of some trips the Justices took, if any, with supporters of Faith in Action?

Mr. SCHENCK. Yes, Mr. Chair. I was aware that Justices Alito and Scalia had visited the home—the second or third home—I'm not sure how they counted it—of the Wrights, Don and Gayle Wright in Jackson Hole, Wyoming. They had both been out there to visit. I was not aware of any other in particular.

Mr. CICILLINE. Were you aware on those trips whether or not the Justices traveled with their spouses?

Mr. SCHENCK. I don't recall, Mr. Chair. Maybe—and I'll just correct myself. I was aware of one trip that Justice Scalia took with Mr. Don Wright that involved hunting. I think they were quail hunting somewhere, perhaps even in South America. I'm not sure.

Mr. CICILLINE. Thank you.

Mr. Sherman, would you speak to this question? There has been some public reporting about this as well. Currently, are Supreme Court Justices permitted to take trips, private trips with individuals valued at—can be valued at thousands of dollars without disclosing that benefit?

Mr. SHERMAN. They are. There is a gift ban statute, but the regulations that apply to lower court judges do not apply—or the Justices of the Supreme Court are not bound by that. So, essentially what you have is Justices accepting gifts based on whether they choose to accept them or not. Everybody loves free trips. Certainly, at the highest court in our land, we should have a transparent process for the Justices to resolve those conflicts of interest.

Mr. CICILLINE. Are there any limitations in the existing law or ethics provisions that limit what happens during those free trips that Justices may take?

Mr. SHERMAN. No.

Mr. CICILLINE. Can you describe for the American people, what is the consequence of permitting free gifts of any value as it relates to travel or other gifts? What is the potential danger? Why does it matter?

Mr. SHERMAN. So, obviously, there's the potential danger of influence in the specter of wealthy activists using their money to get the Justices to change their mind or decide in their favor. More importantly, an independent and impartial Judiciary is what ensures that the law protects regular folks, like all the constituents and holds the powerful accountable.

Mr. CICILLINE. So, if we were—I have legislation that, in fact, would require the disclosure and set some limitations on travel that can be given to Supreme Court Justices.

Would that address this issue appropriately?

Mr. SHERMAN. While I certainly would hope that the Court implemented a Code of Conduct, that would help address the issue, yes.

Mr. CICILLINE. If the Court fails to do so.

Mr. SHERMAN. Yes.

Mr. CICILLINE. Thank you.

We now have two votes on the House floor, so we will recess now and return immediately after the second vote.

The Committee stands in recess.

[Recess.]

Mr. JOHNSON of Georgia. [Presiding.] The Committee will come to order. I will now recognize Mr. McClintock, the gentleman from California, for five minutes.

Mr. MCCLINTOCK. Thank you.

Mr. Chair, this hearing is absolutely astonishing to me. Your star Witness is a pathetic grifter, a documented liar, and he comes here to tell us that in 2014, Justice Alito told a dinner companion how the Supreme Court would rule in the *Hobby Lobby* case. His source vehemently denies it. The Justice vehemently denies it. There are no contemporaneous notes or recordings, and not a single newspaper can corroborate this, although they desperately tried.

So, the testimony is impeached by the very sources the drifter claims to have had, and there's nothing, nothing, to support his claims. He didn't think to share it publicly until eight years later when the left began a concerted effort to smear Justice Alito for the *Dobbs* decision, and to delegitimize the Court as an institution because they intend to pack it.

Meanwhile, the Judiciary Committee, the Judiciary Committee, has no interest in some fundamental questions, like who leaked the draft of the *Dobbs* decision? Or why isn't the Justice Department enforcing the law to protect Supreme Court Justices from intimidation at their own homes? Or did the Justice Department really interfere in the 2016 and 2020 presidential elections? Those are important questions.

This is a theatre of the absurd, and it's how the left operates, outrageous and slanderous claims, and when they're thoroughly debunked, they just move on to the next target.

Mr. Chair, I am sincerely embarrassed for you. I'm sincerely embarrassed for your colleagues. This hearing puts a punctuation mark on the whole sad proceedings of this Committee.

My problem in asking questions is simple facts are so damning against the Democrats as to make any further commentary pointless. So, res ipsa loquitur, the thing speaks for itself.

I'll simply ask Mr. Paoletta for any thoughts that he has in my remaining time.

Mr. PAOLETTA. Mr. McClintock, thanks for the opportunity.

It's just, as I said in my opening statement, we're left with relying on the credibility of Mr. Schenck's word. I noticed because, of course, he didn't turn his testimony in until 10 minutes before the hearing, when I think the rest of us did the night before by 6 o'clock. So, we couldn't cross-check it before the hearing. He says—there was an interesting story line in one of his comments. I pulled up a *Christian News* wire story from I think the day of the *Hobby Lobby*—what was—of the decision. He's referencing the fact that on the day of the oral argument, he claims in here that—I'll read it.

> On the day their case was argued before the Justices, Reverend Schenck led the Greens and the Hahn family, owners of Conestoga Wood Specialties, for an unprecedented prayer service in the Supreme Court dining room just before they all entered the courtroom.

I thought that was impossible to be having a prayer service on a day of oral argument in the dining room. Okay. The Supreme Court is a pretty locked-down place in general. When they're doing oral arguments, it's very locked down for things like that.

If you look at his testimony today, he says, "On March 25, I attended the oral argument in the *Hobby Lobby* case, having obtained a reserved seat from the Marshal's office." Earlier that day, I convened a prayer service in the Supreme Court's cafeteria dining area, which attorneys for both *Hobby Lobby* had attended.

So, he's changed it completely from this behind-the-scenes sort of access of going into the dining room of the Supreme Court to the cafeteria, which is literally open to the public when you're there. So, again, this is, just—there's so many of these things.

Again, going back to what Congressman Jordan had brought up about this, his book, which I saw this weekend, about how he was so happy that Chief Justice Rehnquist had said Reverend Paul Schenck as he called up the case, and it's a complete lie.

Now, if you look at Mr. Schenck's book, he had to have looked back at that because it has the caption of the case. Like, he had to go back and look at what was actually said to write his book. So, back in 2018 when this book came out, he was looking—and he literally invented that scene, but he put that word in there for Chief Justice Rehnquist to say, so he could support his story line that somehow he had overcome all these naysayers and gotten the Court to put Reverend in his name.

So, that is why he's not a reliable, narrator of the truth as I say.

Mr. MCCLINTOCK. Al contraire. He's the Democrats' star Witness in this. It's upon his ridiculous testimony they base this entire hearing, their last hearing of this session. I think it's a reflection on them more than anything. As I said, I think it is a fitting way to end a pathetic session of this Congress and the work of this Judiciary Committee.

With that, I yield back.

Mr. JOHNSON of Georgia. The gentleman yields back.

I will now recognize the gentlelady from the State of Washington, Representative Jayapal for five minutes.

Ms. JAYAPAL. Thank you, Mr. Chair.

Thank you all very much for being with us today.

Blatant moral and ethical violations in the Supreme Court, the highest court in the land, have eroded America's trust in our system. From Justice Clarence Thomas's failure to recuse himself after his wife's questionable January 6th-related activities to lavish private dinners and trips paid for by wealthy donors, the Supreme Court is long overdue for a more ethical Code of Conduct.

I wanted to focus on how wealthy donors cozy up to Justices and influence SCOTUS decisions.

Reverend Schenck, it's been reported that you trained your stealth missionaries to get to know the conservative Justices at a personal level and support their conservative viewpoints through faith.

Did you instruct them to talk to Justices in a specific way? What were they trained to say or not say?

Mr. SCHENCK. Thank you, Representative Jayapal.

Yes, I did. We had orientations. We told them what would be appropriate, even how to address the Justices, and then to find areas of commonality that might establish a rapport. That proved to be very effective.

Ms. JAYAPAL. Were these Justices aware that you were seeking to influence or embolden their decisionmaking on the bench, or at least encourage or support more hard-line or conservative-leaning positions?

Mr. SCHENCK. I'm not certainly how to answer that because I didn't—I wasn't inside their thinking. Over time, I felt that our presence there became more welcome, and that was just registered by the amount of invitations that they extended to our stealth missionaries for conversation and even visits inside chambers.

Ms. JAYAPAL. Can you talk about how the messaging, particularly prayers in the company of conservative Justices, were shaped as political?

Mr. SCHENCK. Yes. I was trained that prayer should always end with an uncertainty and a submission to the will of God, whatever that may be. On the other hand, there's another kind of prayer that telegraphs a different kind of message. When you pray for a specific outcome, it is not necessarily conversation with the Divine anymore; it's a conversation between two persons and of a privileged nature because very few people will interrupt a prayer. So, you can get through the cases you're making in a very effective way.

Ms. JAYAPAL. So, a wealthy interest group regularly wines and dines the Supreme Court Justices for the specific purpose of swaying opinions on landmark cases that will affect millions of Americans.

Members of Congress have already requested that the Supreme Court launch an inquiry into these claims. Has the Supreme Court demonstrated any openness to an investigation, Mr. Sherman?

Mr. SHERMAN. Not that I'm aware of. The Court has no transparent process for either receiving or investigating complaints or allegations of ethical misconduct, which we have seen both with respect to the *Dobbs* leak and the allegations made by Reverend Schenck here, which, again, pales in comparison to the transparency and accountability measures, both in the Executive Branch and in Congress.

Ms. JAYAPAL. Professor Fredrickson, why is explicit partisanship concerning when it's demonstrated by Members of the Judiciary? Why would we generally want Justices to appear nonpartisan? Is it the same as appearing impartial? I think this is important for the whole country to understand.

Ms. FREDRICKSON. Both of those are critical elements for the Judiciary, to be nonpartisan and to be impartial. Obviously, unlike Members of Congress and the President, they are not elected. They serve under good behavior, which is generally been understood to be for life. It means that we really do need to have a belief in their honesty and their adherence to Rule of Law. Ultimately, when it comes down to it, we have to remember what Alexander Hamilton said in Federalist 78, which is that the Judiciary is the least dangerous branch because it has neither purse nor sword, unlike the Executive or the Congress, and that its power is in the public confidence and the faith in their adherence to Rule of Law. If they start to lose the public confidence, then we lose our Rule of Law.

Ms. JAYAPAL. In fact, that's already happened. We've seen a historic drop in public confidence. If the American people can't trust the independence of the Judiciary, of the decisions, the very foundations of our democracy are threatened.

It's why I introduced H.R. 7706, the Judicial Ethics and Anticorruption Act, which bans Federal judges from owning conflicted assets and a number of other things.

I know my time has expired, so, Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. Thank you.

Next, the gentleman from Wisconsin, Mr. Fitzgerald, is recognized for five minutes.

Mr. FITZGERALD. Thank you, Mr. Chair.

To Mr. Paoletta, as many of my colleagues have noted, following the leak in the decision in the *Dobbs* case there were several instances of fanatics professing anti-life views targeting, destroying, and vandalizing numerous pro-life facilities and groups to further their political cause.

I led a letter to Attorney General Garland with my colleagues from Wisconsin regarding a specific case of arson that you may have heard of against a pro-life office in Madison, Wisconsin. Six months later, there still has been no arrest in that case. Many people, including the head of Wisconsin Family Action, are rightfully questioning whether State and Federal law enforcement are not pursuing this case simply because it was against a pro-life facility.

I share the frustrations with the lack of justice in this case. So, could you answer for me: What can Congress do to shed more light on these attacks and ensure that law enforcement is doing their job diligently in these specific instances?

Mr. PAOLETTA. Congressman, I think it's very troubling that the Department of Justice has done nothing in response to all these attacks. It's really—these attacks have been despicable, and the fact that the Department of Justice I don't think has done anything in response to them is truly troubling. I think Congress should have looked into it long ago. Perhaps, in the new Congress investigating the Department of Justice for why they didn't look into these attacks is a good use of time and accountability. If you want to talk about accountability and transparency, let's see why the Depart-

ment of Justice hasn't done anything to protect these tremendous organizations that help women who are in trouble.

You see Democrats in Congress belittling these organizations. I think I saw Senator Warren saying they were con organizations or something like that, really just offensive comments.

So, that's what I would hope Congress would do in the next Congress.

Mr. FITZGERALD. Very good.

Just to follow up. The *Dobbs* draft opinion was leaked months ago. Despite an investigation, as we know, the leaker still has not been identified. We are circulating an accountability Act that would specifically focus on leaks, which would make it a crime to leak any of this confidential information from the Supreme Court.

Do you see a path to ever finding this specific person for the leak? Then, ultimately do you think that we can hold them accountable?

I think the frustration that many Members of Congress are expressing at this point is that there aren't many secrets in this town. For some reason, this individual has certainly been sheltered, and there is absolutely, I think, evidence that there are specific people that know who this purpose is, and why they haven't been identified at this point is beyond me.

Mr. PAOLETTA. It was, again, a despicable act, whoever leaked that opinion, in my view, trying to bring down the Supreme Court and the integrity and the working relationships among the Justices in terms of doing their work.

So, I join you. I hope the leaker is found and held accountable. We can speculate all day as to who did it and how they did it. I assume that this person was careful and thought it through before they did it. I'm not sure we'll ever find that person in the near-term. I hope we do, but it was a despicable act.

Mr. FITZGERALD. Very good.

I have one more question for you. During the Trump Administration, Congressional Democrats and leftist organizations used dark-money allegations to criticize the Trump Administration and the Senate's success in confirming conservative judicial nominees. However, Democrats conveniently ignored their role in using dark money groups. Democrats' active role in lobbying against judicial nominees can be traced back to the partisan campaign led by then Senate Judiciary Chair, Joe Biden, against the Reagan Supreme Court nominee, Judge Bork, that we're all familiar with.

More recently, Demand Justice reportedly sought to spend $5 million to try and block the confirmation of Brett Kavanaugh.

Additionally, Amalgamated Charitable Foundation is a 501(c)(3) and a donor advise fund, which is basically a charitable savings account for donors. It was created by the labor unions and Amalgamated Bank to support left-wing causes.

My question would be, just to kind of sum this up, would be, is there a way of tracing this dark money? How prevalent do you think it is in the system? As far as you can tell, why do you think that there's this double standard that exists between any times you talk about dark money on one side versus another?

Mr. PAOLETTA. Look, the First Amendment is important and for people to be able to contribute and have the anonymity protected

and to have, you know, the free flow of exchange and sort of efficacy. There is a wicked double standard that the Democrats—I think when you look at the amount of money that is spent on either side, I think it's Arabella Advisors and all of their tentacles far exceed anything that the conservatives or—I don't know that for sure, but I think that's right. So, it's a double standard. You know, I'm not—

Mr. JOHNSON of Georgia. The gentleman's time has expired. If you would just wrap up.

Mr. PAOLETTA. It's a double standard.

Mr. JOHNSON of Georgia. Thank you.

Mr. FITZGERALD. Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. We'll now go to the gentleman from California, Representative Swalwell for five minutes.

Mr. SWALWELL. I thank the Chair.

At the beginning of the hearing, Mr. Jordan alluded to threats that were made toward Judges Kavanaugh, Gorsuch, and others, and I want to make it clear that I, and I believe most of my colleagues have denounced any threats of violence that have been made to any judges, to any public officials. That's not how we conduct ourselves in this country. We enact the will of the people through voting, not through violence.

I do want to ask the Ranking Member, because he wants to have this conversation. Will he, after tweeting this morning a tweet that said: "The left attacks Justices Thomas and Alito because they're standing up for the Rule of Law, the Constitution, and freedom." Will the Ranking Member denounce what the former President said last week when he said: "A massive fraud of this type and magnitude allows for the termination of all rules, regulations, and articles, even those found in the Constitution."

So, I will wait after my time is up to see if the Ranking Member endorses Donald Trump's call to terminate the Constitution, because the Ranking Member seems to have a high interest in protecting it, or if he will continue to be silent, and I think we should all conclude that his silence is complicity.

Since we're on the topic of denouncing violence, will the Ranking Member also denounce the tweet that he put out praising Kanye West. He tweeted: Kanye. Elon. Trump. Kanye went on after that tweet, of course, to say that he's going to declare a war on Jews, and, also, that he would go on to praise Hitler.

So, I will wait again for the Ranking Member. Does he stand with Kanye and his hatred of Jews and love for Adolf Hitler, or will he denounce it? Again, we will wait to see because the Ranking Member has a lot of opinions, Mr. Jordan, about what others should be denouncing. So, we will wait to see what you can do.

Moving on to Mr. Schenck. Mr. Schenck, thank you for coming forward. Your testimony is important as Americans wonder if the Supreme Court can be independent and credible.

I have to ask you for the sake of your own credibility, are you being paid by anyone for your testimony today?

Mr. SCHENCK. No.

Mr. SWALWELL. Have you been paid by anyone for this story that was printed in *The New York Times* about what you heard eight years ago?

Mr. SCHENCK. No, Congressman.

Mr. SWALWELL. In fact, have you received threats, including death threats, because of what you've said?

Mr. SCHENCK. I don't know if they rise to death threats. They have certainly been quite menacing. Yes, I have received those kinds of threats. It's been very costly for me, both for the current organization that I'm leading, for me personally, and most especially for the duress on my family.

Mr. SWALWELL. Well, I'm sorry to hear that as someone who receives the same types of threats and thinks about their family first.

I have to ask then, if you're not being paid for coming forward with this information, and you are suffering threats to yourself and your family and your personal finances, why did you come?

Mr. SCHENCK. For three reasons, Congressman. First, I felt it was a moral obligation. Second, in this season of my life in ministry, I made a new resolution that truth telling should be at the core of everything that I do. Finally, I think it's in the best interests of the country. I think it's in the best interests of the Court where I spent 20 years, and still have great respect for the institution and almost venerated in a sense. Its integrity is critical to its success and role in our democracy.

So, those are the three principal reasons I'm here. There are more, but they haven't come without cost.

Mr. SWALWELL. Thank you, Reverend. God bless you and your family as you come forward with the truth.

Mr. Chair, I yield back. I will sit here to see if Jim Jordan will address Donald Trump's threats to the Constitution or if Mr. Jordan will just simply look the other way.

Mr. JOHNSON of Georgia. Mr. Swalwell, would you yield your balance to the gentleman—

Mr. SWALWELL. I yield back, Mr. Chair.

Mr. JOHNSON of Georgia. —Mr. Jordan?

I think, Mr. Jordan, are you—okay. Mr. Jordan wanted a couple of seconds to answer.

Mr. SWALWELL. Yes. Will Mr. Jordan denounce President Trump's termination of the Constitution?

Mr. JORDAN. President Trump has clarified his comments regarding the Constitution. He put out another post, I think a day or so later, maybe even the next day. I can't recall.

Everyone knows President Trump, there's no way this guy is anti-Semitic. This guy was the most pro-Israel President in history, put the embassy back in Jerusalem. Abraham—the most pro-Israel President we've ever had, did more in foreign policy in the Middle East than any President we've ever had, so—

Mr. SWALWELL. Do you denounce your tweet praising Kanye West?

Mr. JORDAN. That tweet was not our account. That tweet—

Mr. JOHNSON of Georgia. The gentleman's time has expired.

Mr. JORDAN. No. It's my time.

Mr. JOHNSON of Georgia. He yielded the balance of his time.

Mr. JORDAN. Well, he's over time. I haven't used my time yet.

Mr. JOHNSON of Georgia. No, you have not.

Mr. JORDAN. Well, I'll let Mr. Gaetz and Mr. Bishop, and then I'll come back. I have a lot of questions for these Witnesses.

Mr. JOHNSON of Georgia. The Chair will recognize the gentleman from Florida, Mr. Gaetz, for five minutes.

Mr. GAETZ. Thank you, Mr. Chair.

Let me start by saying it used to be the case on Palm Beach Island that at the private clubs, no Blacks or Jews were even allowed to be members or invited as members, and it was actually Donald Trump, before he was in politics, that made that very important change so that we weren't treating people differently based on their immutable traits.

I also want to say on the subject of this hearing, when it comes to Supreme Court ethics and guardrails, I am supportive of bipartisan efforts to have some sort of an ethics construct on the Court. I don't understand why Congress is subject to ethics rules, the Executive is subject to ethics rules. Because we put a black robe on somebody and give them a lifetime appointment, all the sudden when they fail to enact their own ethics rules, we just allow that to occur?

To my friends on the right, like, if you can buy off Supreme Court Justices, the left is definitely going to end up being way better at that than we are. So, I would suggest in the next Congress when this is more than just a theatrical exercise, we actually work together on opportunities to have strong ethics requirements that enhance the public perception of the Court.

I yield the remainder of my time to Mr. Jordan.

Mr. JORDAN. I thank the gentleman for yielding.

Mr. Schenck, how did *The New York Times* get the story?

Mr. SCHENCK. They called me and asked me to confirm facts surrounding what they had heard about a 2014 leak of the *Hobby Lobby* decision.

Mr. JORDAN. What prompted them to call you?

Mr. SCHENCK. They said they had learned some facts about the case, and they were asking me if it was true.

Mr. JORDAN. From whom?

Mr. SCHENCK. They did not—the reporters did not tell me from whom they learned it.

Mr. JORDAN. Just out of the clear, blue sky, they come say, hey, did Ms. Wright at a dinner party hear from Justice Alito the outcome of a pending case, in particular, the *Hobby Lobby* case? Did she call you? How did they know the facts, the alleged facts? Because they're not facts. I don't think it happened.

Mr. SCHENCK. That was not the question they asked me. The first call from reporter Jodi Kantor, I think it was something along the lines of, we are aware of a possible prior leak, and that you were involved. Can we ask you some questions about that? It was words to that effect.

Mr. JORDAN. What did you say then?

Mr. SCHENCK. I said I was not prepared to talk about that.

Mr. JORDAN. Okay. Then you subsequently talked to *The New York Times*. So, when did you call them back?

Mr. SCHENCK. It was probably days to—I would say certainly multiple days. I was very conflicted. I wanted to keep this a private matter. I did not intend to go public with it.

Mr. JORDAN. Well, do you remember the date that you did call *The New York Times* back and tell them the alleged story that you have shared here today?

Mr. SCHENCK. It may have been late May. I would have to consult my notes on that, but—

Mr. JORDAN. Let me ask it this way: You said this to *The New York Times* after the actual leak of the *Dobbs* opinion?

Mr. SCHENCK. Let me think about that for a minute, Congressman.

Mr. JORDAN. I just want—I'm trying to figure out where it fits in. You have the *Dobbs* leak on May 2. You write a letter to the Chief Justice of the Supreme Court, Justice Roberts, on June 7.

When did you talk to *The New York Times*?

Mr. SCHENCK. Sometime—I would have to check again, but it was sometime in late May to early June.

Mr. JORDAN. Before you sent—so it was more important to talk to the press about this leak than it was to send—put the Court on notice of something that's so egregious that you're here today testifying in front of Congress?

Mr. SCHENCK. Oh, I was in great turmoil about the whole matter, Congressman. I was literally praying on it. I was agonizing over it—

Mr. JORDAN. Well, I appreciate that.

Mr. SCHENCK. —what I should do about it.

Mr. JORDAN. It's important. I appreciate that.

You did it before you sent the letter to the Chief Justice?

Mr. SCHENCK. Off the record. Strictly off the record, I did answer some questions.

Mr. JORDAN. Well, now we're talking off the record. Why off the record? If it's so darn important you're praying for it, why not just tell them? More importantly, if you really want this to happen, why not go to the Chief Justice first? Why not go to the Court first? If you're so concerned this is so egregious, we've got to come forward even though—why not do that? But no, no. You said I'm going to go off the record with *The New York Times*.

Mr. SCHENCK. I wonder, Mr. Jordan, have you ever dealt with the Chief Justice? I wasn't sure I wanted to get called in by the Chief Justice.

Mr. JORDAN. I do a call with the Chief Justice. We do a call where we talk about the Courts and the whole system.

Mr. GAETZ. Well, Mr. Jordan, maybe the reason that he was off the record then was because there was no book deal.

Mr. JORDAN. Maybe, maybe. My time is up.

Mr. SCHENCK. Could I ask just to your comment, Mr. Gaetz? I couldn't hear that. I'm so sorry.

Mr. GAETZ. Yeah. Maybe a book deal—

Mr. SCHENCK. There was no book deal.

Mr. GAETZ. —would be a motivator.

Mr. SCHENCK. No, absolutely no book deal. There was no book deal, no consideration of a book deal.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

We'll now go to the gentleman from California, Mr. Lieu, for five minutes.

Mr. LIEU. Thank you, Mr. Chair.

I heard some disturbing comments from my colleagues across the aisle today that somehow, we need to not criticize the Supreme Court, that we need not to attack the legitimacy. That is just absolutely wrong. We are coequal ranks of government. Our job is to conduct oversight over the other branches of government, including the Supreme Court. If they have self-inflicted wounds, if they do bad things, it's our job to criticize them and to show that to the public. We are not here to prop up institutions if they don't deserve to be.

Now, one reason the United States Supreme Court is at its lowest approval rating in U.S. history is because multiple Supreme Court Justices lied to the American people.

So, I have some questions for Professor Fredrickson. These Justices lied during their confirmation hearings, and this is how we know. In the *Dobbs* majority opinion, the majority states that *Roe* was egregiously wrong from the start. Justices Gorsuch and Kavanaugh signed under that opinion. They had to know at the time of their confirmation hearings that *Roe* was egregiously wrong from the start.

So, Professor Fredrickson, did Justice Kavanaugh tell the American people under oath during his confirmation hearings that *Roe* was egregiously wrong from the start?

Ms. FREDRICKSON. No, I don't believe so.

Mr. LIEU. Did Justice Gorsuch tell the American people that he believed *Roe* was egregiously wrong from the start?

Ms. FREDRICKSON. No, I don't believe so.

Mr. LIEU. In fact, they did exactly the opposite. Justices Kavanaugh and Gorsuch went out of their way to assure the United States Senators under oath and the American people that they view *Roe* as settled precedent. In fact, he told Senator Lindsey Graham that he would have walked out the door had Trump asked him to overturn *Roe*. Justice Gorsuch said:

> I would tell you that *Roe* v. *Wade*, decided in 1973, is a precedent of the United States Supreme Court. It has been reaffirmed. A good judge will consider it as precedent of U.S. Supreme Court worthy of treatment as precedent like any other.

He did not say *Roe* was egregiously wrong from the start.

Then Justice Kavanaugh had the following to say. He said: "It is settled as a precedent of the U.S. Supreme Court, entitled to the respect under principles of stare decisis." The Supreme Court has recognized a right to abortion since the 1973 *Roe* v. *Wade* case and has reaffirmed it many times. Kavanaugh did not say that *Roe* was egregiously wrong from the start.

These two Justices lied to the American people. They went out of their way to assure U.S. Senators and the American people that they viewed *Roe* v. *Wade* as settled precedent. That is one reason the U.S. Supreme Court is at its lowest approval rating in history. That's why we need to also pass a Supreme Court Code of Ethics.

Then in my remaining time, I would like to ask Reverend Schenck some questions. So, clearly, when *The New York Times* called you and asked you about the Supreme Court, they already had information that there was a leak of the *Hobby Lobby* decision. Is that correct?

Mr. SCHENCK. Yes.

Mr. LIEU. Based on that article and the leak of the *Hobby Lobby* decision, it is certainly possible that the *Dobbs* decision was actually leaked by conservatives on the Court. Isn't that correct?

Mr. SCHENCK. I'm not sure I can answer that, Congressman.

Mr. LIEU. So, I'll dismiss it. It's certainly possible. My Republican colleagues are adamant this leak came from the liberal Justices. There's no evidence of that. The evidence could certainly point to conservatives leaking this, to hold the conservative Justices to that opinion.

So, I wish my Republican colleagues would stop sneering the left of liberal Justices for leaking this when there's no evidence that they did so.

Then, let's talk about what Congress did to protect Supreme Court Justices. We passed a law. We voted on the floor a bill to help protect Supreme Court Justices, and I know it was conservatives that refused to protect Supreme Court Justice law clerks with that same production. I think that's shameful. I think Supreme Court clerks should also be protected.

When we talk about actual political violence, you know who had their skull hit by a hammer? It was a spouse of the Speaker of the House. Multiple Republicans made fun of that. They circulate conspiracy theories. They said all sorts of things that were not true. Republicans should be ashamed for doing that.

So, please stop whining about threats to Supreme Court Justices when the actual violence of a person being hit in the head with a hammer, had to go to surgery was a spouse of the Democratic Speaker of the House.

I yield back.

Mr. JOHNSON of Georgia. The Chair will now recognize the gentleman from North Carolina, Mr. Bishop, for five minutes.

Mr. BISHOP. Thank you, Mr. Chair.

I think Mr. Lieu is pretty far afield on a couple of things.

Professor Fredrickson, could I just ask this? Do you endorse the rhetoric just used that Justices lied when they testified to the Senate Committee that *Roe*—that they were effectively open-minded about *Roe*, that *Roe* was established law and stare decisis follows the principles that exist in law?

Ms. FREDRICKSON. Respectfully, Mr. Congressman, I'm here to talk about this bill, and I think we should stick to this conversation about the ethics—

Mr. BISHOP. Yeah, but you don't get to tell me what the questions are here. I get to decide. So, you can tell me you refuse to answer the question I ask, and that would be revealing enough.

Do you endorse the notion that those Justices lied as Mr. Lieu just accused them?

Ms. FREDRICKSON. I have no idea whether they lied or whether they simply changed their minds because, as Reverend Schenck said earlier, "we don't know what's going on inside their minds."

Mr. BISHOP. Isn't it correct—

Ms. FREDRICKSON. They certainly did change positions quite radically.

Mr. BISHOP. Isn't it correct that a judge reserves judgment on an issue to come before them until that case is presented? Isn't that the proper discord—or proper approach for a judge?

Ms. FREDRICKSON. Indeed. However, when they're asked about whether there is existing precedent, they're also—generally, would confirm that there's existing precedent. If they say they're going to abide by it, one would assume they would abide by it.

Mr. BISHOP. Do you think it's ethical to smear a Justice by confusing the public about that, by suggesting that Justices being examined by a Senate Committee are lying when they're, in fact, reserving judgment as to an issue that is not yet presented?

Ms. FREDRICKSON. Unfortunately, the biggest ethics smear for Supreme Court Justices right now is all the information that has been coming out about the trips—

Mr. BISHOP. Right. You are now answering something else. I asked you if what I propose to you is ethical. Is it ethical to smear a Justice by doing that?

Ms. FREDRICKSON. You asked me whether the public would consider those to be ethics problems if we were—

Mr. BISHOP. No. That's not what I asked you.

Ms. FREDRICKSON. The perception of—

Mr. BISHOP. I'll reclaim my time if you're not going to answer my question.

Let me move to Mr. Schenck. Mr. Schenck, in a blog post you wrote recently—it's up here on the—yeah, I'm sure you've seen it here today. It says: "In my 64-plus years, I've not only believed a fair number of consequential lies, I've promulgated them."

Although the Chair said it was unseemly in some way, before the Chair said that, Mr. Jordan, rather devastatingly, cross-examined you about a claim you made in your book. So, you've proclaimed that you are a liar, or you have been a liar.

Do you think it's ethical for this Committee, for the majority of this Committee to bring in an inveterate—who's whispering in your ear? Mr. Schenck, who is it that is whispering in your ear as you're testifying?

Mr. SCHENCK. My counsel.

Mr. BISHOP. That's your lawyer. So, he's advising you in your ear while you're getting this question? Okay. I just wanted—

Mr. SCHENCK. Yes.

Voice. It is his right to counsel.

Mr. BISHOP. No, absolutely. I just want to know who's whispering in your ear.

Do you think it's ethical for the majority of this Committee to bring in someone who has professed to have been a liar, been demonstrated to be a liar, to cast aspersions on a Supreme Court Justice for the purpose of bringing the Court into disrepute?

Mr. SCHENCK. Congressman, the Members of—some Members of this Committee with whom I've spent time in prayer, Bible study, many visits, there are Members of this Committee who have visited my headquarters building on numerous occasions to participate in events there, no. All during the years that I was an advocate for certain causes, I was a passionate believer in them.

At this stage of my life, and at this part of my journey, I look back and realize that many of the things that I promulgated were not true.

Mr. BISHOP. So, did you know at the time they were not true?

Mr. SCHENCK. I did not know at the time.

Mr. BISHOP. Okay. So, you did not know the difference between the truth and a lie?

Mr. SCHENCK. One of them—

Mr. BISHOP. Let me ask you this question. The thing that you say that you did, you encouraged wealthy donors to insinuate themselves with Supreme Court Justices in hopes of influencing them. Was that unethical?

Mr. SCHENCK. I'm not an expert on judicial ethics. I don't know anything—

Mr. BISHOP. I didn't set any preconditions. Was it unethical? Can you say that was an unethical thing to do?

Mr. SCHENCK. It violated Christian ethics.

Mr. BISHOP. Okay. So, you—all right.

You're the person that they decided to bring in here as a Witness? That says a lot.

I think to Mr. Gaetz's point earlier, I don't know exactly how the Supreme Court ought to have a Code of Ethics or whether it will change something important. I do think a lot of people want to use it tactically to prevent them from doing their jobs, but nothing is new here over the hearings we have had before, except Mr. Schenck's testimony. The Witness they decided to bring in speaks for itself.

I yield back.

Mr. JOHNSON of Georgia. The Chair will next recognize the gentleman from Maryland, Mr. Raskin, for five minutes.

Mr. RASKIN. Thank you, Mr. Chair.

Ms. Fredrickson, do most State Courts of Appeal or State Supreme Courts have a Code of Ethics?

Ms. FREDRICKSON. Yes. I believe most courts in the world have a Code of Ethics.

Mr. RASKIN. So, the high courts of countries in Europe, Asia, and Africa would be governed by Code of Ethics?

Ms. FREDRICKSON. So, I understand, yes.

Mr. RASKIN. Do you recognize this quote:

> No man is allowed to be a judge in his own case or cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.

Ms. FREDRICKSON. Yes, indeed.

Mr. RASKIN. Where is that from?

Ms. FREDRICKSON. Well, it comes from the Latin, "No man may be a judge of his own cause."

Mr. RASKIN. This is James Madison's statement in the Federalist Papers in Federalist 10. Defining this is a cardinal principle of our law.

So, leaving aside the questions of the leaks and this Witness, and so on, do you think it should be something that everybody across the country should be able to accept that the Supreme Court of the United States should be governed by a Code of Ethics?

Ms. FREDRICKSON. Indeed, I do. I was heartened by Mr. Gaetz's comments, and I understand that Mr. Issa in the past has also supported legislation that would impose ethics obligations on the Court.

Mr. RASKIN. Is there anyone on the panel who disagrees with what Mr. Gaetz said a few moments ago, that this Court should

undertake a rigorous examination of how we can arrive at a serious Code of Ethics for the Supreme Court?

Does anybody disagree? No. Okay. No. All right.

Let the record reflect that.

Now, Mr. Schenck, they call you a liar. They call you deceitful. They call you manipulative, exploitative, and so on.

I take it that they weren't calling you that when you were in service of the right-wing religious agenda, though, right, or were these same forces attacking you then?

Mr. SCHENCK. No, Mr. Raskin. In fact, I enjoyed quite a bit of support from some of those same voices.

Mr. RASKIN. In fact, you were part of that right-wing religious movement, weren't you?

Mr. SCHENCK. I was.

Mr. RASKIN. Okay. How long were you part of that movement?

Mr. SCHENCK. Thirty-five years.

Mr. RASKIN. So, whatever your character is, you might be considered by some to be a saint, you might be considered by some to be Satan's spawn, or you might be considered a normal person with virtues and vices and strengths and flaws. In any event, has your character changed over the course of your life?

Mr. SCHENCK. No, Mr. Raskin, I think I have been consistent. I have been through some marked changes, I described as conversions that I think are important along the path.

Mr. RASKIN. Explain the conversion that would help us understand why people who would ordinarily be embracing you if you were still saying the same things you were saying for many decades are now attacking you. What was the conversion you went through that's made them turn on you?

Because we've seen this many times in this Committee and next door in the Oversight Committee. I remember when Michael Cohen came, and he was Donald Trump's loyal sycophantic, obsequious lawyer for years and years, and they all defended him. Then when he said, "I can't take it anymore and I'm going to tell the truth about Donald Trump," they turned on him. Then suddenly they discovered he was a liar, he was deceitful, he was manipulative.

So, what happened to you?

Mr. SCHENCK. For the last few years of my teen years and the entirety of my adult life, I have been a committed evangelical Christian. What I came to see in the last 12 years was how my faith and that of the community that I have been a part of all these years was politically coopted in what I call a Faustian pact with the Republican Party. When my eyes were opened to that, it changed my opinion on many things, including the stand I had taken on abortion since—

Mr. RASKIN. Okay. So, you didn't want to be part of the cooptation. You didn't want to be part of the political exploitation. You don't want to be part of the political domination anymore. Whether people think that you're the greatest hit in the world or the biggest jerk, this is a sincere religious revelation that you've had. Is that right?

Mr. SCHENCK. Yes.

Mr. RASKIN. This is sincere in terms of your religious conviction?

Mr. SCHENCK. Yes, sir.

Mr. RASKIN. Okay. The people who never attacked you before are suddenly attacking you now. Is that right?

Mr. SCHENCK. That's right.

Mr. RASKIN. Mr. Chair, I yield back.

Thank you.

Mr. BIGGS. Mr. Chair?

Mr. JOHNSON of Georgia. The gentleman is recognized.

Mr. BIGGS. I have a unanimous consent request. I ask unanimous consent to submit for the record the letters of Reverend Dr. Myke D. Crowder, Senior Pastor of Christian Life Center in Layton, Utah, about Mr. Schenck, and the statement of Father Frank Pavone, National Director of Priests for Life.

Mr. JOHNSON of Georgia. Without objection, so ordered.

[The information follows:]

MR. BIGGS FOR THE RECORD

To Members of the House Judiciary Committee,

My name is Rev. Dr. Myke D. Crowder, senior pastor at Christian Life Center, in Layton, Utah, since 1986 until present and founder of Layton Christian Academy in 1993. I have personally known and worked closely with Rob Schenck in our ministry in Washington D .C. from approximately 1988 until his departure from the ministry in 2018.

On June 6, 2016 I was a part of a group that met with the Supreme Court justices privately and was paired with Abigail Disney, who is known to be a far left individual and is not pro-life by stance. Before going to the dinner, Rob made it very clear so that we all understood that there was to be absolutely no discussion about any ongoing cases as this would be highly inappropriate. This was merely an opportunity to get some time with the justices for some of our significant donors. This experience was professional, with general conversation and to my surprise, the justices were more interested in me and my ministry in Utah than I anticipated and to be sure, Abigail did her fair share of talking and she was a great partner.

Since Rob's departure from the ministry, I have remained in contact with him. My deep, personal relationship with him as a dear and trusted friend has been greatly challenged by his admissions in his 2018 book, "Costly Grace", that was made devastatingly clear to me that he learned how to influence and raise money through dishonest manipulation of the evangelical community and was good at it. The reasons in which we find ourselves here today may well cause a lot of us to question what his motives are. To be sure, my experience in the ministry there, does not at all line up with Rob's accusations and I'm very sorry to have to be in this position today.

My love for Rob Schenck will always remain but my trust in his words has been completely shattered.

Sincerely,
Rev. Dr. Myke D. Crowder

Priests For Life

Activating God's People to End Abortion

Statement of Rev. Frank Pavone, National Director of Priests for Life

Submitted to House Judiciary Committee Chairman and Ranking Member:
Chairman Jerrold Nadler
Ranking Member Jim Jordan

For the hearing
"Undue Influence: 'Operation Higher Court' and Politicking at SCOTUS"
Thursday, December 8, 2022, 10:00am

May I express first of all my respect and gratitude to this committee and its members for their work on behalf of our nation, and my gratitude for the opportunity to contribute this statement to today's hearing.

I do so because for the better part of the last three decades, I have had a personal and professional relationship with Rev. Rob Schenck and with his brother, Rev. Paul Schenck. This began at the outset of my own fulltime role in national pro-life leadership as Director of Priests for Life. Priests for Life is one of the nation's leading pro-life organizations.

The ministry teams of our two organizations collaborated on many projects. My ministry rented office space, and still does to this day, at 113 Second Street NE. When we began doing so, that office was the ministry center (along with 109 Second Street) that Rob Schenck administered.

I served for a number of years as a member of the Board of Trustees for P&R Schenck, Associates in Evangelism, Inc., AKA Faith and Action in the Nation's Capital and the National Pro-Life Center on Capitol Hill.

Rev. Paul Schenck, Rob's brother, served for some years as a fulltime pastoral team member of Priests for Life. I was privileged to receive him into the Catholic Church during that time.

And I was party to many confidential meetings and conversations with the Schencks throughout this period.

The projects and activities we engaged in took place under various names, like the Ten Commandments Project, Operation Save Our Nation, and Operation Higher Court. Two points were always clear: first, that all our activity was pastoral and religious in nature, and second, that all our activity was legal and Constitutional.

First, the religious and pastoral nature of our activity can be summarized in the words found on the Certificate of Appreciation that Rob and Paul sent me on January 19, 2008 (attachment one). Those words read:

> *"For your partnership with us in challenging Capitol Hill with Biblical Truth and changing the nation, one policymaker at a time."*

Consistent with this mission, Rob would always sign his letters with some variation of the phrase, "Your missionary to elected and appointed officials," as you can see on the attachment.

By definition, "missionary" activity means bearing witness to the Word of God, in a way that is consistent with the mission of every bible-believing Church in America. If this is to be reframed as "undue influence," it puts under a shadow the legitimate efforts of every follower of Christ to carry out his command to "make disciples of all the nations" and to "teach them to carry out everything I have commanded you" (Matthew 28:20).

Moreover, there would be no religious reason to limit this missionary activity to two rather than three branches of government. Of course, the outreach included the Courts.

Second, I would have never consented to one day of service with this ministry if I thought that we were participating in or planning an effort to "unduly" influence the Court – that is, to do so in any way that is not part and parcel of the Constitutional right of every American to express their views to elected and appointed officials, or that would involve the breach of protocols of confidentiality – or of any kind – that are in place vis-à-vis the Court.

As Rev. Rob Schenck communicated in a letter to me of June 21, 2004 (attachment two),

"[E]verything we are doing and saying related to the Justices is fully legal, ethical and protected by the United States Constitution…"

As part of our activities, I became a member of the Supreme Court Historical Society. So did others who were associated with P&R Schenck. This enabled us to understand the workings of the Court better, and to have opportunities, at lectures and at the Annual Reception held every June by the Society, to meet the Justices.

At the time, Mr. David Pride was Executive Director of the Society. When I joined, both he and Rev. Rob Schenck made clear in no uncertain terms what I already knew, namely, that it would be inappropriate to raise with the Justices any matters that were or might be the subject of cases which they would have to decide, and that if we used our membership to try to do that, such membership would be terminated.

We utilized only avenues that were legitimately open to everyone, including having qualified people within our ministry contacts become members of the Board of the Supreme Court Historical Society, all as part of the stated religious mission to bear witness to the Word of God, and not for the purpose of gaining confidential information or exercising undue influence.

It is my sincere hope that the work of this Committee, and the fruits of this hearing, will serve to strengthen rather than to chill the religious freedom of ministries like mine and of all Americans to be missionaries of the Word of God to our elected and appointed officials, without having to worry that such activity will be redefined as inappropriate.

I renew my sentiments of gratitude to the Committee for receiving my input.

Fr. Frank Pavone
National Director, Priests for Life
President, National Pro-life Religious Council

Mr. JOHNSON of Georgia. The Chair will now recognize the gentlelady from Florida, Ms. Demings, for five minutes.

Ms. DEMINGS. Thank you so much, Mr. Chair.

Thank you to our Witnesses, to all of you who are being here today.

I have to say, as I sit here as a former police officer and a police chief, this is one of the strangest discussions. It's interesting that we are not having this discussion in a more proactive way.

It was even suggested earlier, as we talked about holding the Court accountable, it was suggested that it was an effort to try to intimidate the Court. That's the strangest—that's pretty strange. See, I have always operated under a belief that everybody counts, but everybody is accountable.

Growing up in this wonderful country that we enjoy, I have admired the Supreme Court since I was a child. No one could've ever made me believe that they could be compromised.

I don't think we can sit here, any of us can sit here and say that their approval rating that has plummeted is something that we can ignore.

I think about some of the landmark decisions, certainly as a person growing up in Florida, and as a law enforcement officer, like *Miranda* v. *Arizona*. It says that a person does not have the ability to self-incrimination.

I think about *Brown* v. *Board of Education* in Topeka, that racial discrimination in public schools was unconstitutional.

I think about *Gideon* v. *Wainwright* that says that every person, every defendant should have access to an attorney regardless of their ability to pay.

That's the America that I support, and that's the Supreme Court that I remember.

Whether you're looking back in history or we're moving forward, we should be very concerned about what's going on in the Court, the final arbiter of decisions that come before the Court, decisions that affect people's lives.

America, as they have in these cases, and as they should be able today and moving forward, should be able to defend and have full confidence in the Supreme Court.

As a former police chief, the most junior police officer on the force was subject to a Code of Ethics. They had to disclose—police chiefs—we had to disclose any gifts or income, travel, and all those things.

I just don't—and the reason is so we cannot be compromised. Then the appearance, the perception of compromise also should matter. So, I'm not really sure why we would be pushing back today against a Code of Ethics for the United States Supreme Court.

I'm glad for all our Witnesses and the information that you've given. Mr. Paoletta, I just have to ask you, why do you believe that the United States Supreme Court, the final arbiter in some very critical decisions that affect people's lives for a lifetime potentially, that they should not be subject to a Code of Ethics or standard of conduct.

Mr. PAOLETTA. I think the Chief Justice has said that they consult the Code of Ethics, the one that's—

Ms. DEMINGS. I saw that, that they consult it.

Mr. PAOLETTA. Yeah, yeah.

Ms. DEMINGS. We didn't leave it to police officers to consult it. It wasn't enough.

Mr. PAOLETTA. My objection—yeah. My objection—

Ms. DEMINGS. I just want to hear what's the fear of having a Code of Ethics—

Mr. PAOLETTA. Yeah. Sure. Right.

Ms. DEMINGS. —for people who will make decisions that can affect us for the rest of our lives? What's the hesitation there?

Mr. PAOLETTA. Sure. I come to testify because I object to the gaslighting of the Supreme Court. All of the things that you're raising now—

Ms. DEMINGS. Okay. I hear that, and I understand that, and we need to knock it off, because we need to get this right.

I heard my colleague from Florida, Mr. Gaetz, say we're on the same sheet of music, that I think there is room for this to happen.

I want to know why you believe that there is no need, it's not necessary for the Supreme Court—

Mr. PAOLETTA. Again, as I said, when you look at the Supreme Court approval rating back in the day when Ruth Bader Ginsburg's husband was appearing before the Supreme Court and she was ruling on her husband's law firm's cases, when she was speaking before the NOW Legal Defense Fund and being honored by them, donating a signed VMI opinion that she wrote—

Ms. DEMINGS. Whether it's Ruth Bader Ginsburg or any Justice, why do you believe they should not be subject to a Code of Ethics?

Mr. PAOLETTA. Right. I just didn't hear a Democratic Congress talking about this Code of Ethics back—

Ms. DEMINGS. We're talking about it now. Sometimes we're late.

Mr. PAOLETTA. I understand that—

Mr. JOHNSON of Georgia. The gentlelady's time has expired.

Mr. PAOLETTA. I understand it. It's just, it wasn't talked about in the past, and so that's my objection to this discussion.

Ms. DEMINGS. I haven't heard a reason why you really believe they should not be subject.

Mr. Chair, thank you for your endurance. I yield back.

Mr. JOHNSON of Georgia. Thank you.

Mr. BISHOP. Mr. Chair, may I be recognized for a unanimous consent request?

Mr. JOHNSON of Georgia. The gentleman is recognized for that purpose.

Mr. BISHOP. I thank the Chair. I offer for the record, from *The Daily Signal*, May 6, 2022, a piece entitled, "Left's Attack on Conservative Justices is Attempt to Delegitimize Supreme Court"; an article from *The Federalist* entitled, "New York Times Knowingly Printed False Smear of Justice Thomas' Wife"; from *The Wall Street Journal*, opinion piece, "The Hypocrisy of Supreme Court Ethics Journalism"; from *The Federalist*, "The New Yorker Lies Again About Clarence Thomas And His Wife"; and from *The Daily Caller*, "Paoletta: Leftist Tantrum Targets Spouses In Latest Attack To Undermine SCOTUS' Legitimacy."

Mr. JOHNSON of Georgia. Without objection, so ordered.

[The information follows:]

MR. BISHOP FOR THE RECORD

THE DAILY SIGNAL

Left's Attack on Conservative Justices Is Attempt to Delegitimize Supreme Court

Mark Paoletta / May 06, 2022

The left's attacks on American institutions accelerated this week with the shocking leak of a draft Supreme Court opinion on Dobbs v. Jackson Women's Health Organization.

The substance of the draft opinion is an outstanding constitutional analysis by Justice Samuel Alito of why it is appropriate and necessary to overturn Roe v. Wade to be faithful to the Constitution. Roe was wrong the day it was issued. But the intent of the leaker appears clear: to intimidate and bully one of the five justices.

In the minutes and days that followed the leak, radical pro-abortion protesters stormed the steps of the U.S. Supreme Court. They didn't stop there. The justices themselves are now facing protests at their homes, putting their security at risk.

Recently, I had the opportunity to testify at a U.S. House of Representatives hearing, "Building Confidence in the Supreme Court Through Ethics and Recusal Reforms." In reality, the hearing wasn't about building confidence in the court.

If confidence is lacking, it is not due to issues of ethics or recusals. Rather, confidence in the court is undermined by the coordinated campaign by the corporate media and Democrats to smear conservative justices with the goal of delegitimizing the court.

Why now? Because liberals fear that the court finally has a working conservative majority that may sweep away a number of long-time liberal landmark cases that cannot stand up to more rigorous constitutional scrutiny. And in this effort, Democrats and the media are trying to threaten, intimidate, destroy, and remove any of the justices who may constitute this new majority.

If you think this is hyperbole, perhaps a brief reminder is in order. Sen. Chuck Schumer, D-N.Y., stood on the steps of the Supreme Court in March 2020 directly threatening Justices Brett Kavanaugh and Neil Gorsuch as the Supreme Court heard oral argument on an abortion case. He said:

> *I want to tell you, Gorsuch. I want to tell you, Kavanaugh. You have released the whirlwind and you will pay the price. You won't know what hit you if you go forward with these awful decisions.*

Less than a year earlier, Sen. Sheldon Whitehouse, D-R.I., the lead Senate sponsor of this proposed legislation, filed an amicus brief in a Second Amendment case pending at the Supreme Court, where he threatened that the court better drop the case or face the consequences. He wrote:

> *The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'*

And now, we are now in the middle of the latest attack in the 40-year war on Justice Clarence Thomas, this time an all-out assault on the justice and his wife, Ginni, for so-called ethical transgressions, such as Thomas allegedly failing to recuse because of his wife's activities. It is a false and malicious attack on two good people.

The left hates Thomas because he is a black conservative who has never bowed to those who demand that he must think a certain way because of the color of his skin. Its racist attacks have repeatedly sought to portray Thomas as dependent on white people, from Judge Larry Silberman on the D.C. Circuit to Justice Antonin Scalia on the Supreme Court, and always his wife. It's despicable.

Thomas triggers the left, exposing its racism. But 30 years later, Thomas is still standing strong, considered by many to be our greatest justice.

But it appears that the left also really hates Ginni Thomas, because she is an outspoken, unapologetic conservative woman.

Thomas has acted ethically and honorably at all times. To date, he has had no reason to recuse himself from any case because of his wife's opinions or activities. The new recusal standards being applied to Thomas have no grounding in the law or in precedent.

Judge Stephen Reinhardt, a liberal icon from the 9th Circuit, did not recuse from a case challenging a ban on same-sex marriages, even though his wife, who was the head of an ACLU chapter, had spoken out against the ban, and her organization had joined two amicus briefs in the court below. Reinhardt wrote that his wife's "views are hers, not mine, and I do not in any way condition my opinions on the positions she takes regarding any issues."

Reinhardt concluded that a reasonable person would not believe he would be partial simply because of his wife's or her organization's views. Reinhardt also determined that his wife had no "interest" in the outcome of this case "beyond the interest of any American with a strong view concerning the social issues that confront this nation." Sound familiar?

When Reinhardt voted exactly as his wife and the ACLU of South Carolina had advocated, nobody accused him of being a puppet of his wife. In fact, Professor Stephen Gillers filed a brief defending Reinhardt, writing:

> *[A] spouse's views and actions, however passionately held and discharged, are not imputed to her spouse … A contrary outcome would deem a judge's spouse unable to hold most any position of advocacy, creating what amounts to a marriage penalty.*

Justice Ruth Bader Ginsburg's husband's law firm appeared before the Supreme Court several times, and Ginsburg never recused. In fact, she voted in favor of the client of her husband's colleague.

Based on the law and precedent, Reinhardt and Ginsburg properly did not recuse. But these and other examples in my written testimony prove that Thomas is correct in not recusing from any case to date because of his wife's activities.

More troubling, in 2016, Ginsburg directly attacked then-candidate Donald Trump. She called him a "faker," trashed him for not releasing his taxes, and opined that she feared living in America if Trump were elected. Talk about undermining the legitimacy of the court. She did not recuse from cases involving the Trump administration, including one where Trump challenged a subpoena to release his taxes. Of course, she voted against Trump.

But despite Ginsburg's dangerous foray into presidential politics to prevent Trump from being elected, no Democrat

called for hearings or talked of impeaching her for these partisan attacks or her refusal to recuse from cases involving Trump. For many on the left, she was a hero for attacking Trump.

There is nothing wrong with ethics and recusals at the Supreme Court. The justices are ethical and honorable public servants. Moreover, to support any reform legislation right now would be to validate this vicious political attack on the Supreme Court.

The Daily Signal publishes a variety of perspectives. Nothing written here is to be construed as representing the views of The Heritage Foundation.

Have an opinion about this article? To sound off, please email letters@DailySignal.com and we'll consider publishing your edited remarks in our regular "We Hear You" feature. Remember to include the URL or headline of the article plus your name and town and/or state.

thefederalist.com

New York Times Knowingly Printed False Smear Of Justice Thomas' Wife

Mark Paoletta

5–6 minutes

The New York Times has smeared again, publishing another vicious and error-filled attack on Justice Clarence Thomas and his wife, Ginni. The Times's latest salvo aims to malign Ginni Thomas for her conservative activist work, including falsely tying her to the planning of Jan. 6 rallies in Washington, D.C. New information reveals the Times knowingly printed a false allegation in a hit piece, demonstrating the depths to which it is willing to go in its anti-Thomas jihad.

Danny Hakim and Jo Becker co-authored The New York Times Magazine story, but it is Hakim whose reporting tactics are at issue. The Times alleged that Ginni Thomas played a "mediating role" between two groups that have been locked in a bitter battle for years, Women For America First (WFAF) and Tea Party Patriots, in the planning of events on Jan. 6. This is categorically false. Ginni Thomas played no role in the planning of Jan. 6 activities with any individual or group, period, let alone any "mediating role" between groups.

Newly obtained messages reveal Hakim was told in a text from Kylie Jane Kremer, the executive director of WFAF, "On background, no Ginni Thomas was not involved with WFAF regarding Jan 6th planning." Hakim received this text on Feb. 17 at 12:41 p.m., long before the New York Times story was published on Feb. 22.

In more exchanges with Hakim that day, Kremer wrote at 1:04 p.m.,

“Again, on background, [Ginni] wasn’t involved with us.” When Hakim persisted in trying to prod Kremer to go on record about whether Ginni Thomas played a mediating role, Kremer responded at 1:08 p.m., “It’s irrelevant to us because we weren’t interacting with her at all.”

Hakim refused to use these Kremer statements (even on background, which means the quote can be used as long as the source isn’t explicitly named) in his story, and then his story falsely claimed that Kremer refused to answer his question about Ginni Thomas’ alleged “mediating role” with WFAF. She answered it three times.

Instead, Hakim and Becker cited Dustin Stockton, a former Tea Party organizer who was part of the March for Trump bus tour, who claims he, according to the Times, “had been told by another organizer, Caroline Wren, on Jan. 5 that it was Ginni Thomas who worked to bring unity ahead of the rally.” According to the Times story, “Wren disputed Stockton’s account.”

So, the Times ran a story its reporter was told was false by a person with first-hand knowledge (Kremer). Instead, Hakim quoted someone (Stockton) with no first-hand knowledge of this allegation. On top of that, Stockton’s source (Wren) disputed his account to the Times.

How on earth can The New York Times run this allegation about Ginni Thomas? How can Hakim claim that Kremer did not answer his question?

Once The New York Times Magazine story ran online on Feb. 22, Kremer texted Hakim asking if he was going to issue a correction to the story regarding the falsehood that she “did not answer that question” about Ginni Thomas’ alleged mediating role. Hakim acknowledged he received her answer but claimed, “I would’ve preferred to have it in a way I could use.” Kremer responded, “You cannot lie and say I didn’t answer the question. Just because I answered it on background, doesn’t mean you can say I didn’t

answer it."

She then texted a quote on the record, and Hakim proceeded to tweet out, "Just got a new statement from @KylieJaneKremer: 'Ginni Thomas was not involved with the planning of our January 6th rally at the Ellipse.'" But Hakim already had this statement on Feb. 17. The Times did not update the online story, nor did it add the quote to its printed edition, which was published on Feb. 27.

Worse, when these falsehoods are printed, they are amped up into even bigger untruths. The Times' David Leonhardt published a New York Times story on the same day Hakim's article went up, with this outrageous line: "The spouse of a sitting Supreme Court justice played an active role in an effort to overturn the result of a presidential election, hand victory to the loser and unravel American democracy." This is false, should be retracted, and frankly Leonhardt should issue an apology.

With reportage like this, the Times ought to consider changing its slogan to: "All the narrative fit to print." It never seems to let the facts get in the way of a good one.

Mark Paoletta served as a lawyer in the George H.W. Bush White House Counsel's office and worked on the confirmation of Justice Thomas. He is a senior fellow at Center for Renewing America, and partner at Schaerr Jaffe.

- Clarence Thomas
- corporate media
- Corrupt media
- Ginni Thomas
- Jan. 6
- January 6
- journalists
- Media
- Media Criticism
- New York Times
- NYT smears
- The New York Times

wsj.com

Opinion | The Hypocrisy of Supreme Court Ethics Journalism

Mark Paoletta

5–6 minutes

Expect to see more baseless attacks on conservative justices.

“Rules for thee but not for me” seems to be the phrase these days when it comes to criticizing Supreme Court justices. Politico adds to the double standard in its recent story that attacks Justice Amy Coney Barrett for not providing a client list from her husband’s law firm on her annual financial disclosure form.

Disclosing such clients is neither required nor appropriate, but that didn’t stop Gabe Roth of the group Fix The Court, which was funded by a left-wing money outfit connected to Arabella Advisors, from bemoaning the supposed loss of public trust in the court resulting from the lack of information about the clients of Jesse Barrett’s firm. And I don’t recall Mr. Roth, or anyone else on the left, hand-wringing over a lack of disclosure from the law firms of the spouses of liberal justices.

The Politico story makes much of Mr. Barrett’s continuing to practice law after moving to Washington when his wife joined the Supreme Court. But by sticking with his Indiana-based firm, SouthBank Legal, Mr. Barrett hasn’t raised any appearance issues. SouthBank Legal doesn’t have a Supreme Court practice and has never represented clients before the court.

Neither Politico nor the press generally raised such concerns over

Marty Ginsburg, who moved to Washington and joined the Fried Frank law firm when his wife, Ruth Bader Ginsburg, was appointed to the U.S. Circuit Court of Appeals for the District of Columbia in 1980. He practiced at the firm until he retired in 2009. There was no hue and cry over Judge and later Justice Ginsburg not providing a list of Fried Frank's many clients to allay public concerns over a potential conflict. A review of Justice Ginsburg's financial disclosures from 2005 to 2009 confirms that she never disclosed Marty Ginsburg's clients and didn't even list Fried Frank in the disclosure form's section on spouse's noninvestment income. Instead she listed her husband's income as coming from Martin Ginsburg P.C.

The press gave scant coverage to the many instances in which Fried Frank filed friend-of-the-court briefs with the Supreme Court. One of Mr. Ginsburg's Fried Frank colleagues also represented KSR International as a party before the high court, with Justice Ginsburg voting in favor of her husband's firm's client. The press likewise wasn't interested in the business relationship between Mr. Ginsburg, Ross Perot and Mr. Perot's company, EDS, even though Perot endowed a chair named after Marty Ginsburg at Georgetown University Law Center. Perot helped wrangle political support at Mr. Ginsburg's request for Ms. Ginsburg's confirmation to the D.C. Circuit, and Perot was a party to at least two cases in which petitions were filed with the Supreme Court. Justice Ginsburg didn't recuse herself from these cases.

None of this is mentioned in the Politico piece. Instead, it attacks Justice Antonin Scalia for having received but not disclosed a gift from a friend (disclosure was not required) and goes after Justice Barrett and her husband for conduct that doesn't even approach the line, much less cross it. Apparently, the behavior of working spouses of conservative justices raises worrisome ethics issues, while their liberal counterparts are celebrated as Washington power couples.

The current justices haven't violated, nor had Ginsburg, the

longstanding federal statute governing recusals: 28 U.S.C. 455, which applies to Supreme Court justices. In 1993, seven justices, including Ginsburg, issued a memo interpreting and applying this statute as to when justices must recuse themselves regarding family members. This is the standard the court has followed for nearly 30 years and, contrary to the current protests of the institutional press, that approach is sound and raises no genuine ethical problems.

The press is manufacturing this supposed ethical problem because it doesn't like the legal direction of the court. The ascendant originalist approach at the court is more faithful to the Constitution, but it is less welcoming to the liberal policy-making many have come to expect from the court since the Warren era. Expect to see many more baseless attacks on the court's conservative members in the future.

Mr. Paoletta served as a lawyer in the George H.W. Bush and Trump administrations. He worked on the nominations of Justices Clarence Thomas, Neil Gorsuch and Brett Kavanaugh and represents Ginni Thomas, Justice Thomas's wife, in the Jan. 6 Committee's proceedings.

thefederalist.com

The New Yorker Lies Again About Clarence Thomas And His Wife

Mark Paoletta

10–12 minutes

Jane Mayer of The New Yorker magazine and her fellow lefties are ramping up attacks on conservative Supreme Court justices, as they fear the court is getting ready to issue a host of decisions they won't like, most especially a ruling that may overturn *Roe v. Wade*. Mayer published a pathetic "hit" piece last week on Ginni Thomas, a long-time conservative activist and the wife of Justice Clarence Thomas. It's a dud.

Mayer's article, titled "Ginni Thomas' Crusades: Is Ginni Thomas a threat to the Supreme Court?" is full of falsehoods and distortions, consistent with the malicious and error-filled book she co-authored in 1994, "Strange Justice: The Selling of Clarence Thomas." Weaving together a mishmash of facts, conspiracies, and comments from dial-them-up liberal judicial ethics "experts," Mayer argues that Ginni Thomas' political activities and public comments on issues that come before the court require Justice Thomas to recuse himself from those cases.

But Mayer does not really care about judicial ethics. Rather, she wants to construct a case where only Ginni Thomas has to stop her political activity or Justice Thomas has to recuse himself. She invents a new "recusal" standard that liberal judges don't follow and misrepresents what other judges in fact do in facing the same situation as the Thomases. Call it Jane Mayer's version of feminism in 2022: conservative women can't speak out on issues when their husbands are judges.

Judges Don’t Recuse Over Their Spouse’s Views

The relevant law requires a judge to recuse from a case “if his impartiality might reasonably be questioned” (28 U.S.C. 455(a)). Another provision requires a recusal if the judge knows that a family member has an “interest that could be substantially affected by the outcome of the proceeding” (28 U.S.C. 455(b)(5)(iii). Based on the law, standards, and past precedents, Ginni Thomas’s political and public policy activities have never in a single instance required Justice Thomas to recuse himself from a case.

It is well-established that a spouse’s separate political views or activities are no basis for such a recusal. In 2011, Judge Stephen Reinhardt, of the Ninth Circuit Court of Appeals and a liberal icon, properly refused to recuse from a challenge to the constitutionality of proposition 8 (regarding same-sex marriage) even though his wife was the executive director of the American Civil Liberties Union for Southern California (ACLU/SC), which had filed a brief at the district court level in this case, and despite his wife publicly expressing her views on the issue.

“My wife and I share many fundamental interests by virtue of our marriage, but her views regarding issues of public significance are her own, and cannot be imputed to me, no matter how prominently she expresses them. It is her view, and I agree, that she has the right to perform her professional duties without regard to whatever my views may be, and that I should do the same without regard to hers,” Reinhardt wrote in *Perry v. Schwarzenegger* (2011).

Reinhardt also properly rejected the claim that his wife had an “interest” under section 455 (b), even though the organization had filed an amicus brief in the district court for the case now on appeal before him. Thus, Judge Reinhardt demolished every argument from Mayer and her so-called judicial ethics experts that Ginni Thomas’ activities or views require Justice Thomas to recuse.

Mayer’s ‘Expert’ Flips Positions Based on Politics

In fact, Stephen Gillers, whom Mayer cites as the gold standard for judicial ethics experts and who rips Ginni Thomas for "behaving horribly and hurt[ing] the Supreme Court and the administration of Justice," filed a brief vigorously defending Reinhardt for not recusing:

> We are long past the day when a wife's opinions are assumed to be the same as her husband's . . Ms. Ripson's opinions, views, and public pronouncements of support for the district court decision below do not trigger any reasonable basis to question Judge Reinhardt's ability to honor his oath of office. A contrary outcome would deem a judge's spouse unable to hold any position of advocacy, creating what amounts to a marriage penalty.

Gilllers' unprincipled and hypocritical attack on Ginni Thomas' permissible conduct and speech is despicable.

Judge Reinhardt also said it is important that "judges not recuse themselves unless required to do so, or it would be too easy for those who seek judges favorable to their case to disqualify those that they perceive to be unsympathetic merely by questioning their impartiality." To succumb to Mayer's argument would be to institutionalize judge shopping.

As the late Justice Antonin Scalia observed, overbroad recusal standards "would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons." Mayer's smear piece is the embodiment of these concerns.

To Mayer, the Left Can Do What the Right Can't

D.C. Circuit Judge Nina Pillard's husband is David Cole, the national legal director of the ACLU, who has been very outspoken on many hot button constitutional issues. He was particularly outspoken in his opposition to the Trump administration.

In fact, Cole wrote an op-ed in May 2019 praising the D.C. district court judge's May 26, 2019, ruling in *Trump v. Mazars*, rejecting

President Trump's arguments that he did not have to comply with a congressional subpoena for his tax records. Cole wrote that Trump "argued that House committees have no authority to investigate except where their investigation is tied to a specific piece of legislation. But that argument is dead wrong, and the federal courts have properly and resoundingly rejected it."

After the D.C. Circuit three-judge panel ruled against Trump on his appeal of that district court decision, Judge Pillard, a Barack Obama appointee, sat on the D.C. Circuit en banc panel that rejected a petition to rehear the case by the full D.C. Circuit. Judge Pillard voted to let stand the D.C. Circuit panel opinion that ruled the exact way her husband advocated in his 2019 article.

To be clear, Judge Pillard is correct to not recuse herself from cases where her husband has opined on an issue that comes before her court, even if he has specifically commented on a case before she considers it. Cole's statements do not provide the basis to question in any way the impartiality of Judge Pillard's rulings.

Despite Jane Mayer's efforts to impugn the integrity of Justice Thomas for properly not recusing in cases involving issues in which his wife may have commented in the public arena, these examples demonstrate that other judges with spouses in the public policy arena do exactly what Justice Thomas does. The only difference, for Jane Mayer, is that Ginni Thomas is a conservative activist and Justice Thomas is an originalist.

Justice Thomas Was Not Where Mayer Says He Was

In every example Mayer cites in her article where Ginni Thomas is involved with a group advocating a public policy position or making a filing in the Supreme Court, Ginni Thomas is not a "party" nor has an "interest" that would be substantially affected by the outcome of a Supreme Court decision.

In one example, Mayer even falsely claims that Justice Thomas attended a luncheon, Impact Awards. Ginni Thomas emceed the

event where awards were given to conservative leaders. Mayer writes that a guest at the luncheon, Jerry Johnson, who was then the president of the National Religious Broadcasters, "later recalled that the Justice sat in front of him and was a 'happy warrior,' pleased to be watching his wife 'running the show.'"

Mayer's claim is 100 percent false. Justice Thomas was not at this Impact Award ceremony. In fact, he has never attended an Impact Award luncheon ceremony. I spoke with Johnson, and he told me Justice Thomas was not at this luncheon. Moreover, Johnson told me that neither Mayer nor anyone from the magazine ever attempted to contact him to ask him if he saw Justice Thomas at this event or made these statements.

A Packet of Malicious Smears

There are many more smears in this piece, the most snarky of which may be that Ginni Thomas failed to pass the bar exam. Mayer does not mention that Ginni Thomas passed it on her second try. Many others have failed on the first and passed on the second try, including Hillary Clinton, Kamala Harris, and Michelle Obama. But Mayer loves to smear.

I know firsthand how malicious Mayer can be. In "Strange Justice," she accused me of violating the Anti-lobbying Act, a criminal law, when I was working on Justice Thomas' confirmation in 1991 as a member of the White House Counsel's office. Mayer wanted to create the false narrative of a White House willing to do anything to get Thomas confirmed, including me committing a felony. It was 100 percent false and defamatory.

I demanded a retraction and threatened to sue her, her co-author Jill Abramson, and the publisher if they did not strike this false accusation. I received a letter of apology from the publisher on behalf of Mayer and Abramson, and they struck that accusation from the paperback version of their book. Mayer was guilty of making scurrilous and false accusations then, and continues that

practice today.

Ginni Thomas is a great patriot. She should continue to engage in her lifelong work of public advocacy, even on issues that could come before the Supreme Court.

This article has been corrected with respect to Judge Pillard and her husband's public discussion of court cases she has adjudicated.

Mark Paoletta served as a lawyer in the George H.W. Bush White House Counsel's office and worked on the confirmation of Justice Thomas. He is a senior fellow at Center for Renewing America, and partner at Schaerr Jaffe.

- Clarence Thomas
- courts
- Ginni Thomas
- Impact Awards
- Jane Mayer
- judicial ethics
- Law
- Media
- Media Criticism
- recusals
- SCOTUS
- Supreme Court
- The New Yorker

dailycaller.com

PAOLETTA: Leftist Tantrum Targets Spouses In Latest Attack To Undermine SCOTUS' Legitimacy

Mark Paoletta

6–7 minutes

Politico's gaslighting of Supreme Court justices continues with its recent story on a letter from four left wing groups requesting Congress to "close a disclosure loophole in the judiciary." According to Politico, "Currently, the justices merely disclose their spouses' jobs, not the identity of their clients or the level of compensation." But there is no "loophole" for justices, who comply with the same laws as Members of Congress & Executive Branch officials, who also don't disclose spouse's clients and income.

Politico implied in a previous story that there are possible serious unknown conflicts of interest for justices because they don't disclose their spouse's clients. The report focused on the spouses of Chief Justice Roberts, Justice Barrett and Justice Thomas. This is nonsense.

The Ethics in Government Act, which governs all federal officials' disclosure requirements for spouses' outside work, applies to Congress, the Executive Branch, and the Judiciary, including justices. The relevant section on disclosure of spouse's income requires the filer to list the source of income exceeding $1,000 earned by a spouse from any person.

Thus, the law is expressly written so that a filer Member of Congress and staff, Executive Branch official, or justice) only needs

to disclose a spouse's employer. That's it. For example, Congressman Hank Johnson's wife is a lawyer in private practice. On his 2022 financial disclosure form, he merely disclosed his spouse's law firm, not her clients or income.

Fix The Court, CREW, POGO and Free Law Project's letter to Congress misleadingly describes this provision as a "loophole in the judiciary," and asks Congress to require justices to disclose the source of any payments totaling more than $5,000 to a spouse from any client for work rendered.

Gabe Roth from Fix The Court claims that these disclosures would allow justices to recuse themselves from cases in which a spouse has a financial interest. But recusal laws already require judges and justices to recuse from cases in appropriate circumstances. This amendment is really just a marriage penalty to bully justices into unnecessarily recusing themselves from cases, and will hamper justices' spouses from being able to work.

It's worth remembering that no group or any media outlet had concerns when liberal justice Ruth Bader Ginsburg never disclosed her husband's clients when he practiced law at a firm that appeared many times before the Supreme Court.

But the authors of this letter nor the Politico story ever mention that this current provision or the proposed amendment covers Congress and the Executive Branch too. Politico only attacks justices' spouses' work, claiming "the details of their clients remain largely unknown" surrounded by Roth's "black box."

These so-called "concerns" surely also exist regarding Members of Congress's spouses and their staff alongside executive branch officials. Congress writes laws and executive branch officials promulgate regulations and administer federal programs. Following the logic of Fix the Court and Politico, lots of companies might hire the spouses of lawmakers or their staff or executive branch officials to influence these public servants' decisions.

But POGO, CREW, FTR, and Free Law Project don't seem to be

interested in these possible conflicts of interest. Politico quotes Rep. Johnson on the proposed law: "I welcome this proposal to shine a light on just who or what may be influencing the justices' decision in major cases." Why didn't Politico ask Rep. Johnson if he supports disclosing his wife's clients too? Per Rep. Johnson's statement, the same argument could be made for shining a light "on just who or what may be influencing" Rep. Johnson's decisions or other Members of Congress' work. But no problems there.

So, why is Politico creating a bogus story that justices have some sort of "loophole" and should have to disclose more than other officials regarding their spouse's work? Politico's story can only be an attack on the court's legitimacy because SCOTUS is moving in an originalist direction.

Given that FTR's proposed amendment would also require Members of Congress and staff to disclose their spouses' clients and income, this proposal will almost certainly never pass, regardless of who is in control of Congress. I don't believe it is good policy to require justices or other federal officials to disclose more on a spouse's clients or income. It's unnecessary and would harm working spouses and make serving in government more unappealing for two-career families.

As noted earlier, recusal laws for judges and justices are already on the books, as well as conflict of interests laws that govern the other branches regarding spousal financial interests.

But in case that isn't enough, let's extend Politico's theory of transparency to its logical conclusion: Should the outlet's reporters, editors, and media owners disclose their spouses' clients and income to see who may be influencing their reporting? Fair is fair, right?

Mark Paoletta served in the George H.W. Bush and Trump Administrations and worked on the confirmations of Justices Thomas, Gorsuch, and Kavanaugh. He is a partner at Schaerr Jaffe LLP and a Senior Fellow at the Center for Renewing

America. He represents Ginni Thomas in connection with the January 6th Select Committee proceedings.

The views and opinions expressed in this commentary are those of the author and do not reflect the official position of the Daily Caller.

Mr. JOHNSON of Georgia. The Chair will now recognize the gentlelady from Texas, Representative Jackson Lee, for five minutes.

Ms. JACKSON LEE. I thank the Chair very much.

Let me put it on the record that I have no desire to undermine the Supreme Court. I am, in fact, an Earl Warren Legal Scholar. I was so honored to have received that honor as I entered into the University of Virginia School of Law. So, I take great umbrage with that suggestion. I am going to suggest that we have some problems that need to be fixed.

Professor Fredrickson, it's good to see you. You've been before our Committee before.

I had already heard from the distinguished gentleman, Mr. Paoletta.

It should be well noted that we do have a factual basis, not presently before this Committee, that the wife of a Justice was actively engaged in January 6 in terms of its advocacy and other aspects of her participation.

For me, that strikes at the core of creating a more perfect union and the upholding of the Constitution that is a responsibility of the United States Supreme Court.

Let it be very clear. Ethics bounds us all. We walk in ethics in most aspects of Americans' interaction. There are corporate ethics that sometimes are followed and not. There are ethics in school boards. There are ethics in the University of Virginia that has its own internal student judicial system. Because people believe that you should adhere to the truth.

So, let me first quickly go to professor—or Reverend Schenck.

Thank you for indicating that you are a simple man of God and your life was around that.

I read from your testimony:

> In March 1996, my team had concluded that the Supreme Court was a necessary part of our designated mission field. By then, I was convinced that no matter how much pro-life Legislation or Executive policy success we achieved, inevitably, any gains would be frustrated, diminished, or nullified by the existence of *Roe* v. *Wade*. As what has sometimes been called a "super precedent" . . .

So, you go on to speak about your understanding of that.

Take me from that point and what you just testified, that the evangelical movement got wrapped up into the Republican toolkit and became a tool of Republicans who did not want to find the balance, of wanting to use the sledgehammer approach, rather than a man of God. I think you were speaking from your heart.

Reverend, would you please?

Mr. SCHENCK. Thank you, Congresswoman Lee (sic).

I'll take you to one very telling event, a meeting inside the U.S. Capitol with Republican Party operatives and a number of leading evangelical spokespersons, institutional leaders, ministry heads from across the country. In that meeting that I participated in, the conversation went something like this.

> You guys want *Roe* v. *Wade* overturned. We can do that for you. But you take the whole enchilada, you take the whole thing, you take everything else that comes with it. Because if you want *Roe* gone, you have to work with us. So, you take it all.

I was at the table, and I watched my colleagues nod, uncomfortably. From that point on, the community that I had served, and still do, made a deal with the devil. That deal was that we would support everything on the conservative agenda whether or not we had conscientious conflict with it. The means were justified by the end of that.

Ms. JACKSON LEE. It also meant that you had to approach the Supreme Court in a different way, that they had to be influenced?

Mr. SCHENCK. Well, certainly we had to do everything we could to ensure that the Justices would be resolved to begin laying the groundwork for the reversal of *Roe*.

Ms. JACKSON LEE. Let me quickly, because I want to get Ms. Fredrickson in. Who was in the room? What operatives were in the room? When I say that, you were in a room of what at that time?

Mr. SCHENCK. These were leading evangelical influencers from across the country.

Ms. JACKSON LEE. That might as well and the person speaking saying you had to do whatever they wanted was an influencer or a—

Mr. SCHENCK. More of a party operative, somebody who knew how to get political objectives achieved.

Ms. JACKSON LEE. I'm going to ask, Madam Professor Fredrickson, is there any insult to having an ethics protocol for the United States Supreme Court to its ability as a third branch of government?

Ms. FREDRICKSON. No. I think it actually would be a celebration of the role that the Supreme Court plays in our system.

Ms. JACKSON LEE. May I ask unanimous consent to submit two documents into the record? This is during the confirmation hearings of Justice Kavanaugh, Gorsuch, and Amy Coney Barrett, where all of them committed to the acceptance of the precedent of *Roe* v. *Wade*, under oath. I ask unanimous consent to place this into the record.

Mr. JOHNSON of Georgia. Without objection, so ordered.

[The information follows:]

MS. JACKSON LEE FOR THE RECORD

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS
COMMITTEES:

JUDICIARY
SUBCOMMITTEES:
Chair
Crime, Terrorism, Homeland Security and Investigations
Immigration and Citizenship
Constitution, Civil Rights, and Civil Liberties

HOMELAND SECURITY
SUBCOMMITTEES:
Cybersecurity, Infrastructure Protection, and Security Technologies
Counterterrorism and Intelligence
Emergency Preparedness, Response, & Recovery

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Congress of the United States
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Washington, DC 20515

STEERING AND POLICY COMMITTEE

VICE CHAIR
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CHIEF DEPUTY WHIP
DEMOCRATIC CAUCUS

FOUNDER AND CO-CHAIR
CONGRESSIONAL CHILDREN'S CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS

COMMITTEE ON THE JUDICIARY

HEARING ON:
"UNDUE INFLUENCE: 'OPERATION HIGHER COURT' AND POLITICKING AT SCOTUS"

THURSDAY, DECEMBER 8, 2022

- Thank you, Chairman Nadler, for convening today's vital Judiciary hearing titled Undue Influence: 'Operation Higher Court' and Politicking at SCOTUS.

- I would like to welcome our witnesses
  - *Rev. Robert L. Schenck*, President and Founder, The Dietrich Bonhoeffer Institute,
  - *Caroline Fredrickson*, Visiting Professor, Georgetown Law, Senior Fellow, Brennan Center for Justice,
  - *Mark R. Paoletta*, Partner, Schaerr Jaffe LLP,
  - *Donald K. Sherman*, Senior Vice President and Chief Counsel, Citizens for Responsibility and Ethics in Washington (CREW).

- It is an uncomfortable truth but one that is all too true: Recent reports reveal that the Supreme Court of the United States of America has not been fulfilling its mandate of delivering complete and impartial justice without fear or favor to the American people.

- Our country and the democratic principles on which it relies depends on the Supreme Court administering justice fairly and impartially and to serve as the ultimate and final arbiter of legal disputes and conflicting interpretations.

- However, recent investigative reporting has uncovered facts showing that members of the organization "Faith in Action" used donations to the Supreme Court Historical Society to gain introductions to conservative Supreme Court Justices that allowed them to build relationships with the Justices, providing the group with unwarranted access and influence.

- The benefits that Faith in Action received not only provides the group with unfair advantages in judicial proceedings. Beyond that, it is dangerous for the rest of the country because the group's influence transcends the appropriate guardrails that has long insulated the American judicial system from such blatant, brazen bias.

- Faith in Action did not necessarily seek out to change the minds of Supreme Court Justices, but rather to embolden them!

- Faith in Action sought to give confidence and reassurance to Justices who are friendly to their views, urging them to stay the course on certain issues that Faith in Action held dear as a conservative christian group. Faith in Action sought to reassure these Justices of the righteousness of their positions when the Justices positions agreed with theirs.

- A Politico article describes an entire **"Ecosystem of Support"** to bolster the confidence of certain Supreme Court Justices!

- Such tactics are, at a minimum, a subterranean, vile effort to co-opt members of the Supreme Court. Yet, their effect is far worse, as it amounts to an insidious way of replacing the free and impartial judgment of certain Supreme Court Justices who are predisposed to embrace their agenda, and malleable enough to be manipulated into inculcating that agenda as a lens through which they review cases.

- Faith in Action does not operate like a registered lobbyist that complies with disclosure and conduct requirements to advance their positions through persuasion and advocacy. The US Supreme Court does not officially welcome lobbyists to intercede in cases before them.

- Instead, what Faith in Action did was more subtle and more dangerous.
- By donating to the Supreme Court Historical Society in exchange for introductions to the Justices, Faith in Action intentionally befriended the Justices, establishing back-channel relationships that would enable them to continue exerting their influence during social engagements.
- Then, the second phase of Faith in Action's plan was to use hospitality to disarm the Justices so that they could deliver their knock out punch: the use of 'nudging' techniques!
- The process of "nudging" respectfully gives confidence and bolsters an individual's confidence in their position, as opposed to urging a wholesale change of opinion.
- Although these seemingly innocuous efforts may not carry an overt plea for a specific outcome of a specific judicial decision, these efforts can have an insidious, longterm – and ethically problematic – influence on the continuing flow of judgments by our nation's highest court that can impact rulings for many years.
- A kind of mental subterfuge was used to incrementally inseminate the thinking of Justices who are susceptible to this form of subtle, false-friendship persuasion. One could even describe it as brainwashing.
- The fortunate exposure by journalists of these practices demonstrates the urgent need for a code of ethics and standards that ensures the autonomy of the Court and insulates the Court from undue influence and questionable interference.
- We must ensure that justice is always served with judicial impartiality and fairness in accordance with the maxim which is inscribed in stone above the entrance of the Supreme Court: "Equal Justice Under Law."
- Our legal system has erected canons of civil and criminal procedure to buttress the legal system and ensure fulfillment of our country's expectation of impartiality in the practice of the law.

- Faith in Action conducted an end-run around these canons and the entire judicial process by donating to the Supreme Court Historical Society and courting friends as if the Court were their country club.

- By doing so, members of Faith in Action curried favor with the Justices, setting up social ties that enabled them to circumvent guardrails to present their views and encouragement to abide by them. In effect, Faith in Action was able to stack the deck against the average American citizen so that they and their friends received or bolstered the outcomes that they wanted from the Supreme Court of the United States.

- This is a distortion of the impartiality that our founders required of the Court when they imbued it with the awesome power to have the final say in legal disputes and prevail over the other two branches.

- The judicial branch of our government must be immune to bias and unfair, undisclosed outside influence if it is to maintain the confidence of the people. Respect for the Court's decisions is based on the Court being fair and impartial without regard to race, status, religion, creed, or other factors....including who invited whom to their holiday party.

- In an affront to those priciples, Faith in Action was so coddled as friends of certain Justices that they led prayers within those Justices' chambers.

- With Faith in Action praying in Justices chambers, how is the average citizen of the United States supposed to receive their fair day in court?

- Where does the average American go to receive a level playing field when the members of Faith in Action are wining and dining and praying with the Supreme Court Justices in their chambers before trial?

- The civil rights movement succeeded in part because, when racists treated nonviolent protesters without dignity or respect, the protestors believed that a just and fair Supreme Court would ultimately recognize the unjust violations of their inalienable rights and correct the injustice.

- The civil rights movement depended upon, and received, judicial outcomes that restored the dignity that the nonviolent protestors deserved, even when state courts tried to negate their rights.

- Those who were denied their civil rights turned to the highest court in the land to uphold the Constitution and assert their humanity. The Court upheld the inalienable rights to life, liberty, and the pursuit of happiness for all Americans, rather than allowing interlopers to try to curry favor with them to influence Supreme Court decisions.

- We must today restore the people's trust in the Supreme Court by passing a Supreme Court code of ethics into law. A code of ethics is the minimum that Congress should do to ensure that the Supreme Court remains an impartial body, focused on the rights guaranteed to all Americans by the Constitution.

- Our democracy depends on it.

- In the era of Jim Crow discrimination, African Americans who wanted to vote had to guess the number of jelly beans in a jar. Access to the right to vote, as guaranteed by the 15th Amendment, was unattainable for many. Rather than resolve that by providing justice, the Supreme Court at that time perpetuated the problem that they viewed through the lens of their neighbors and other stakeholders who resembled them, with whom they shared interests and biases.

- Now it has become clear that certain Justices on today's Supreme Court are reviving the anachronistic insular favoritism and bias that many of us thought had been relegated to history. If that dynamic is permitted to continue, the interests of average Americans will increasingly be at risk, that is, unless they are wealthy enough to donate to the Supreme Court's Historical Society.

- Although "Lady Justice" traditionally is blindfolded while holding the scales of justice, the recent revelations make it clear that, without a code of ethics, Lady Justice's blindfold has been removed as she sits down for dinner and gets cozy with members of Faith in Action.

- That is not how justice works!

- There was a day were only white, older, land-owning men had access to justice and participation in government. But Faith in Action shows that certain Justices welcome a return to the days of special access to justice at the Supreme Court that is not available to the average American.

- We cannot go back to the times when justice was based on who you knew, what color your skin was, and what schools you went too.

- I applaud the investigative journalists who dug deep to expose the disposition of justice by certain conservative members of the Court.

- The Supreme Court must perform an internal inspection to confront its own errors. It must welcome an impartial internal audit to identify and publicly acknowledge problematic practices. It must look in the mirror to come to terms with the ethical lapses and biases of certain Justices.

- A code of ethics for the Court must be the starting point, and not the end point, of reforms requiring scrupulous adherence to practices that ensure Equal Justice Under Law. Upon further self examination, the Court may find that further steps must be undertaken voluntarily.

- The recent revelations mandate that the Court can no longer evade basic standards for conduct and ethics that are routinely required in virtually every entity with public responsibility in the US. No longer can Justices set their own standards individually, without requirements to disclose gifts of entertainment, food, or lavish hospitality from stakeholders.

- The question before us today is, are we committed to plattitudes and lassitude or do we insist that the Supreme Court gets its house in order? I, for one, stand <u>with</u> the American people and <u>against</u> undue influence.

- Americans do not want a Supreme Court that is so insulated and isolated from the people that it becomes arrogant and unaccountable. We must do all that we can to ensure that the Court has a functional code of ethics to prevent them from becoming tantamount to an arm of aristocracy.

- We must bring the Supreme Court closer to the people and stiffen its resolve to dispense impartial justice like we claim in our pledge: "one nation, indivisible, WITH LIBERTY AND JUSTICE FOR ALL."

- Thank you, and I yield back.

Kavanaugh

- "It is settled as a precedent of the Supreme Court, entitled the respect under principles of stare decisis. The Supreme Court has recognized the right to abortion since the 1973 Roe v. Wade case. It has reaffirmed it many times."

- "Start with my record, my respect for precedent, my belief that it is rooted in the Constitution, and my commitment and its importance to the rule of law. I understand precedent and I understand the importance of overturning it."

- "Roe is 45 years old; it has been reaffirmed many times, lots of people care about it a great deal, and I've tried to demonstrate I understand real-world consequences, I am a don't-rock-the-boat kind of judge. I believe in stability and in the Team of Nine."

- "So Casey now becomes a precedent on precedent. It is not as if it is just a run-of-the-mill case that was decided and never been reconsidered, but Casey specifically reconsidered it, applied the stare decisis factors, and decided to reaffirm it. That makes Casey a precedent on precedent."

Gorsuch

- "I would tell you that Roe v. Wade, decided in 1973, is a precedent of the United States Supreme Court. It has been reaffirmed. A good judge will consider it as precedent of the U.S. Supreme Court worthy as treatment of precedent like any other."

- "For a judge to start tipping his or her hand about whether they like or dislike this or that precedent would send the wrong signal. It would send the signal to the American people that the judge's personal views have something to do with the judge's job."

Amy Coney-Barret 

- "What I will commit is that I will obey all the rules of stare decisis, that if a question comes up before me about whether Casey or any other case should be overruled, that I will follow the law of stare decisis, applying it as the court is articulating it, applying all the factors, reliance, workability, being undermined by later facts in law, just all the standard factors."

- "I promise to do that for any issue that comes up, abortion or anything else. I'll follow the law."

Ms. JACKSON LEE. I thank the Witnesses.

Thank you for your courage, Professor. I want to call you professor. Reverend, thank you for your courage.

Mr. JOHNSON of Georgia. The Chair will now recognize the gentlelady from Georgia, Representative McBath, for five minutes.

Ms. MCBATH. Thank you, Chair.

I want to thank the Witnesses today. Thank you so very much for patiently being here with us today and your testimony.

I have to say, with all moral clarity today, for each and every individual in this room, let him who is without sin cast the first stone.

Reverend Schenck, you and I have had the pleasure to meet almost 10 years ago, and long before I had ever even considered running for Congress.

My son Jordan had just been murdered by a man with a gun who didn't like the loud music that he was playing in his car with his friends. When we met, most assuredly at that time you and I didn't necessarily agree on gun safety policy. You listened to a mother's story, you listened to my heart.

Years later, you began to challenge your own ideas as you believe God had warranted you to do, as he was calling you to do. As his shepherd, you still continue to reflect on your moral and theological responsibility to God's people.

Faith has helped guide you all your life, I do know this to be true, and the decision to come forward today, like many of the very difficult spiritual and moral decisions that God has called on you to make of most recent years, today could not have been an easy one for you at all.

You have faced fierce negativity and scrutiny, and it has come at a great personal and financial cost.

Someday everyone in this room will stand before God and account for the lives that we have lived. You and I, Reverend Schenck, have engaged in that conversation of faith and truth almost a decade ago. I have a few questions for you today.

This is kind of a three-part question, so if you need me to reiterate anything, please feel free to do so.

I'm interested to know what you took from our very first conversation. I'm also interested to know what role God and faith have had in your life's decisions.

I'm also interested to know what this particular decision, the decision to come forward and speak the truth, means to you as a man of God and a minister to his people.

Mr. SCHENCK. Thank you, Congresswoman. Yes, thank you for the role you have played close and from a distance in the pilgrimage I've been on these last several years.

To begin with, I will tell you that there came a moment in a dusty seminary basement, comparing the story of the Evangelical church in Nazi Germany, which declared Adolf Hitler to be a gift and miracle sent by God to restore Germany to its greatness, that was an eye-opening and deeply disturbing experience for me because I realized how my spiritual family could be utterly politicized in the worst possible way imaginable. That was an eye-opening experience.

Along the path I met you and I heard your story, and I realized that the ideology of my community that embraces unfettered Second Amendment rights became an idol. Ideology can quickly become a form of idolatry.

Then came other experiences, including the memory of one in a Montgomery County jail when I was detained for supporting then Chief Justice Roy Moore of Alabama in his public display of the Ten Commandments, and hearing the shrieks of a woman in an odd co-ed wing, psychiatric wing of the jail, screaming for her children, begging for mercy for her three children, "Where are they? Who will, who are caring for my children." I realized I had never heard the voice of that woman in 30 years of anti-abortion activism.

That came back to me in a certain instance in time and shook the foundations of the ideology that had become idolatry for me.

That brought me to a place of repentance, which I'm still working out. I consider myself a penitent pilgrim. At this time of my life, part of my penance is to tell the truth.

I hid many secrets during my public life as an activist on the religious right. I don't want to hold those secrets any longer, and that's why I've come forward to tell the truth today.

Ms. MCBATH. Thank you for your courage and your conviction. I yield back.

Mr. JOHNSON of Georgia. The Chair now recognizes the gentleman from New York, Mr. Jones, for five minutes.

Mr. JONES. Thank you, Chair.

During oral argument this week in a case called 303 Creative, which threatens to undermine the rights of LGBTQ people in our economy to not be discriminated against, Justice Alito joked about Black children dressing up in KKK costumes.

His remarks caused many Americans to question his mental fitness. Even before his antics this week, Americans had reason to question his integrity.

On November 19, *The New York Times* published a bombshell report describing credible allegations that Justice Alito leaked both the outcome and the authorship of the Court's 2014 opinion in *Hobby Lobby* to Gayle and Don Wright of Centerville, Ohio.

The Wrights were far-right donors to the Supreme Court Historical Society who were actually secret operatives for a radical anti-abortion group called Faith and Action. The mission of the Wrights and other operatives trained by Faith and Action was to ingratiate themselves with those Justices who proved amenable—the Alitos, the Thomases, the Scalias—go figure—to influence Supreme Court decisions.

The President of Faith and Action, who I'm grateful is testifying today—the former President—at the time called those operatives stealth missionaries.

Their strategy worked. The Wrights became close friends of the Alitos and they dined in each other's homes. Sam and Martha-Ann Alito even vacationed with Gayle and Don Wright at their home in Jackson Hole, Wyoming—which sounds incredible, by the way. I've never gone skiing in Jackson Hole.

In clear evidence that *Hobby Lobby*, the result specifically had been leaked and the author of it had been leaked, *The New York*

Times described several contemporaneous emails and conversations from 2014 which confirmed that today's key Witness, Reverend Schenck, was indeed aware of the outcome of the *Hobby Lobby* opinion and the identity of its author.

The only way he could've known this is if Justice Alito had indeed leaked this information to Gayle and Don Wright. That is common sense. Justice Alito's hypocrisy, as well as the hypocrisy of some of my colleagues on this Committee today, astounds me. It astounds me.

That is because in October of this year, while speaking at an event commissioned by the right-wing Heritage Foundation, Justice Alito referred to the leak of his draft opinion in *Dobbs* as a, quote, "great betrayal of trust." A great betrayal of trust.

Will Justice Alito use these same words to describe his own leak of the Supreme Court's decision in *Hobby Lobby*? With this new information, why should any of us believe that he wasn't the person who leaked the *Dobbs* opinion? Again, more likely than not given the evidence that we have before us.

Justice Alito went on to say that, quote, "Someone crosses an important line when they say that the Court is acting in a way that is illegitimate," and that he did not think anyone in a position of authority, quote, "should make that claim lightly."

Well, Justice Alito, your conduct as a member of the Supreme Court is directly responsible for the American public increasingly viewing the Supreme Court, unfortunately, as illegitimate. "Keep up what you're doing, it's making a difference," Justice Thomas told Reverend Schenck.

Reverend Schenck, thank you for your candor today. I know this has been very difficult. You wouldn't be the first Witness who my Republican colleagues have cast unfair aspersions on, but it's still shocking to hear some of the things that they're saying about you today and that they have said about you today because you were just their friend a few years ago, in their eyes.

What do you think Justice Thomas meant when he said that it's making a difference, the work that you were doing?

Mr. SCHENCK. The context of that, Congressman, was the work I had been doing introducing the individuals I referred to as stealth missionaries into the life of the Court.

I saw Justice Thomas in the hallway of the Court, and he made a point to signal to me, and he said, "Keep up your good work, it's making a difference." The context of that was what we had been doing at the Court for, at that stage, nearly 17 years.

Mr. JONES. Indeed that work is described in great detail in *The New York Times* reporting by Jodi Kantor and others.

In the limited time I have left, I would just make the following observation. This Committee has requested, time and time again, a representative from the Supreme Court to opine, to provide testimony on a variety of questions bearing on the ethics and the need for ethics reform at the Court.

In October 2021, the Chief Justice failed to send a representative to testify at our hearing on judicial ethics and transparency.

In March of 2022, the Chief Justice failed to send a Witness for this Committee's hearing on workplace protections for judicial employees.

Yet, again in April 2022, after other bombshell reporting regarding the violation of the recusal statute by Justice Thomas pertaining to his wife's far-right activism trying to overturn the Presidential election and his continued insistence on ruling in matters relating to January 6, the Supreme Court, and Chief Justice Roberts, in particular, failed to send a witness.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

Mr. JONES. So, I would just conclude, Mr. Chair, by saying that this is on Justice Roberts to finally do something about the crisis of legitimacy at the Court. The buck stops with him.

Thank you. I yield.

Mr. JOHNSON of Georgia. The Chair will now recognize the gentlelady from Pennsylvania, Ms. Dean, for five minutes.

Ms. DEAN. Thank you, Mr. Chair, and thank you for your interest and determination in this important issue.

I thank our testifiers.

Dr. Fredrickson, you mentioned something that cannot be said enough, that Supreme Court Justices are not elected. This is by design.

> The Judiciary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment.

Of course, that's Hamilton, as has been noted earlier.

We've seen today that money is moving toward the Supreme Court Justices. We've seen attacks on our civil rights coming from the courts, on our voting rights protections. This is the reason public confidence in SCOTUS is at an all-time low.

So, Dr. Fredrickson, I believe this goes a long way in terms of the leaked opinion. For the average citizen, for my constituents, why should Americans care about the low approval rating of our highest court in the land? What is the impact on their daily lives?

Ms. FREDRICKSON. Thank you so much. Thanks for the promotion too. I've never been called "Dr. Fredrickson" before. I like it.

Ms. DEAN. Forgive me. Forgive me.

Ms. FREDRICKSON. No, it's great. It's great.

Mr. DEAN. Professor. From an old professor to another.

Ms. FREDRICKSON. I have a J.D. but not a Ph.D.

No, thank you very much for that question. I think I would just go back to, I think, what Alexander Hamilton was trying to suggest, and did suggest very forcefully in that, in Federalist 78, was that the Court really depends for its strength.

Its strength is purely moral. Its strength is purely where it stands in the confidence of the people. When that has been undermined, it becomes a real danger for the whole idea of checks and balances and separation of powers.

The role of the Court is to ensure that we stay within the boundaries of the law, but the only way that they can enforce that is by respect for their rulings.

I would also evoke James Madison, who Mr. Raskin mentioned, other author of the Federalist Papers, who talked about checks and balances and the importance and the fact that there are only parchment barriers in between the branches and that the way to actually really effectuate the checks and balances that are inherent

in separation of powers is through the ability of each branch to oversee the others.

That's why I think it is very critical that this Committee is undertaking this project. Again, I thank Mr. Johnson for this legislation.

Ms. DEAN. I do too.

Reverend Schenck, in my time remaining, I'm a lawyer by training, and I remember learning in my early ethics class about judges avoiding even the appearance of impropriety. Stunning to me in my adult life to understand that the Supreme Court Justices don't seem to be accountable to that same important ethical standard.

So, I'm outraged by the schema of wealthy donors cozying up to Supreme Court Justices to influence them. As my colleague just said, what a great betrayal of trust, in this case our trust.

My question for you, Reverend, is while it's shocking to me, did any Justice raise his or her hand at one of these socials, or soirees, to say, "This doesn't feel right, this is inappropriate access and attempt at influence"? Did any Justice say that?

Mr. SCHENCK. Never in my hearing or presence, Congresswoman.

Ms. DEAN. Never. Never any of their staffers say, "We're really worried about the appearance of this"?

Mr. SCHENCK. No.

Ms. DEAN. Never. I would say that there's an awful lot on these Justices. We hold them in such high regard, or at least I always did in the past as a student of the law, I held them in such high regard, and how corrosive these last years have been.

With that, Mr. Chair, I sincerely thank you for the mission you are on, of course, to bring ethical standards to our Supreme Court, and I am going to stand with you all the way.

I yield back.

Mr. JOHNSON of Georgia. I thank the gentlelady. The gentlelady yields back.

At this time, I'd like to read several letters—well, I won't read them into the record, but I'll enter them into the record for today's hearing, from a number of groups, thanking this Committee for holding this hearing and endorsing an urgent floor vote on the Supreme Court Ethics, Recusal, and Transparency Act.

These letters are from Demand Justice and a coalition of over 80 national, State, and local organizations; also, Project on Government Oversight; NARAL Pro-Choice America; Interfaith Alliance; Alliance for Justice on behalf of 150 public interest and civil rights organizations; also, Senator Russ Feingold of the American Constitution Society; and last, but not least, Fix the Court.

Without objection, these are entered into the record.

[The information follows:]

MR. JOHNSON OF GEORGIA FOR THE RECORD

December 8, 2022

The Honorable Jerrold Nadler
Chairman
U.S. House Committee on the Judiciary
2141 Rayburn House Office Building
Washington DC 20515

Dear Chairman Nadler:

We, the undersigned organizations, write to thank you for scheduling today's hearing on "Undue Influence: Operation Higher Court and Politicking at SCOTUS" and for your continued commitment to bringing transparency and accountability to the Supreme Court of the Supreme States. We also urge the House to pursue a legislative response to the justices' multiple ethical lapses by passing the Supreme Court Ethics, Recusal, and Transparency Act of 2022 ("SCERT Act"), H.R. 7647, which your Committee reported in May. In just the past month, two more incidents have been reported that make crystal clear the urgent need for Supreme Court ethics reform and this important legislation.

First, as your hearing will further explore, reporting from the *New York Times* reveals that Justice Samuel Alito may have divulged confidential information about a pending case to wealthy donors of Faith and Action, a conservative non-profit organization with a vested interest in the outcome of the case.[1] Faith and Action was then able to use the advance notice to prepare a public relations response to the decision and cultivate a new prospective donor. More significantly, the dinner between Justice Alito and the donors was apparently part of Faith and Action's broader effort to persuade justices to adopt more conservative positions in their legal opinions. In fact, reporting from this summer suggests that Justices Scalia, Thomas, and Alito all met with representatives of the organization as part of the lobbying initiative.[2]

Second, Justice Clarence Thomas once again intervened in a case involving efforts to overturn the 2020 election, despite obvious conflicts of interest that exist because of his wife's involvement in those efforts. In this most recent case, Arizona Republican Party chair Kelli Ward sought to block a subpoena from the House Select Committee to Investigate the January 6th Attack on the United States Capitol. Given earlier reporting that Ginni Thomas communicated with dozens of Arizona legislators in the lead-up to the January 6 attack, such a subpoena could clearly unearth material that implicates her directly.[3] Though a seven-justice majority of the

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[1] Jodi Kantor and Jo Becker, Former Anti-Abortion Leader Alleges Another Supreme Court Breach, *New York Times*, Nov. 19, 2022, *available at* https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html.
[2] Peter S. Canellos and Josh Gerstein, 'Operation Higher Court': Inside the religious right's efforts to wine and dine Supreme Court justices, *Politico*, July 8, 2022, *available at* https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739.
[3] Emma Brown, Ginni Thomas pressed 29 Ariz. lawmakers to help overturn Trump's defeat, emails show, *Washington Post*, June 10, 2022, *available at* https://www.washingtonpost.com/investigations/2022/06/10/ginni-thomas-election-arizona-lawmakers/.

Court declined to block the subpoena, Justice Thomas dissented from that decision.[4] He was joined only by Justice Alito. This is just the latest example of Justice Thomas's refusal to recuse himself from cases related to the 2020 election and January 6 insurrection,[5] even as details continue to mount about Ginni Thomas's involvement in the efforts.[6]

While these most recent examples are damning, they are only the latest in a long list of the Court failing to enforce basic standards of judicial ethics. Earlier this week, Justice Amy Coney Barrett sat for oral arguments in a case being litigated by an organization that has paid her, personally, for at least five speaking engagements since 2011.[7] In 2019, Justices Alito and Brett Kavanaugh met at the Court with the head of National Organization for Marriage, an anti-LGBTQ group that had filed an amicus brief in a case for which the Court heard oral arguments less than three weeks earlier.[8] In 2017, Justice Neil Gorsuch gave a speech addressing a conservative group at the Trump International Hotel, shortly after he was nominated to the Court by Trump himself and less than two weeks before the Court heard oral arguments in a case challenging Trump's Muslim travel ban.[9] On three separate occasions, Chief Justice John Roberts has failed to recuse himself from cases before the Court in which he owned stock related to one of the parties.[10]

Confidence in the Supreme Court has been in a freefall in recent years, and the justices' approval ratings recently hit an all time low.[11] Meanwhile, a vast majority of the American public supports Supreme Court ethics reform.[12] The Court has failed to voluntarily address the very real and understandable concerns Americans have about the judiciary, so now, Congress must quickly step in and address the eroding public trust in our courts.

It is well past time for the justices to be held accountable, and the SCERT Act will show the American people that the House is serious about common sense judicial ethics reforms. This important legislation would:

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[4] Jackie Calmes, Clarence Thomas' Jan. 6 conflicts of interest are showing again, *Los Angeles Times*, Nov. 23, 2022, available at https://www.latimes.com/opinion/story/2022-11-23/clarence-thomas-recusal-supreme-court-jan-6.
[5] Adam Liptak, Justice Thomas Ruled on Election Cases. Should His Wife's Texts Have Stopped Him?, New York Times, March 25, 2022, available at https://www.nytimes.com/2022/03/25/us/supreme-court-clarence-thomas-recusal.html.
[6] Emma Brown, Ginni Thomas pressed Wisconsin lawmakers to overturn Biden's 2020 victory, *Washington Post*, Sept. 1, 2022, *available at* https://www.washingtonpost.com/investigations/2022/09/01/ginni-thomas-wisconsin-bernier-tauchen/.
[7] Lynn Edwards, Amy Coney-Barrett to rule on LGBTQ case whose anti-LGBTQ attorneys paid her 5 times for speaking engagements, *Raw Story*, Sept. 7, 2022, *available at* https://www.rawstory.com/supreme-court-docket-2658159280/.
[8] Ephrat Livni, An unseemly meeting at the US Supreme Court raises ethics questions, *Quartz*, Nov. 2, 2019, *available at* https://qz.com/1740845/scotus-justices-impartiality-questioned-after-unseemly-meeting/.
[9] Adam Liptak, Neil Gorsuch Speech at Trump Hotel Raises Ethical Questions, *New York Times*, Aug. 17, 2017, *available at* https://www.nytimes.com/2017/08/17/us/politics/gorsuch-speech-trump-hotel-ethics.html.
[10] Fix The Court, John Roberts Voted. But He Shouldn't Have., Nov. 7, 2018, *available at* https://fixthecourt.com/2018/11/cjrrecusalerror3/.
[11] Jeffrey M. Jones, Confidence in U.S. Supreme Court Sinks to Historic Low, *Gallup*, June 23, 2022, *available at* https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.
[12] Alison Durkee, Trust In Supreme Court Drops To New Low, Poll Finds As Ethics Bill Moves Forward In House, *Forbes*, May 15, 2022, *available at* https://www.forbes.com/sites/alisondurkee/2022/05/12/trust-in-supreme-court-drops-to-new-low-poll-finds-as-ethics-bill-moves-forward-in-house/.

- Require the Supreme Court to finally adopt a binding and enforceable code of conduct on the justices. It also would clarify and strengthen the duty of justices to recuse themselves from cases in which they have conflicts of interest and require public notification into what those conflicts might be.

- Mandate that the Justices must adhere to, at a minimum, the same gift, travel, and income disclosure standards as Members of Congress.

- Require a clear duty for a judge/justice to know their and their family's financial interests and interests that could be substantially affected by cases before them.

- Shine a light on dark money and the courts by requiring all parties and amici to list any lobbying or substantial expenditures in support of a justice's nomination, confirmation, or appointment; and any gifts, income, or reimbursements made to the justices. The bill would also require parties that file amicus briefs to disclose their major sources of funding and authorize the courts to strike amicus briefs that would otherwise require a judge to recuse.

We urge the House of Representatives to swiftly pass the SCERT Act and bring accountability and transparency to a Court that has evaded it for far too long.

Sincerely,

National Organizations:
Advocates for Youth
American Atheists
American Humanist Association
American Oversight
Bayard Rustin Liberation Initiative
Blue Wave Postcard Movement
Catholics for Choice
Cause Communications
Center for American Progress
Center for Popular Democracy
CenterLink: The Community of LGBT Centers
Citizens for Responsibility and Ethics in Washington (CREW)
Clean Water Action
Climate Hawks Vote
Committee for a Fair Judiciary
Demand Justice
Demand Progress
DemCast USA
Demos Action
End Citizens United / Let America Vote Action Fund
Freedom From Religion Foundation

Friends of the Earth
Government Accountability Project
Government Information Watch
Greenpeace USA
Hispanic Federation
Indivisible
Interfaith Alliance
Jean-Michel Cousteau's Ocean Futures Society
League of Conservation Voters
Lights for Liberty
NARAL Pro-Choice America
National Center for Transgender Equality
National Council of Jewish Women (NCJW)
National Employment Law Project
National Employment Lawyers Association
National Immigration Law Center
National Organization for Women
P Street/Progressive Change Institute
People's Parity Project
Pride At Work
Revolving Door Project
Secure Elections Network
Stand Up America
Take Back the Court Action Fund
The Secular Coalition for America
The Workers Circle
True North Research
UltraViolet
ValidatetheVoteUSA.org
Voices for Progress
Walking to Fix Our Democracy
We Said Enough
Women's March

State and Local Organizations:
Baltimore Nonviolence Center
Broward for Progress
CD2Action
Clean Elections Texas
Courts Matter Illinois
Equality California
Fix Democracy First
For the People -- Maryland
Get Money Out -- Maryland
Houston Immigration Legal Services Collaborative
Indivisible CA Green Team

Indivisible Chicago Alliance
Indivisible Hawaii
Indivisible Illinois
Indivisible Marin
Indivisible MN03
Indivisible North Mateo
Indivisible Northern Nevada
Indivisible Santa Fe
National Council of Jewish Women - Cleveland
National Council of Jewish Women - Greater Dallas Section
National Council of Jewish Women - Maryland Action Team
National Council of Jewish Women - Saddleback Section
National Council of Jewish Women - St Louis
Oregonizers
Plymouth Area Indivisible (MN)
Wisconsin Democracy Campaign

PROJECT ON GOVERNMENT OVERSIGHT

Statement of the Project On Government Oversight
for the House Judiciary Subcommittee on Courts, Intellectual Property,
and the Internet
on "Protecting Supreme Court Impartiality Through Ethics Reform"
December 8, 2022

Thank you, Chairman Johnson, Ranking Member Issa, and members of the Subcommittee, for the opportunity to submit this testimony about the urgent need for a robust ethics program at the United States Supreme Court.

Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. The Constitution Project was founded in 1997 and joined POGO in 2017.

The Problem

No ethics regime should be based on the mere faith that those entrusted with enormous power will simply "do the right thing." Of course, we hope that public servants will conduct themselves ethically, whether in their official capacity or in the private sphere. But trust alone is not a guardrail for our democracy.

This could not be more true than in the case of the Supreme Court of the United States. The federal judiciary is an institution — the only one in our democratic system — where individuals hold their positions for life. Certainly, lifetime tenure can be viewed as a mechanism to ensure the decisional independence of the Supreme Court. But possession of a job for life in our democracy without robust ethical guardrails on the individual in that position is a recipe for impunity, whether inadvertent or intentional. This is not an attack on the court; it is common sense. Our legal system is built on the principle that nobody should be a judge in their own case. Like anyone else, justices are not necessarily the best judges of their own conduct. And outside entities are more than willing to exploit ethics gaps to buy access to the justices.

It is folly to rely on faith alone, yet that is exactly what we have done with the public servants who occupy the roles of justices of the Supreme Court of the United States. State court judges and all other federal judges are bound by a code of conduct.[1] The only exceptions are the most visible and consequential jurists in the land — the justices of the Supreme Court.

[1] Judicial Conference of the United States, "Code of Conduct for United States Judges," Guide to Judiciary Policy, vol. 2, ch. 2 (March 12, 2019), 2,

Many of you, including Chairman Johnson and Ranking Member Issa, have known this for some time and have supported the adoption of a Supreme Court code of conduct.[2] At POGO, we have long promoted a code of conduct and a more robust ethics program for the nine justices on the Supreme Court.

Last year, we convened a task force of experts — including former judges with varied ideological backgrounds — who issued a report, *Above the Fray*, containing several recommendations to turn down the temperature on Supreme Court selection and enhance the court's legitimacy.[3] Our recommendations are drawn from the principles laid out in that report. Ethics reform is neither partisan nor personal. Ethical failures are not limited to justices who subscribe to a particular judicial philosophy or who were nominated by presidents of one party or the other. Every justice who has served in the last decade has done something that has raised questions about propriety and impartiality.[4]

Over a decade ago, Chief Justice John Roberts wrote in his 2011 judicial report that he has "complete confidence in the capability of my colleagues to determine when recusal is warranted."[5] Today, such confidence is not warranted. Since the chief justice wrote that report, one of his colleagues on the bench has made remarks denouncing a 2016 candidate for president during the middle of a heated presidential campaign.[6] Another threatened to exact revenge on

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https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

[2] Judiciary ROOM Act of 2018, H.R. 6755, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/house-bill/6755 (sponsored by Representative Issa); Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R. 7647, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/7647/text (sponsored by Representative Johnson).

[3] This testimony draws on several previous POGO testimonies and publications, including *H.R. 1, the "For the People Act of 2019": Hearing before the House Committee on the Judiciary*, 116th Cong. (January 29, 2019) (testimony of Sarah Turberville, Director, The Constitution Project at POGO), https://www.pogo.org/testimony/2019/01/closing-the-gap-in-judicial-ethics/; Task Force on Federal Judicial Selection, *Above the Fray: Changing the Stakes of Supreme Court Selection and Enhancing Legitimacy*, Project On Government Oversight, July 8, 2021, https://www.pogo.org/report/2021/07/above-the-fray-changing-the-stakes-of-supreme-court-selection-and-enhancing-legitimacy/; *Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules: Hearing before the House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet*, 117th Cong. (October 26, 2021) (testimony of Dylan Hedtler-Gaudette, Government Affairs Manager, POGO), https://www.pogo.org/testimony/2021/10/pogo-testimony-increasing-transparency-and-accountability-in-the-judicial-branch/; Sarah Turberville and David Janovsky, "A Potential Watershed Moment on Supreme Court Ethics," Project On Government Oversight, March 31, 2022, https://www.pogo.org/analysis/2022/03/a-potential-watershed-moment-on-supreme-court-ethics/; Sarah Turberville and David Janovsky, *Building Confidence in the Supreme Court Through Ethics and Recusal Reforms*, 117th Cong. (April 27, 2022) (statement of Sarah Turberville and David Janovsky, The Constitution Project at POGO), https://www.pogo.org/testimony/2022/04/building-confidence-in-the-supreme-court-through-ethics-and-recusal-reforms.

[4] Fix the Court, "Ahead of House Hearing on SCOTUS Ethics, We Recount the Justices' Many Ethical Lapses," March 2, 2022, https://fixthecourt.com/2022/03/ahead-house-hearing-scotus-ethics-recount-justices-many-ethical-lapses/; Turberville and Janovsky, "A Potential Watershed Moment on Supreme Court Ethics" [see note 3].

[5] Chief Justice John Roberts, *2011 Year-End Report on the Federal Judiciary*, December 31, 2011, https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[6] Adam Liptak, "Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term," *New York Times*, July 10, 2016, https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html.

political rivals during his confirmation hearing.[7] Yet another barred the press from a closed door speech to a partisan organization.[8] And another has failed to recuse himself from any case involving the insurrection, despite the fact that his wife's conduct is the subject of an ongoing congressional investigation into the attack on the Capitol on January 6th.[9]

Numerous reports over the last several months have also underlined just how susceptible the Supreme Court is to improper influence in the absence of meaningful disclosure obligations. Several conservative justices were reportedly the targets of a decades-long and multi-million dollar effort, "Operation Higher Court," by an evangelical leader to "stiffen the resolve of the court's conservatives in taking uncompromising stances that could eventually lead to a reversal of Roe" and make "them more forthright in their views" on issues like gay marriage.[10] This scheme arranged travel to Washington for dozens of supporters to meet with Justices Clarence Thomas, Samuel Alito, and Antonin Scalia.[11] Wealthy donors invited justices to dinners, vacation homes, and private clubs.[12] Allies to the effort were also advised to donate money to the Supreme Court Historical Society to cultivate access to the justices.[13]

The alleged effort appears to have paid off. Justices dined at the private homes of these donors and stayed at their vacation homes, and the donors attended private parties with the justices. Wittingly or not, the resolve of the conservative justices appeared stiffened, as they gutted the mandate for contraception coverage in federal law under the guise of religious freedom, dissented vigorously to oppose gay marriage, and eventually overturned Roe v. Wade.[14]

To make matters worse, the organization sponsoring the covert lobbying scheme, Faith and Action (now called Faith and Liberty), also filed friend of the court briefs with the Supreme Court.[15]

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[7] *Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States*, Hearing before the Senate Judiciary Committee, 115th Cong. (September 27, 2018) (testimony of Brett Kavanaugh), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript.
[8] Mark Sherman, "Media barred from Justice Gorsuch talk to Federalist Society," Associated Press, February 1, 2022, https://apnews.com/article/coronavirus-pandemic-us-supreme-court-travel-health-ron-desantis-615d109c686464cbbd22b602ce58b27f.
[9] Luke Broadwater and Stephanie Lai, "Ginni Thomas Denied Discussing Election Subversion Efforts With Her Husband," *New York Times*, November 30, 2022, https://www.nytimes.com/2022/09/29/us/politics/ginni-thomas-jan-6-committee.html.
[10] Jodi Kantor and Jo Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach," *New York Times*, November 19, 2022, https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html; Peter S. Canellos and Josh Gerstein, "'Operation Higher Court': Inside the religious right's efforts to wine and dine Supreme Court justices," *Politico*, July 8, 2022, https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739.
[11] Canellos and Gerstein, "Operation Higher Court" [see note 10].
[12] Kantor and Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach" [see note 10].
[13] Kantor and Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach" [see note 10].
[14] Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014); Obergefell v. Hodges, 576 U.S. 644 (2015); Dobbs v. Jackson Women's Health Organization, No. 19-1392, 597 U.S. ___ (2022).
[15] Kara Voght and Tim Dickinson, "SCOTUS Justices 'Prayed With' Her — Then Cited Her Bosses to End Roe," *Rolling Stone*, July 6, 2022, https://www.rollingstone.com/politics/politics-features/roe-supreme-court-justices-1378046/.

Correlation is not causation. But after reports like these, the public is left wondering whether the court's decisions were based on the merits of the public arguments presented or due to the private access afforded to a limited, well-moneyed few.

The Solutions

Time and time again, the justices have shown they are unable to be objective about their own conduct. The cloistered court is unable to see what is plain to any reasonable observer: Ethics reform is obviously and urgently needed.

There are only a handful of statutes, case law, and norms that currently provide a basic and wholly insufficient ethics framework for the Supreme Court. Section 455 of Title 28 of the United States Code specifies when judges and justices must recuse themselves from a proceeding. It contains a blanket obligation to recuse whenever a judge or justice's "impartiality might reasonably be questioned."[16] The Ethics in Government Act of 1978 also confers limited ethical responsibilities by requiring federal judges, including Supreme Court justices, to submit annual financial disclosures.[17] According to Chief Justice Roberts, the Supreme Court justices also consult the Code of Conduct for United States Judges, which does not formally apply to the justices but governs the conduct of judges in lower federal courts.[18]

Lifetime tenure may assure the public that the court decides cases without fear, but ethics reform is needed to assure us that the court decides cases without favor.

A Supreme Court Code of Conduct

The seeming impunity of the justices of the Supreme Court comes into stark relief when compared to the ethics regime in place to guide the conduct of even the lowest level executive branch employee. A person whose job is to procure and manage contracts for a federal facility must receive ethics training after accepting the position and can face up to five years in prison if they so much as hold stock in a company that is involved in a solicitation or procurement at that federal facility.[19]

Meanwhile, justices of the Supreme Court — whose decisions can alter the lives of millions of Americans, reshape the American economy, even take lives — are held to minimal and predominately self-imposed limits. The court needs a code of conduct that addresses the unique circumstances that arise from service on the nation's highest court, including clear direction in recusal decision-making, limits on conduct that impede the impartiality of the court, and robust financial and non-financial disclosure obligations.

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[16] The provision, originally passed in 1940, was extended to appeals court judges and Supreme Court justices in 1974. The law also instructs judges to step aside when they have personal biases toward parties or knowledge of disputed facts; have previously been involved with a case as a lawyer, judge, or public servant; have a financial interest or a family member with a financial interest in the outcome; or when they or a family member are involved in or could be affected by the proceedings. 28 U.S.C. § 455 (2021), https://law.cornell.edu/uscode/text/28/455.
[17] 5 U.S.C. App. § 101(f)(11), https://uscode.house.gov/view.xhtml?req=(title:5a%20section:101%20edition:prelim.
[18] Roberts, *2011 Year-End Report on the Federal Judiciary* [see note 5].
[19] 5 CFR § 2638.304(b), https://www.law.cornell.edu/cfr/text/5/2638.304; 18 U.S.C. § 216, https://www.law.cornell.edu/uscode/text/18/216.

Recusals

Congress should clarify the recusal statute to better specify the types of situations that require recusal. While the current law lists several specific scenarios, largely dealing with conflicts from financial or employment relationships, many scenarios fall under the law's catchall provision, which requires recusal when a reasonable person would doubt a judge's impartiality.[20] The Supreme Court Ethics, Recusal, and Transparency Act would add much-needed detail, including specifying additional financial or work entanglements by judges or their families that require recusal and covering organizations affiliated with ones that pose a direct conflict.[21] Spousal conflicts are imputed to employees throughout the federal government — a minimal standard that the Supreme Court should meet.[22]

Revised recusal rules, both in statute and a code of conduct, should also clarify when financial or other circumstances involving a justice's family member would counsel the justice's disqualification from a case. This is not to suggest a justice should be disqualified simply because a spouse or child has strong views on controversial topics. The law currently requires recusal when a justice's immediate family has an "interest that could be substantially affected" by the outcome of a case, but it provides little elaboration.[23] If a relative is closely affiliated with a litigant, amicus, or issue before the court, that should call for a more critical analysis. The public has no way of knowing what justices and their close relatives discuss, and the public should not have to take it on faith that relatives who are tied to litigants are refraining from exerting influence.

Bringing greater transparency to recusal decision-making should be a priority. Judges' and justices' reasons for recusal are often unstated; the Supreme Court's decisions and orders simply note if a justice did not participate in an opinion or proceeding. A public explanation of the justification for recusal would promote the development of a body of precedent to support consistent application of recusal standards across the federal judiciary, and it would assist judges in identifying situations that require actions like divestments so that they need not recuse in the future. Additionally, the public and litigants have a right to know why an individual in such a consequential position must step away from presiding over a case.

Prohibitions on Conduct

Having been entrusted with power, the justices owe the public not only a commitment to the ethical use of power but also a conspicuous demonstration of their ethical conduct. While the simplest solution may be to apply the Code of Conduct for United States Judges to the Supreme Court as well, the existing code of conduct for lower federal court judges does not address a number of issues that are particular to the ethical conduct of Supreme Court justices, given their stature and the impact of their decision-making. It is time for the justices to be bound by a code

[20] 28 U.S.C. §455(a) (2022), https://www.law.cornell.edu/uscode/text/28/455.
[21] Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R.7647 (117th Cong.), https://www.congress.gov/bill/117th-congress/house-bill/7647.
[22] 18 U.S.C. §208(a) (2022), https://www.law.cornell.edu/uscode/text/18/208.
[23] 28 U.S.C. §455(b)(5)(iii) (2022), https://www.law.cornell.edu/uscode/text/28/455.

of conduct that accounts for the unique circumstances that accompany service on the nation's highest court.

To avoid even the specter of bias, a Supreme Court code of conduct should advise justices to avoid affiliating with organizations that cast doubt on the justices' impartiality, even if the organizations are not legally defined as "political" in nature.[24] The code could mirror the example set by Chief Justice Roberts and Justice Elena Kagan, both of whom have avoided appearances before any such organizations, potentially due to the heavy partisan perception they create.[25]

Public comments and organizational affiliations are not the extent of potential questionable conduct by justices. A code of conduct provides an opportunity for guidance on issues discussed elsewhere in this testimony, including recusals based on the conduct of a spouse or prior participation in a case before the court,[26] private travel paid for by litigants before the court,[27]and participation in events funded by litigants and potential beneficiaries of the court's decision-making.[28]

The perception of impartiality is just as important as the reality of it, which is why adopting a code of conduct for our nation's highest court is so important. Such a code of conduct would provide explicit guidance to the justices to carefully assess whether a public statement or event could be objectively perceived as undermining their impartiality, independence, or integrity. It would also give the public a better measurement of the propriety of the justices' ethical decision-making.

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[24] *Above the Fray*, at 17; 37, n. 75 [see note 2]. The Judicial Conference attempted to address this issue in 2020 with its draft ethics opinion No. 117, which would have barred judges from being members of the American Constitution Society and Federalist Society ("reasonable and informed public would view judges holding membership in these organizations to hold, advocate, and serve liberal or conservative interests"). The proposal was abandoned after a group of judges objected to the ban on Federalist Society membership. See Letter to Robert Deyling, Assistant General Counsel, Administrative Office of the United States Courts, March 18, 2020, https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draftethics/53eaddfaf39912a26ae7/optimized/full.pdf.

[25] *Above the Fray*, at n. 75 [see note 2].

[26] Justice Kagan's vote to uphold the Affordable Care Act also caused controversy, as she had served as solicitor general under the Obama administration before joining the court. Warren Richey, "Would Elena Kagan Bow Out of a Health-Care Reform Case?" *Christian Science Monitor*, July 15, 2012, https://www.csmonitor.com/USA/Politics/2010/0715/Would-Elena-Kagan-bow-out-of-a-health-care-reform-case?msclkid=321f7584c4c811eca143a93b8ca0b24f.

[27] In a widely reported incident in 2004, the late Justice Antonin Scalia participated in a hunting trip with then-Vice President Dick Cheney, mere weeks after the Supreme Court had agreed to hear a case that had been brought against the vice president. Dan Collins, "Scalia-Cheney Trip Raises Eyebrows," *CBS News*, January 17, 2004, https://www.cbsnews.com/news/scalia-cheney-trip-raises-eyebrows/ (Downloaded January 25, 2019).

[28] In 2011, Common Cause requested then-Attorney General Eric Holder to investigate whether Justices Scalia and Thomas should have recused themselves from Citizens United, as both justices had attended private events hosted by Koch Industries, which stood to benefit financially from a decision favoring Citizens United. Sam Stein, "Justices Scalia and Thomas's Attendance at Koch Event Sparks Judicial Ethics Debate," *HuffPost*, October 20, 2010, https://www.huffpost.com/entry/scalia-thomas-koch-industries_n_769843.

Disclosures

The final component of any effective ethics framework is disclosure. Given what we now know about dubious and covert efforts to shape and influence the Supreme Court, the need for unambiguous disclosure requirements for the justices and those with business before the court is clear. As Justice Anthony Kennedy wrote in the court's *Citizens United* decision, a robust system of disclosures is vital to educated decision-making:

> Prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests.'"[29]

This exhortation is equally applicable to the Supreme Court to ensure the public and litigants can identify conflicts of interest and the justices can appropriately recuse. Unfortunately, the existing law fails to cover a range of circumstances that should require disclosure.

The Ethics in Government Act of 1978 requires justices to disclose financial assets like stocks.[30] Following the revelation that 131 federal judges had presided over cases where they had a financial conflict of interest, Congress enacted the Courthouse Ethics and Transparency Act of 2022, which requires judges and justices to file periodic reports whenever they make certain securities transactions and requires all financial disclosure documents to be available online.[31] This is a moderate improvement, but it is only one component of a meaningful disclosure program.

To minimize the likelihood of conflicts, a code of conduct should also direct justices to divest from individual stocks or place their assets in a blind trust.[32] Here, executive branch practices provide a useful model. It has been standard practice in recent decades for most presidents to use blind trusts or non-conflicting assets, and senior officials typically divest problematic assets.[33] The law should also require more detail from Supreme Court justices with regard to travel and gifts provided by third parties, including hospitality perks and the nature and details of events attended. Finally, to promote improved transparency for recusal decisions, Congress should require disclosure of any source of income paid to close family members of a justice, including spouses.

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[29] Citizens United v. FEC, 558 U.S. 310, 370, quoting McConnell v. FEC, 540 U.S. 93, 259 (opinion of Scalia, J.).
[30] Ethics in Government Act of 1978, 5 U.S.C. App., https://www.govinfo.gov/app/details/USCODE-2010-title5/USCODE-2010-title5-app-ethicsing.
[31] James Grimaldi, Coulter Jones, and Joe Palazzolo, "131 Federal Judges Broke the Law by Hearing Cases Where They had a Financial Interest," *Wall Street Journal*, September 28, 2021, https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421; Courthouse Ethics and Transparency Act of 2022, S. 3059, 117th Cong. (2022).
[32] 7 Canon 4(D)(3) of the "Code of Conduct for United States Judges" directs judges to "divest investments and other financial interests that might require frequent disqualification."
[33] *Above the Fray*, 17 [see note 2]; Walter Shaub, "Conflicts of Interest," in Brookings Institution, *If It's Broke, Fix It* (2021), 12, https://www.brookings.edu/wp-content/uploads/2021/02/Brookings-Report-If-its-Broke-Fix-it.pdf.

Because of the unique expectations of impeccable impartiality and even-handed judgment placed on judges, litigants and the public should also have access to certain non-financial information about the justices. Current processes for reporting public and private appearances by the justices are not adequate.[34] Since it is the appearances themselves that could color the public's perception of impartiality, public disclosure and improved access to information about these extrajudicial engagements are critical.

Ethics reforms should include robust rules requiring timely disclosure of justices' appearances, regardless of their financial component. Such rules would go a long way toward improving the public's awareness of the justices' actions, while also requiring judges and justices to scrutinize their extrajudicial conduct carefully so as to avoid the appearance of impropriety. Justices should also be required to disclose positions they hold in social and political groups, two categories of organizations currently exempted from the Ethics in Government Act's reporting requirements.[35]

Finally, because the integrity of the judicial process is the responsibility of everyone who participates, Congress should also strengthen the reporting rules for parties and amici who appear before the court. There have been multiple proposals, including in the Supreme Court Ethics, Recusal, and Transparency Act, to require amici to identify their major funders.[36] Such disclosures could help the court identify amici that would cause conflicts for justices, giving the court an opportunity to reject such briefs.

A Note on the Role of Congress

Since the founding, Congress has sought to protect the independence of the judiciary by refining ethical obligations on the justices and governing the court's form and function.[37] Article III explicitly grants Congress the power to regulate the scope and procedure for the Supreme Court's appellate jurisdiction.[38] Congress has also — without controversy — regulated other aspects of the court's functioning, including the size of the court, the precise day on which its

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[34] Justices report some of these activities in their financial disclosures. But those disclosures are triggered not by the fact of the appearance but by reimbursements for transportation, lodging, or meals. The rules for judicial financial disclosures require judges to report reimbursements from any single source that are individually worth more than $166 and in aggregate worth more than $415. Thus, an appearance that only resulted in a $40 parking reimbursement would not have to be reported, nor would an appearance that did not result in a reimbursement. Judicial Conference of the United States, Guide to Judiciary Policy, vol. 2D, ch. 3 § 330, https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf.

[35] 5 U.S.C. App. §102(a)(6)(A) (2022), https://uscode.house.gov/view.xhtml?req=(title%3a5a+section%3a102+edition%3aprelim)&msclkid=b344428fc4c911ec86f8b8158f801939.

[36] Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R.7647 (117th Cong.).

[37] Congress's authority to structure the Supreme Court primarily flows from Article I, Sec. 8 of the Constitution, which empowers it "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."

[38] U.S. Const. Art. III, cl. 2: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

term would begin, and the days on which justices would be required to appear in their assigned circuits.[39]

Congress did not explicitly apply the disqualification statute, which had existed for district judges in various forms since 1792, to Supreme Court justices until it recodified Title 28 of the United States Code in 1948. When it did so, however, it was a deliberate change, and one made after a process that included extensive consultation with the bar, the federal judiciary, and Supreme Court justices themselves.[40] Today, Section 455 of Title 28 of the United States Code specifies when judges must recuse themselves from a proceeding.[41] In addition to a blanket obligation to recuse "in any proceeding in which [their] impartiality might reasonably be questioned," the law instructs judges to step aside when they have personal biases toward parties or knowledge of disputed facts; have previously been involved with a case as a lawyer, judge, or public servant; have a financial interest or a family member with a financial interest in the outcome; or when they or a family member are involved in or could be affected by the proceedings. This provision applies to "any justice, judge, or magistrate judge."

Further, the Ethics in Government Act of 1978 requires all federal judges, including Supreme Court justices, to submit annual financial disclosures, and there are civil penalties for failure to comply and criminal penalties for falsifying their disclosure.[42] The recently enacted Courthouse Ethics and Transparency Act of 2022, requiring that various financial disclosures of federal judges and justices be made publicly available, is the most recent iteration of Congress's prerogative to regulate the form and function of the court.[43] Congress has — and should use — the power to ensure the court has a robust ethics framework, as it has done for much of the rest of the government.

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[39] See Judiciary Act of 1789, 1st Cong., sess. 1, ch. 20, 1 Stat 73 (1789); Judiciary Act of 1802, 7th Cong., sess. 1, ch. 31, 2 Stat. 156 (1802).

[40] The recodification effort was aided by both a Judicial Conference Committee appointed by the chief justice and a Supreme Court committee comprised of Chief Justice Harlan Fiske Stone, Justice Felix Frankfurter, and Justice William O. Douglas. Revision of Titles 18 and 28 of the United States Code: Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 80th Cong. 8 (1947) (statement of Representative Eugene Keogh), https://catalog.hathitrust.org/Record/100953076. Indeed, in the words of the lead congressional sponsor, the proposed recodification was circulated to "every United States attorney … every member of the Federal judiciary … [and] everyone who ever evidenced any interest in the work at all." Revision of Titles 18 and 28 of the United States Code: Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 80th Cong. 8 (1947) (statement of Representative Eugene Keogh), https://catalog.hathitrust.org/Record/100953076. The hearing record does not suggest there was any controversy about extending the disqualification law to the justices.

[41] 28 U.S.C. § 455, https://www.law.cornell.edu/uscode/text/28/455.

[42] 5 U.S.C. App. § 101(f)(11); 5 U.S.C. App. § 104(a); Judicial Conference of the United States, Guide to Judiciary Policy, Vol. 2D, 2018, https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf (Downloaded January 24, 2019). Members of the nation's highest court are not, however, covered by the Judicial Conduct and Disability Act of 1980, which created a process for the filing and investigation of complaints, and for discipline of federal judges, based on misconduct or an inability to perform the job. 28 U.S.C. §§ 351-364.

[43] The Courthouse Ethics and Transparency Act of 2022, S. 3059, 117th Cong. (2022).

Conclusion

Clear and rigorous ethical obligations are a far more effective way to protect the court's decisional independence and impartiality than reliance on subjective and self-enforcing measures. A Supreme Court code of conduct and relevant new rules should, at minimum,

- Specify additional financial or work entanglements by justices or their families that require recusal;
- Require publication of an explanation of the justification for recusal;
- Prohibit justices from affiliating with organizations that cast doubt on the justices' impartiality, even if the organizations are not legally defined as "political" in nature;
- Require justices to divest from individual stocks or to place their assets in a qualified blind trust;
- Require more detail from justices with regard to travel and gifts provided by third parties, including hospitality perks and the nature and details of events attended;
- Require disclosure of any source of income paid to close family members of a justice, including spouses;
- Require disclosure and improved access to information about justices' extrajudicial engagements, regardless of their financial component; and
- Strengthen the reporting rules for parties and amici who appear before the court.

Like the Chief Justice, we, too, are "deeply committed to the common interest in preserving the court's vital role as an impartial tribunal governed by the rule of law."[44]

But the public cannot trust that the court's decisions are issued without favor if there are no meaningful ethical limitations on the conduct of the justices. The most recent revelations detail escalating ethical failures by the justices, and they add new dimensions to the ethical dilemmas faced by the court. Congress should not wait any longer to help a court unwilling to help itself.

[44] Roberts, *2011 Year-End Report on the Federal Judiciary* [see note 5].

Statement of NARAL Pro-Choice America
U.S. House Committee on the Judiciary
"Undue Influence: Operation Higher Court and Politicking at SCOTUS"
December 8, 2022

Thank you for the opportunity to submit a statement to the Committee on this critical issue. NARAL Pro-Choice America is a national advocacy organization dedicated to protecting and advancing reproductive freedom. For over 50 years, NARAL has fought to protect and advance reproductive freedom at the federal and state levels—including access to abortion care, birth control, pregnancy and post-partum care, and paid family leave. Through education, organizing, and influencing public policy, NARAL and our 4 million members from every corner of the country work to guarantee every individual has the freedom to make personal decisions about their lives, bodies, and futures, free from political interference. For this reason, we are submitting this statement to highlight the impact that undue influence has on the U.S. Supreme Court, the threats this influence poses to reproductive freedom and democracy at large, and to call on Congress to pass long overdue Supreme Court ethics reform.

This hearing comes in the wake of an explosive *New York Times* report that revealed how a longtime anti-choice activist was told the outcome of the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby Stores* "weeks before it was announced," allowing him "to prepare a public relations push" and tip off the head of the Hobby Lobby chain.[1] The details of the investigation demonstrate how not only did Justice Samuel Alito, the author of the *Hobby Lobby* decision, reveal the outcome of the case to conservative extremists, but that he and other justices also had long-standing, personal relationships with them—giving the far right unique and unchecked access to our nation's highest court.

The news of the *Hobby Lobby* leak follows the leak of the *Dobbs v. Jackson Women's Health Organization* decision earlier this year, where the Supreme Court ended the constitutional right to abortion as we know it, signaling an ominous sign for the future of abortion rights in this country. While less details are available about this more recent leak, reporting shows that the leader of the same group associated with the *Hobby Lobby* leak, Faith and Liberty, bragged about praying with some of the Justices inside the Supreme Court building.[2] This group also filed an amicus brief in *Dobbs*—which Justice Alito cited in the opinion he authored overturning the right to abortion.[3]

This conspiratorial dynamic between far right elements and the Supreme Court, combined with the eventual overturning of *Roe v. Wade,* should not come as a surprise. It is part of a decades-long campaign waged by the anti-choice movement and the politicians that do its bidding to end *Roe* and decimate reproductive freedom—despite the fact that the vast majority of Americans support reproductive freedom. Polling shows that 8 in 10 Americans support the legal right to abortion.[4]

The negative impact this cruel Supreme Court decision is inflicting cannot be overstated. This horrifying rollback of our fundamental rights is causing immediate and devastating harm to millions of people across the country who can no longer access the care they need in their own

communities. Bans on abortion most harm those already marginalized at every turn by our systems and institutions, and losing *Roe* only compounds this. Women; Black, Latina/x, Asian American, Native Hawaiian, Pacific Islander, and Indigenous people; those working to make ends meet; the LGBTQ+ community; immigrants; young people; those living in rural communities; people with disabilities, and other historically oppressed communities are disproportionately impacted by these attacks on reproductive freedom.

We did not get here by accident. The threats that our most cherished rights and freedoms face are the result of a decades-long, far-right strategy to advance a radical and out-of-touch ideological agenda—including through directly influencing the Supreme Court and federal judiciary at large. In the late 1970s, radical conservatives weaponized the formerly non-political, back-burner issue of abortion rights as political cover for their efforts to maintain white patriarchal control amidst diminishing support for racist policies like school segregation, which had previously been the backbone of their movement. In the years immediately preceding and following *Roe v. Wade*, Evangelical Christians, who now form the backbone of the GOP, were overwhelmingly indifferent on the issue of abortion. But through the carefully crafted messages of Paul Weyrich, Jerry Falwell, and other architects of the far right, abortion became the political tool of choice for a movement determined to maintain control in a changing world, and the trojan horse for a far-reaching array of ideologies meant to thwart social progress.[5]

As part of this effort, anti-choice activists have spent decades building their influence over the federal judiciary through well-funded, secretive networks like the Federalist Society. This coordinated strategy to execute their agenda through the courts was aided, in part, by the fact that the Supreme Court—unlike the rest of the federal judiciary—is not bound by a judicial code of ethics.[6] Conservative activists have never been shy about the fact that their takeover of the federal judiciary is part of a broad strategy to quell the majority and cement minority rule, but the election of Donald Trump took this tactic to new heights.

In May 2016, Trump pledged to only nominate anti-choice judges, a promise he doubled down on in 2020.[7,8] And with the help of Senator Mitch McConnell, Trump installed anti-choice federal judges with lifetime appointments at a breakneck pace. More than a quarter of currently active federal judges are now Trump appointees, including Supreme Court justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—tipping the balance of the Court to a supermajority unmistakably hostile to reproductive freedom.[9] Now, the work of these extremists has culminated in the end of *Roe v. Wade* and an anti-choice majority on the Court that poses a threat to all of our most fundamental freedoms.

The threat to our fundamental rights does not stop with abortion. The same anti-choice, anti-freedom extremists working harder than ever to roll back abortion rights and access are also targeting our other fundamental freedoms, including birth control access, our freedom to vote, LGBTQ+ rights, civil rights, and more. There's simply no low they won't sink to in order to advance their quest for control and political gain. These recent reports of covert and nefarious efforts by the extreme right to circumvent democratic processes and directly influence the

Supreme Court should concern every individual who cares about protecting democracy and the fundamental rights it enshrines.

Without proactively addressing the current lack of transparency, accountability and ethics at the highest court, the Supreme Court's legitimacy—including declining public faith in the institution[10]—will only continue to erode. We know that bold and creative ideas are needed to figure out how to address the damage to our democracy. This is about restoring our democracy and the legitimacy of one of our three branches of government. In response to this new information about the collusion of Supreme Court justices and far-right extremists, NARAL applauds this Committee's efforts to investigate undue influence on the Supreme Court and urges the Senate to do the same. NARAL also calls on Congress to pass meaningful court reform, which must address the critical need for ethics reform at the Supreme Court. Legislation like the Supreme Court Ethics, Recusal, and Transparency Act of 2022 (H.R. 7647), which NARAL Pro-Choice America endorsed, would be an opportune starting point.

As has become undeniably clear this past year, the conservative supermajority on the Supreme Court is issuing decisions with catastrophic repercussions for our fundamental rights and freedoms. While the Court's collusive relationship with the far right is nothing short of shocking, the fight for democracy, fundamental rights, and reproductive freedom is far from over. Our rights and our freedoms are on the line—with real consequences for our lives and families. The stakes could not be higher, and we will never stop fighting to make sure reproductive freedom is a reality for *every* body.

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[10] Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

December 7, 2022

The Honorable Jerry Nadler, Chair
The Honorable Jim Jordan, Ranking Member
Judiciary Committee, U.S. House of Representatives
2141 Rayburn House Office Building
Washington, D.C. 20515

RE: House Judiciary Committee Hearing, "Undue Influence: Operation Higher Court and Politicking at SCOTUS," December 8, 2022

Dear Chairman Nadler, Ranking Member Jordan, and Distinguished Members of the Committee:

With great concern for the integrity of the Supreme Court and our fundamental freedoms, I offer the following statement ahead of the Committee's upcoming hearing, "Undue Influence: Operation Higher Court and Politicking at SCOTUS." My name is Katy Joseph and I serve as the director of policy and advocacy for Interfaith Alliance Foundation, a national nonpartisan organization that champions an inclusive vision of religious freedom, promotes policies that protect freedom of belief for people of all faiths and none, and works to ensure that all Americans receive equal treatment under the law.

In addition to directing our legislative advocacy program, I have the pleasure of coordinating our federal amicus practice. Interfaith Alliance regularly participates in strategic "friend of the court" briefs that spotlight federal cases impacting the boundary between religion and government. In an average year, Interfaith Alliance appears in this capacity in four to six U.S. Courts of Appeal and before the U.S. Supreme Court. Recent examples include multifaith briefs affirming the right to religious accommodations for Sikh members of the Marine Corps,[i] damages for clergy subjected to tear gas by the Trump Administration outside St. John's Church,[ii] and the threat posed to religious minority and nonreligious communities should the Supreme Court grant an exemption from state nondiscrimination laws.[iii]

Interfaith Alliance's amicus practice is based on the tacit assumption that members of the federal judiciary will, as their oath of office requires, "faithfully and impartially discharge and perform" their duties without fear or favor. Yet recent disclosures by the Rev. Rob Schenck, former head of Faith and Action, reveal a religiously motivated influence campaign targeting members of the Supreme Court to "embolden the justices" to issue increasingly conservative decisions on key issues.[iv] Rev. Schenck will elaborate on this effort in his testimony before the Committee.

In anticipation of Rev. Schenck's testimony, I offer two important pieces of context. First, during the period in which "Operation Higher Court" was underway, the Court experienced a dramatic rightward shift in its religious freedom jurisprudence. While one group, even one as well connected and well-resourced as Faith and Action, cannot receive sole credit for this transformation, the religious freedom decisions of the 1960s - 1990s bear little resemblance to those of the current Roberts Court. Second, this distortion of one of our most basic freedoms has had a deleterious effect on the civil rights and civil liberties of millions of Americans.

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I. A "Doctrinal Sea Change" Occurred During the Period of Operation Higher Court, Accelerated Under Chief Justice Roberts

The ability of the Supreme Court to alter the contours of our constitutional rights, like those protected under the Establishment and Free Exercise Clauses of the First Amendment, cannot be overstated. Our "living" Constitution figures differently in the interpretative and ideological perspectives of the nine justices who grapple with its text. Just as court watchers observed a leftward shift in the Court's religious freedom jurisprudence in the 1960s and 1970s,[v] a strong rightward trend emerged in the late 1990s and accelerated under Chief Justice Roberts.[vi]

A robust statistical analysis, conducted by leading scholars Lee Epstein and Eric A. Posner in 2021, confirmed "the popular notion that the Roberts Court represents a break in the development of the jurisprudence of the religion clauses is amply supported by the data."[vii] Together they examined every Supreme Court opinion issued between the 1953 and 2020 terms relating to the Free Exercise or Establishment Clauses, for a dataset of 95 cases. They conclude:

> *Over the entire period, the Court ruled in favor of religion 59% of the time. Win rates do not differ significantly for Free Exercise Clause cases (59%) and Establishment Clause cases (57%). Across the Warren, Burger, and Rehnquist courts the religious side prevailed about half the time, with gradually increasing success. In the Roberts Court, the win rate jumps to 83%.*

And the "religious side" referenced above often reflects a particular subset of American religious identity. During this period rulings in favor of mainstream Christian parties, as opposed to members of Christian minority or non-Christian religious groups, increased dramatically. For instance, such parties won 44% of the cases in the Warren court, 52% in the Burger court and 57% in the Rehnquist court. After Chief Justice Roberts assumed the role in 2005, favorable outcomes for mainstream Christian groups increased to 80%.

These victories are not solely attributable to Faith and Action, but emerge through the efforts of a constellation of conservative Christian legal institutions that recruit, train, litigate, and lobby for judicial candidates that will advance their agenda. Rev. Schenck has described this an "an ecosystem of support for conservative justices"[viii] as they work to expand the role of religion in American public life. In July 2022, speaking at the University of Notre Dame, Justice Sam Alito seemed to offer words of encourage to these groups saying, "the champions of religious liberty who go out as wise as serpents and as harmless of doves can expect to find hearts that are open to their message."[ix]

A telling echo came from Rev. Schenck himself who, reflecting on the work of Operation Higher Court in a recent interview with the Daily Podcast, noted that "a favorite bible of mine in those days came from the words of Jesus Christ himself, who said to his followers 'you must be as wise as serpents and as harmless as doves." But, he added, "when you're working in the environment that we're in, we not only have to be wise as serpents – we have to be downright snakey."[x]

II. Recent Decisions by the Roberts Court Are Exposing Millions to Harm Under the Guise of Religious Freedom

Even as the efforts of groups like Faith and Action come to light, some are still heralding the decisions highlighting by Epstein and Posner as victories for religious freedom writ large. In fact, the New York Times ran a piece highlighting Epstein and Posner's work under the title "An Extraordinary Winning Streak for Religion at the Supreme Court."[xi] Yet for Interfaith Alliance and many of our partners with deep roots in diverse religious communities, the Court's dramatic redefinition of religious freedom has meant fewer – not more – protections for our most fundamental rights.

The Court's recent decision in *Kennedy v. Bremerton* encapsulates this shift. On its most basic level the First Amendment grants us the freedom to believe as we choose, with respect for the autonomy of others to do the same. For decades, the Supreme Court has upheld this right in our schools by protecting students' religious freedom and preventing the use of public funds for religious activities. But recent changes to the Court have presented an opportunity for the Religious Right to overturn decades of settled law.

No student should ever be made to feel excluded—whether in the classroom or on the football field—because they do not share the religious beliefs of their coaches, teachers, or fellow students. Yet Bremerton, Washington, students repeatedly felt pressured by their football coach to participate in public prayer. After Kennedy refused accommodations to facilitate his religious practice while protecting students' religious freedom, the school district placed the coach on administrative leave. Interfaith Alliance joined 33 faith-based and civil rights organizations in an amicus brief supporting the actions of the Bremerton school district to prioritize the rights, safety, and well-being of its students.[xii]

But Justice Gorsuch, writing for the majority, instead cast Kennedy as the target of "discipline" for offering a "private quiet prayer" while students were otherwise engaged.[xiii] Throughout the opinion, he makes no mention of the impact an administrator's religious conduct might have on students' religious freedom – those who share their coach's beliefs but would rather not participate in a public prayer as well as those who believe differently. Instead, the very facts of the case were recast to position Kennedy as the harmed party in service of a decision that radically expanded the meaning of free exercise. This disparity was so striking that Justice Sotomayor included photos of the "private" prayer in her dissent, showing Kennedy on the 50-yard line surrounded by dozens of students, community members, and media.

The same pattern appears in *303 Creative LLC v. Elenis*, argued before the Court earlier this week. A successful website designer in Colorado seeks an exemption from the state's nondiscrimination law, permitting her to reject same-sex couples due to her conservative Christian beliefs about marriage. The twist, however, is that no same-sex couple has sought her services. Despite the absence of a live controversy, the Court heard arguments suggesting that the state has unfairly burdened this designer because of her religious convictions. Interfaith Alliance again joined partners in an amicus brief emphasizing the threat such an exemption would pose to religious minority and non-religious people.[xiv]

As the Supreme Court has grown increasingly receptive to religious freedom claims levied by conservative Christian legal entities, Americans who have historically been protected under robust civil rights and civil liberties laws face increased harm. The rightward shift of the Court is not a victory for religion, but a win for the many groups aligned with Operation Higher Court in warping our first freedom.

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PROTECTING FAITH AND FREEDOM

III. Conclusion

The right to religious freedom is under threat, hastened by the work of groups like Faith and Action and their allies in the conservative Christian legal movement. On behalf of Interfaith Alliance, I commend the Committee for exploring this area of urgent concern and urge you to consider swift action to ensure that all Americans may see the Supreme Court as a beacon for equal justice under the law.

Respectfully,

Katy Joseph
Director of Policy & Advocacy
Interfaith Alliance Foundation
kjoseph@interfaithalliance.org

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[v] *See, e.g.,* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Engel v. Vitale, 370 U.S. 421 (1962); School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963).
[vi] *See, e.g.,* Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014); Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018); 15 Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020); Town of Greece v. Galloway, 572 U.S. 565 (2014); The American Legion v. American Humanist Association, 139 S. Ct. 2067 (2019).
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December 7, 2022

The Honorable Jerrold Nadler
Chairman
House Judiciary Committee

Dear Chairman Nadler:

On behalf of the Alliance for Justice (AFJ), a national association representing over 150 public interest and civil rights organizations, we write to thank you for holding the hearing, *"Undue Influence: Operation Higher Court and Politicking at SCOTUS."* We express deep concern about the corruption and impartiality of the United States Supreme Court, especially in light of the most recent reporting by the New York Times of alleged corruption in the nation's highest court.

We urge the House of Representatives to pass Supreme Court ethics reform legislation, such as the Judicial Ethics and Anti-Corruption Act of 2022 (H.R.7706, S.4177); the Supreme Court Ethics, Recusal, and Transparency Act of 2022 (H.R.7647, S.4188); the 21st Century Courts Act of 2022 (H.R.7426, S.4010); and the Supreme Court Ethics Act (H.R.4766, S.2512). Supreme Court ethics reform is essential to reestablishing the respect and integrity of our federal judicial system and preserving our democracy.

The Court has become an unaccountable, partisan institution that increasingly displays a reckless disregard for the judicial norms and practices established to protect American democracy. Public trust in the Supreme Court has fallen to an all-time low, after the Court has overturned decades of precedent on fundamental rights such as voting rights, women's rights, labor rights, and gun safety. People are literally dying, being forced to give birth, and are working in dangerous conditions across the country because of this Court's decisions. In addition to these harmful rulings, we have witnessed an uptick in Supreme Court justices' engagement in public debate and participation in political events, actions that violate the model rules of judicial conduct and undermine public trust in an independent judiciary.

The justices are the only federal judges who are not bound by ethical rules. While all other federal judges are required to follow the Code of Conduct for United States Judges (the "Code") — a set of ethical guidelines codified and enforced by the U.S. Judicial Conference — the Supreme Court justices merely use the Code for "guidance." Since the Court has not voluntarily adopted the Code or created a similar set of binding and enforceable ethical rules, Congress must act. Several pieces of legislation have recently been introduced that would bolster accountability and transparency and enhance public trust in our judiciary (see above). All these bills represent movement towards meaningful reform and would help restore public trust in our courts.

As the Committee knows, the Court is in an ethics crisis. Most recently, on November 19th, the New York Times revealed the latest scandal: Justice Samuel Alito allegedly leaked the result of his 2014 *Hobby Lobby* decision to conservative activists weeks before it was issued. The decision further codified a fundamentalist religious vision of the Constitution, allowing the owners of a private company to limit their employees' reproductive health care choices. At the time, conservative justices were regularly meeting behind closed doors with anti-abortion "stealth missionaries" organized by Rev. Rob Schenck, former head of the nonprofit Faith and Action.

These revelations are galling, yet unsurprising. In the absence of a mandatory code, questionable conduct by Supreme Court justices has proliferated, creating escalating concerns about the integrity of our court system. An Alliance for Justice report released earlier this year, entitled *Accountable To None: The Urgent Need for Supreme Court Ethics Reforms*, catalogued multiple additional allegations of extrajudicial and political misconduct by Supreme Court justices.

- For example, according to Canon 2 of the Code, judges should prevent family relationships from influencing their judicial conduct or judgment. Yet, Justice Clarence Thomas failed to recuse himself in any of the 2020 election petitions, despite his wife, Ginni Thomas's, involvement in efforts to subvert and overturn the election results. He also participated in a case related to the January 6th insurrection, despite his wife's participation in the rally that immediately precipitated that attack on the Capitol related to the January 6th insurrection, despite his wife's participation in the rally that immediately precipitated that attack on the Capitol. This past month, Justice Thomas indicated his desire to once again block enforcement of investigations into the January 6 insurrection, investigations that directly implicate his wife.
- Canon 5 of the Code states that judges are not to participate in political activities, including making speeches at political organizations or supporting candidates for office. Justices, however, have a pattern of not abiding by this rule. For example, Justice Alito was a keynote speaker at a black-tie gala hosted by the conservative Federalist Society and praised the influence the group has had on the legal landscape, conduct other federal judges would likely not partake under the Code's ban on engaging in political activities. Additionally, last year Justice Amy Coney Barrett gave a speech at the McConnell Center, during which she exhorted the public to not view the Court as political while standing next to Senator Mitch McConnell—clearly engaging in a politicized event. Other examples of the include, during the 2016 election, the late Justice Ruth Bader Ginsburg inappropriately critiqued then-candidate Trump in a CNN article. And in the 1990s, Justice Breyer attended the Renaissance Weekend event with Democratic politicians including then-President Bill Clinton.

These types of blatant ethical violations have gone uninvestigated for too long. With confidence in the Supreme Court at an all-time low and our democracy in peril, the nation's most powerful Court must be subject to a mandatory code of ethics like all other federal judges. The Court is largely unaccountable to the American people, whose lives they degrade with each new cold-hearted ruling. Congress must act.

The Supreme Court's decisions shape the lives of every American. Last term, the Court dismantled the constitutional right to abortion; undermined the separation of church and state; jeopardized the ability of states to enforce common sense gun violence prevention measures; undermined the EPA's ability to enforce safeguards for our climate and environment; and much more. In this upcoming term, the Court has already considered cases with implications for millions of Americans, on issues like racial gerrymandering, civil rights, LGBTQ+ rights, and the criminal justice system. When so many fundamental rights are at stake, the American public needs to know that the justices who pen these momentous decisions have integrity and are committed to the rule of law.

We applaud the House Judiciary Committee for conducting desperately needed oversight and investigating the ethics violations taking place at the highest court. We urge the House of Representatives to swiftly pass Supreme Court ethics legislation in order to reestablish respect and integrity for the federal judiciary and for rule of law.

Sincerely,

Rakim H.D. Brooks

Rakim Brooks
President, Alliance for Justice

Statement by Russ Feingold, President of the American Constitution Society
Before the House Judiciary Committee
"Undue Influence: Operation Higher Court and Politicking at SCOTUS"
December 8, 2022

Thank you, Chairman Nadler, Ranking Member Jordan, and Members of the Committee for the opportunity to submit this comment about the urgent need for structural and non-structural Supreme Court reform to restore public confidence and legitimacy to our highest court. I am submitting this statement on behalf of the American Constitution Society, a 501(c)(3) non-profit, non-partisan organization.

One of the pillars of a democracy is a fair, impartial, and legitimate judiciary. This necessitates a judiciary that is bound by the rule of law, judicial norms, and ethics, and is not committed to a partisan agenda. Unfortunately, our highest federal court does not meet this threshold. The U.S. Supreme Court is in a legitimacy crisis, evident by plummeting public confidence in the face of the Right's packing of the Court and the resulting partisan lurch of the supermajority's decisions. Fortunately, there are remedies to this legitimacy crisis – structural and non-structural Supreme Court reform. This includes, but should not be limited to, creating a binding code of ethics for our highest court.

The Public Has Lost Confidence in Its Highest Court

The Supreme Court's decisions are not self-enforcing, nor does the Court employ a law enforcement or regulatory agency whose job is to go out and enforce the Court's decisions from sea to shining sea. Put simply, the Court must rely on public trust in and compliance with its decisions. This makes the Court's effectiveness, even legitimacy, dependent on the level of confidence the public has in the institution and its members.

In June of this year, only 25 percent of Americans expressed confidence in the Supreme Court according to Gallup. This is down 11 points from just last year. Moreover, this represents a "new low in Gallup's nearly 50-year trend." This poll was conducted before the most controversial decisions of the Court's last term were handed down, including *Dobbs v. Jackson Women's Health*. In a poll conducted after *Dobbs*, Pew Research found that the public rated the Supreme Court more negatively and as more "politically polarized" than "at any point in more than three decades of polling on the nation's highest court."

Public confidence is routinely less than fifty percent for the Executive and Congressional branches of government. However, these branches do not rely on public confidence for their legitimacy. They rely on elections and mandates provided by voters. (Voters, by the way, whose right to vote is being eroded by the one branch of government that is not subject to their will – the Supreme Court.) Neither of which are available to life-tenured Supreme Court justices. The

public's plummeting confidence in the Court is thus a much more existential problem than it would be for the elected branches.

Our shared goal as a nation should be to return to a situation wherein we have a credible, trusted, and legitimate Supreme Court that respects judicial norms, upholds ethical standards, and protects constitutional rights and democratic safeguards. To do this, we must reform the Court.

The Capturing of the Court

I served in the Senate for 18 years, during which time I had the privilege of casting a vote on the confirmation of six Supreme Court justices.[1] During my time, the confirmation of Supreme Court justices was routinely bipartisan. Even the more partisan confirmations adhered to established procedure and Senate norms.

Then, in 2012, the Right put in motion their decades' long project to capture the Supreme Court, and the Senate's established norms were cast aside for partisan gain. Senator Mitch McConnell and his party reduced the Supreme Court to eight justices for over a year so that they could fill Justice Scalia's seat with a justice who would be loyal to and would advance their ideological agenda. In an unprecedented move, they denied Merrick Garland, President Obama's Supreme Court nominee, so much as a confirmation hearing, let alone a vote. They got what they wanted when President Trump was elected in 2016 and filled the vacancy with the Right's chosen candidate. In explaining his refusal to even consider Garland, McConnell wrote in a *Washington Post* opinion piece:

> The American people have a particular opportunity now to make their voice heard in the selection of Scalia's successor as they participate in the process to select their next president — as they decide who they trust to both lead the country and nominate the next Supreme Court justice. How often does someone from Ashland, Ky., or Zearing, Iowa, get to have such impact? . . . We don't think the American people should be robbed of this unique opportunity.

Mind you, Justice Scalia passed away in February 2016, nine months before Election Day. Fast forward to 2020, Senator McConnell intentionally denied voters that same unique opportunity when Justice Ginsburg's death left a vacancy on the Court less than two months before Election Day. As voters cast ballots that would elect Joe Biden president and change the party in control of the Senate, Senator McConnell and his colleagues again gamed the confirmation process to capture another Supreme Court seat.

[1] I voted to confirm Justices Stephen Breyer, Ruth Bader Ginsburg, John Roberts, Sonia Sotomayor, and Elena Kagan, and I voted against the confirmation of Justice Samuel Alito.

Our highest court's current composition is the result of partisan capture and Court packing. In turn, the Supreme Court has lurched to the Right and is now abusing its power to issue increasingly partisan decisions that ignore or overturn established precedent, undermine and even deny constitutional rights, and that are exactly the types of decisions that Senator McConnell and his colleagues captured the Court to obtain. Low and behold, public confidence in the Court is tanking, and the Court is in the midst of a full-fledged legitimacy crisis.

A Greenlight for a Captured Court to Misbehave

There are only nine judges in this country who are not bound by a code of ethics. They are the most powerful judges in the country, sitting atop our highest court, to which all other federal courts are subservient. This Court claims the final word on the interpretation of our Constitution and the power to deny constitutional rights with the vote of just five of its members. This awesomely powerful court has no binding code of ethics, and the consequences are abundant.

Recent reporting by the *New York Times* details how permeable a Supreme Court with no binding code of ethics is to outside influence. Some may dismiss this reporting or claim that the actions documented in it were harmless or at least did not influence the outcomes of cases. This cavalier thinking ignores the Supreme Court's reliance on public confidence for its legitimacy. Public confidence reflects perception, and the perception of impropriety or corruption, or even uncertainty of its absence, is damaging.

A Campaign to "Exploit the Court's Permeability"

The *New York Times* (NYT) recently detailed an influence campaign carried out by Reverend Rob Schenck and his then organization, Faith and Action in the Nation's Capital, on members of the Supreme Court. As Schenck explained to the NYT, his job with Faith and Action was to "exploit the Court's permeability." A permeability that exists in part because of the absence of a binding code of ethics.

Schenck reportedly recruited donors with the financial means to invite justices to lavish meals, to use their vacation homes, and to attend private clubs. He worked with these donors to engage and build relationships with justices, granting them unique access during the deliberation of cases in which the donors had interests in the outcome. This access included what Schenck now describes as "political prayers" with select justices. All the while, Faith and Action filed amicus briefs in cases before the Supreme Court, including in *Gonzales v. Planned Parenthood*, which upheld the Partial-Birth Abortion Ban Act of 2003.

Peggy Nienaber, the executive director of Liberty Counsel's DC Ministry, the successor organization to Schenck's Faith and Action, has also claimed to have prayed with current Supreme Court justices. This too was while Liberty Counsel filed amicus briefs in Supreme

Court cases, including in *Dobbs v. Jackson Women's Health*. It's hard to overlook the fact that the *Dobbs* decision even referenced an amicus brief written by Liberty Counsel.

The damage done by these types of outside influence campaigns should not be measured only by specific case outcomes, however. As Schenck has explained, his goal was not necessarily to influence a justice's decision in a specific case. Rather, the goal was to make certain justices more emboldened and willing to make controversial decisions. This type of attitude shift could have much more significant and broader repercussions than swaying a justice on just one case. Repercussions like, hypothetically, emboldening justices to take away the federal constitutional right to abortion and to forecast the potential overturning of the right to contraception and same-sex marriage.

It is impossible to state for sure that the influence campaign by Schenck's organization and its successor, Liberty Counsel, influenced the outcome in *Dobbs v. Jackson Women's Health* or in any other case. But, the uncertainty alone is damaging and results in questions about whether justices are deciding cases based on law, precedent, and fact, or based on partisan agenda and outside influence.

Mr. Schenck has said his organization was "pushing the boundaries of appropriateness." It would be woefully naïve to think that he and his organization were the only ones doing such pushing. This is particularly the case given other engagements and relationships with justices that are well known.

Chief Justice Roberts was reportedly "standoffish" to Mr. Schenck. And for his part, Justice Alito has said "I never detected any effort on the part of [Faith and Action donors] to obtain confidential information or to influence anything that I did in either an official or private capacity, and I would have strongly objected if they had done so."

The public is left to take justices at their word in these situations. The same word that under oath swore allegiance to precedent only to obliterate it once given life tenure atop our highest court. If there were a time for voluntarily ethics, that time is long gone. Plummeting public confidence in the Court makes clear that relying on voluntary compliance is insufficient, particularly given the evidence that certain justices were not as "standoffish" as the Chief Justice.

A binding code of ethics could impose restrictions on judicial behavior and provide transparency to give the public faith that a campaign like Mr. Schenck's "Operation Higher Court" cannot be successfully waged in the future. For instance, if there were a code of ethics that forbade justices from socializing with individuals associated with cases before the Court, it would not matter if such an individual did or did not influence a justice, the mere proximity would be a violation.

Judicial Ethics Exist, Just Not for the Supreme Court

Besides the members of our highest court, every other federal judge in the country is bound by the Code of Conduct for U.S. Judges. While not legally binding, the Code of Conduct does have an enforcement mechanism as violations can result in sanction under the Judicial Conduct and Disability Act of 1980. This gives the Code "teeth."

The Code requires judges to "uphold the integrity and independence of the judiciary;" "avoid impropriety and the appearance of impropriety in all activities;" "perform the duties of the office fairly, impartially and diligently;" "engage [only] in extrajudicial activities that are consistent with the obligations of judicial office;" and, "refrain from political activity." Again, these restrictions do not apply to the nine most powerful judges in the country.

Chief Justice Roberts has noted that the Code of Conduct "does not adequately answer some of the ethical considerations unique to the Supreme Court." This is all the more reason to establish a binding code of ethics specific to the Supreme Court. Such a code could provide clarity on those "ethical considerations unique to the Supreme Court." A code written for the Supreme Court could also, like the Code of Conduct for U.S. Judges does, set out a procedure for justices to request advice on how to handle a specific situation. For other federal judges, such advice is provided in the form of advisory opinions by the Judicial Conference of the U.S. Committee on Codes of Conduct. This body has no jurisdiction over the Supreme Court, further underscoring the benefit of a code of ethics – and corresponding procedure – that is designed around and for the Supreme Court.

Minimum Requirements for a Supreme Court Code of Ethics

1. **Restrictions on justices accepting gifts, including travel, access to property and clubs, and other items of a value over $50.**

The justices are currently bound by statute not to accept gifts from parties "whose interests may be substantially affected" by a decision by the Court. However, we run into an enforcement problem here. Namely, there isn't any enforcement, and in recent years justices have accepted lavish gifts, including memberships, expensive trips, and contributions to pet causes. There need to be stricter guidelines and some method of accountability that give the public more faith in the justices' compliance than the current set-up provides.

This is one area where even Congress has stricter rules by forbidding Senators and Representatives from accepting gifts that are valued over $50. A similar restriction would serve the Supreme Court well, with an accompanying disclosure requirement of any gift offered and refused over $50.

2. Robust requirements for financial disclosure

A Supreme Court code of ethics should require justices to routinely and publicly disclose any and all stock held by themselves, their spouse, or their immediate family. Such disclosures should be readily available to the public, including online. This, in turn, should be accompanied by a requirement that a justice recuse themselves in any case that relates to a company in which that justice has any financial interest.

We have precedent for Supreme Court justices recusing themselves because of their stock holdings. Given the concern about recusals reducing the Court to eight, it is worth noting that such recusals could have been prevented if justices were required to divest from individual stocks upon confirmation and were forbidden from acquiring individual stock during their tenure. They could still invest, but in mutual funds, just like millions of Americans do with their retirement funds. This combination of divestment, thorough public disclosure, and transparent recusal would greatly improve public trust by reducing the existence and perception of justices participating in self-benefiting decisions.

3. Guidelines for recusals, including situations that require recusal of a justice.

Currently, a Supreme Court justice is statutorily supposed to recuse themselves from cases "in which his impartiality might reasonably be questioned." The problem here is that justices are left to independently decide whether to recuse in a case, and they are not required to provide any explanation whether they do or do not recuse. Public transparency demands, at a minimum, that a justice explain why they think they can be impartial in a case where there is an arguable conflict of interest. For instance, the public deserved an explanation for why a sitting justice opted not to recuse himself in a case in which his spouse had actively participated in underlying events.

In 2004, Justice Scalia went hunting with then Vice President Cheney, "just three weeks after the Supreme Court agreed to take up the vice president's appeal in lawsuits over his handling of the administration's energy task force." Justice Scalia provided a written explanation for his decision not to recuse in the case. While this at least provided some level of transparency, the Justice was allowed to single-handedly make the decision and without the obligation to consider or abide by binding ethics. Similarly, Justice Thomas was allowed to independently make the decision not to recuse in cases involving events in which his spouse was actively engaged, and he did so without any written explanation.

Recusals of Supreme Court justices are more consequential than on lower courts as a justice cannot be replaced. But rather than an argument against recusal, this argues for clarity and transparency around what warrants recusals. All justices should follow the same rules when it comes to recusals, and the process should be transparent. This would bolster public confidence in the event that a justice does or does not recuse in adherence to the code of conduct.

To Solve the Supreme Court's Legitimacy Crisis Also Requires Structural and Other Non-Structural Reforms

To fully redress the Right's capture of the Supreme Court and to restore the Court's legitimacy, there must be structural reform. This means expanding the Court to remove the impact of the Right's capture. Additionally, life tenure should be done away with in favor of term limits and regular, predictable turnover on the Court.

To prevent future gamesmanship, the Senate also should amend its rules or Congress should pass legislation that requires a minimum number of days for the Senate to advise on a Supreme Court nominee before holding a confirmation vote. This would prevent a nominee from being jammed through while voters are casting their ballots. There should similarly be a maximum number of days by which time a confirmation vote must be held. This is to prevent the hijacking of a Supreme Court vacancy and the intentional reduction in the number of justices on the Court for an extended period of time. Together, these would restore public confidence in the means by which individuals are elevated to our highest court.

In terms of non-structural reform, there needs to be a binding code of ethics. See above. In addition to that, there should be restrictions imposed on the Court's use of emergency decisions, nicknamed the "Shadow Docket" by William Baude, a conservative scholar at the University of Chicago Law School. Emergency petitions used to be reserved for just that, emergencies. Now, the Court routinely issues sweeping decisions using this mechanism, which prevents the justices from having to explain or even sign their names to the decision. These opaque decisions further undermine public confidence. At a minimum, emergency docket decisions should be signed and accompanied by at least a minimal explanation.

Conclusion – It Is Time for Congress to Check and Balance the Supreme Court

The Supreme Court's voluntary adoption of a binding code of ethics would be a powerful statement and a promise of reform from within. However, whispers of such internal reform have failed to bear fruit. Our federal government is designed to achieve checks and balances, with no branch more powerful than the other two. It is time for Congress to check the Supreme Court by enacting meaningful reform, including a binding code of ethics.

"Undue Influence: Operation Higher Court and Politicking at SCOTUS"

Hearing Before the House Committee on the Judiciary

December 8, 2022

Statement of Gabe Roth, Executive Director of Fix the Court

Chairman Nadler, Ranking Member Jordan and Members of the Committee: thank you for the opportunity to submit a statement for this hearing.

As you know from my testimony earlier this year at a Subcommittee hearing on a similar topic, I am the executive director of Fix the Court, a nonprofit that since 2014 has been advocating for apolitical improvements to judicial transparency and accountability. Though major steps toward reform have been achieved of late — livestreaming at the Supreme Court, online financial disclosures and bills to make PACER free — more needs to be done to build a modern, ethical and exemplary federal judiciary.

The revelation[1] that Justice Alito in 2014 allegedly tipped the result of open case during a social outing highlights deficiencies in SCOTUS's gift and personal hospitality guidelines and underscores the need for immediate action to strengthen the rules governing the justices' ethics and extracurricular activities. The leak of the *Dobbs* opinion earlier this year only accentuates the point. Given SCOTUS's decades-long reluctance to act in this realm, Congress must step in, both on the legislative and investigative fronts.

Ethics Rules Must Be Strengthened

On SCOTUS ethics, though it's been said time and again, I will repeat here the preposterous fact that lawmakers, business leaders, medical providers and lower federal court judges, to name a few, all must follow an articulated code of ethics, for which there are consequences for noncompliance, yet at the Supreme Court no such code exists.

A formal, written statement of principles that sets behavioral expectations for the justices, and against which the public can measure the justices' moral aptitude, would give Americans confidence that the nine are discharging their duties, both on and off the Court, with the highest moral character. That the justices now play such a central role in our public and political discourse today only amplifies this need. So does the frequent embarrassment judges elsewhere in the country feel when they see their peers on the high court behaving injudiciously.[2]

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[1] *See* Jodi Kantor and Jo Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach," *New York Times*, Nov. 19, 2022 (link).

[2] When I speak to current and former lower court judges about ethics (almost always off the record or on background), I hear their frustration that the Supreme Court is neglecting its responsibilities. Relatedly, earlier this year D.D.C. Senior Judge Reggie Walton said it's "unimaginable that we have a segment of our federal judiciary that's not subject to an ethics code; *see* Nate Raymond, "Federal judge takes rare step of backing U.S. Supreme Court ethics code," Reuters, May 26, 2022 (link). *See also*, Ed Cohen, "Almost all judges believe Supreme Court justices should be subject to an ethics code," National Judicial College, June 21, 2022 (link), reporting the results of NJC's "Question of the Month," e-mailed to 12,000 alumni (both federal and non-federal judges),

Even with recent attention focused on Justice Alito and earlier this year on Justice Thomas, it is important to note that every justice has committed ethical errors in the past few years.[3] In fact, public discussion about the justices' ethical blind spots has been a part of every era of American history (e.g., Chief Justice John Marshall should have recused in *Marbury v. Madison* since he was involved in not delivering Marbury's commission).

In the modern era, an ethics scandal over the acceptance of outside income led to the 1969 resignation of Justice Abe Fortas, and a similar ethics issue nearly forced Justice William Douglas off the bench.[4] Congress responded with all sorts of proposals to improve judicial integrity in the years that followed: some that became law, like the 1978 Ethics in Government Act, which requires justices and lower court judges to file annual financial disclosure reports; and others that did not, like a 1977 proposal[5] that would have created a Commission on Judicial Disabilities and Tenure to determine upon request whether a justice or judge has failed to serve with good behavior. In other words, inaction today would be ahistorical.

In the aftermath of Justice Ginsburg's injudicious comments about then-candidate Donald Trump, and Justice Scalia's death in an $700-per-night room that he did not pay for, which was furnished by a recent SCOTUS litigant, the House Judiciary Committee Chairman Bob Goodlatte, along with former Committee Chairman Lamar Smith and then-Courts Subcommittee Chairman Darrell Issa, all Republicans, drafted a bill in consultation with their Democratic colleagues called the Judiciary ROOM Act[6] that would have had the Judicial Conference of the U.S. write an ethics code for all levels of Article III, including the Supreme Court. The bill passed out of Committee on Sept. 13, 2018, without a single "no" vote, though it expired before floor action could commence.

Sadly, that experience did not compel the Court of its own volition to write an ethics code. Luckily, this Congress the Supreme Court Ethics, Recusal and Transparency Act[7] was introduced, and it includes a similar ethics provision (though much to my chagrin it's a Democrats-only bill[8]). Its Section 2 states, "Not later than 180 days after the date of enactment of this section, the Supreme Court of the United States shall, after appropriate public notice and opportunity for comment […] issue a code of conduct for the justices of the Supreme Court." Here, the justices, not the Judicial Conference, would be the ones

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which asked, "Should U.S. Supreme Court justices be bound by a code of ethics?" More than 97 percent of the 859 judges who responded answered "yes."

[3] This even includes the newest justice. This fall Justice Jackson failed to recuse from a petition despite a financial interest in a party. She remains a registered voter with a political party. And she noted in her nomination documents earlier this year that from time to time she's failed to list some of her husband's outside income in her disclosure reports. A full accounting by Fix the Court of the justices' recent ethical lapses — more than six dozen over the past decade — is available here.

[4] See Andrew Glass, "Abe Fortas resigns from Supreme Court, May 15, 1969," *Politico,* May 14, 2017 (link).

[5] The Judicial Reform Act of 1977 (H.R. 9042; 95th Congress) (link).

[6] The Judiciary ROOM of 2018 (H.R. 6755; 115th Congress) (link).

[7] The Supreme Court Ethics, Recusal, and Transparency Act of 2022 (H.R. 7647; 117th Congress) (link).

[8] It's worth noting that the Courthouse Ethics and Transparency Act (Public Law 117-125) — a bill President Biden signed two days after H.R. 7647 passed through the Committee, which requires the judiciary to post federal judges' and justices' annual disclosures and periodic stock transaction reports online —was a 100 percent bipartisan effort in both the House and Senate, led by Reps. Deborah Ross (D-N.C.) and Darrell Issa (R-Calif.) and Sens. Chris Coons (D-Del.) and John Cornyn (R-Tex.).

to write their own code, albeit with some prodding from Congress to get the ball rolling. As you know, the bill passed out of Committee in May and awaits floor action.

Taking a step back, I would argue that Congress imposing a requirement that the justices write an ethics code is less burdensome than the justices filling out a financial disclosure report each year, which lists all their reimbursed travel, outside income, financial investments, major debts and more. (They do that each year without issue.) A code already exists for the lower courts that SCOTUS could use as a starting point; they say they "consult" it after all.[9] The justices in their code would likely remove some sentences to reflect their nonfungibility and add a section that more clearly lays out how they would handle recusals, gifts, travel and personal hospitality, but overall, this is not only a much needed project but also a very doable one.

What's more, the Court would have the public behind this effort, as a May 2022 *Politico*/Morning Consult poll[10] found 67 percent of Republicans and 81 percent of Democrats support the justices having a "binding […] code of ethics."

Frankly, if the justices can't be bothered to write an ethics code, maybe Congress shouldn't bother giving the nine $122 million in discretionary spending for the coming fiscal year.[11] That might sound like a drastic step, but Congress attaching strings to a nine-figure appropriation is not uncommon, and in the realm of strings, an ethics code is more twine than suspension bridge cable. In fact, one leading Senate Appropriations Committee member is already considering this option.[12]

Regulations on Extracurricular Activities Must Be Strengthened

It's not just the lack of an ethics code that recent events have brought into stark relief, though. The *Times*' Nov. 19 report indicates that not only did Justice Alito allegedly share the results of *Hobby Lobby* with a wealthy couple he and his wife had befriended but that the same couple took the Alitos to their vacation home near Jackson Hole, Wyo. — a trip that never appeared on an Alito disclosure report. If, per a Nov. 28 letter[13] from Supreme Court Legal Counsel Ethan Torrey, Alito's acceptance of this trip from people clearly seeking to impact the outcome of a SCOTUS case "[didn't] violate ethical standards," then those standards need to change.

Luckily, more exacting standards already exist — in the halls of Congress. According to Rule XXV, clause 5, of the Rules of the House of Representatives (117th Congress), "a Member […] may not accept a gift the value of which exceeds $250 on the basis of the personal friendship exception […] unless the Committee on Ethics issues a written determination that such exception applies." Here, the definition of

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[9] *See generally* Chief Justice Roberts' 2011 Year-End Report on the Federal Judiciary (link).

[10] *See* "Crosstabulation Results," Morning Consult | *Politico* National Tracking Poll #2205036, May 6-9, 2022, p. 189 (link).

[11] Here's the math: the Court requested $143.6 million for FY23 (link). Taking out $2.5 million for justices' salaries and $19 million for the salaries of the Supreme Court Police Department, assuming a staff of 190 and $100,000 in compensation per SCPD staff, that leaves $122 million in discretionary spending.

[12] *See* Katie Barlow, "Lawmakers urge action after report of other SCOTUS leak," Fox 5 D.C., Nov. 21, 2022 (link): "Maryland's Democratic Senator Chris Van Hollen chairs the appropriations subcommittee that oversees the Supreme Court's budget. He says they are prepared to look at all options including tying conditions to the court's funding if they can't pass a law requiring a code of conduct."

[13] The letter has been posted at this link.

a gift is "a gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. The term includes gifts of services, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred." Nearly identical rules exist in the Senate.

Section 3 of the aforementioned Supreme Court Ethics, Recusal and Transparency Act would require the Court to abide by gift, travel and personal hospital rules that are at least as strict as those for members of Congress.[14] And it envisions the role of ethics ombudsman to be played by the Counselor to the Chief Justice, a statutory officer that under 28 U.S.C. §677 may be delegated this type of advisory role. A justice might ignore the advice of the Counselor, of course, but at least there would be a written record about such a trip, on which Congress could follow up as needed.

It's important to point out that the use of the personal hospitality exemption to the gift- and travel-reporting rules is not a new phenomenon, nor is it something a single justice has availed himself or herself of in the recent past. From FOIA requests that Fix the Court sent to the U.S. Marshals Service in 2016 and 2018, we found that justices in 2015, 2016 and 2017 took trips to cities where we know they have friends that were not accounted for in their annual disclosure reports. It's possible, of course, that the justices paid for these trips themselves.[15] But it's far more likely that at least some of them received free transportation, lodging or meals, of which no formal record exists.

There's nothing wrong with the justices having friends, but, for example, a neutral party should have been consulted about Justice Scalia's plans to stay at the Mississippi governor's mansion at a time when the state was party to a lawsuit seeking to strike down the Affordable Care Act,[16] and when, just months after the Court denied *cert.* in a patent case that preserved a lower court win for Amdocs and its founder Morris Kahn, Justice Ginsburg was the guest of Kahn on a free trip to Israel and Jordan.[17] These appearances of impropriety are apparent.

Congress Must Step in Given the Court's Decades-Long Reluctance to Act

Finally, and this is for those who pay lip service to separation of powers when someone proposes a policy for the judiciary that they don't like, here are the facts: Congress has broad authority to legislate institutional policies in the third branch, including in the Supreme Court — everything from where and when they meet to what types of cases they take to how much money they spend on landscaping the Court grounds — and given the justices' reluctance to moderate their behavior, or even acknowledge that ethics issues exist, Congress has the responsibility to set them straight.

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[14] In 2019 there was a bipartisan effort in the House, in a bill called the Judiciary Travel Accountability Act (see. H.R. 4715; 116th Congress), to require the justices and the rest of Article III to follow the same gift, travel and personal hospitality as members of Congress — another example of judicial oversight not being a traditionally partisan issue.

[15] You can see how many of the marshal-covered trips do not appear on their annual financial disclosures by consulting the FOIA documents Fix the Court has posted at this link and the annual financial disclosure documents posted at this link.

[16] *See* Stephen R. Bruce, "'Any Good Hunting?': When a Justice's Impartiality Might Reasonably Be Questioned," Oct. 5, 2016, p. 24 (link).

[17] Although Justices Ginsburg's trip did appear on her 2018 disclosure report (link), under current practices there is no one inside the Court apparatus who checks whether such a trip might violate best practices in judicial ethics, which it clearly does.

It might surprise you that in the modern era, Chief Justices of the United States have emphasized ethics as part of their role as chief administrator of the Court itself and of the entire judicial branch. For example, a month after the Fortas resignation, Chief Justice Warren Burger called a special session of the Judicial Conference to address judicial ethics and laid out a broad plan for improvement that included capping extrajudicial compensation, requiring financial disclosure, strengthening the codes of conduct and permitting stronger enforcement of ethics rules.[18]

In 1991, as a bill strengthening gift- and travel-reporting requirements for Congress and the executive branch was going into effect, Chief Justice William Rehnquist released a memo,[19] with his colleagues' blessing, stating that although the new law didn't apply to SCOTUS, the justices would nonetheless follow its requirements. (That policy remains in effect.)

Two years later, with two new justices having just joined the Court, bringing the number of justices with attorney-spouses or attorney-children to seven, Rehnquist released a second memo[20] on recusal policy that discussed the situations in which a justice would, or would not, step aside from a case or petition given the involvement of a family member or their firm. (That policy also remains in effect.)

The Roberts era has seen no shortage of ethics scandals,[21] yet in contrast to his predecessors, one finds scant examples of the current Chief Justice working to improve to the status quo. In 2017, Roberts did establish a Working Group on Workplace Conduct in response to the Judge Kozinski harassment scandal, which advocates maintain, including before this Committee earlier this year,[22] has not yielded satisfactory results. And in 2019, though Justice Kagan told a congressional committee[23] that the Chief Justice was "studying the question of whether to have a code [of conduct…] that's applicable only the United States Supreme Court," no such code, nor even a draft of such a code, has materialized.

Hoping that the latest scandals will compel the Chief Justice to act does not cut it. The Committee must push House Leadership to bring the Supreme Court Ethics, Recusal and Transparency Act to the floor before the lame-duck session ends.

The Supreme Court Historical Society Must Be Investigated

Finally, what is going on at the Supreme Court Historical Society? The *Times'* Nov. 19 story describes in detail the way in which Society donors were using it as a conduit to try to influence the justices. It's clear why: no other institution in American life features a justice or justices at their annual dinner besides

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[18] *See* Andrew J. Lievense and Avern Cohn, "The Federal Judiciary and the ABA Model Code: The Parting of the Ways," *Justice System Journal*, Volume 43, Issue 3, 2007 (link).

[19] *See* "Resolution," Supreme Court of the United States, Jan. 18, 1991 (link).

[20] See "Statement of Recusal Policy," Supreme Court of the United States, Nov. 1, 1993 (link).

[21] *See* link at the end of fn 3.

[22] See generally "Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change," Hearing before the House Judiciary Committee's Subcommittee on Courts, IP and the Internet, Mar. 17, 2022 (link).

[23] *See* "User Clip: Kagan Says Chief Justice 'Studying' Question of SCOTUS Ethics Code," C-SPAN, Mar. 7, 2019 (link).

SCHS,[24] and the justices have been known to attend or speak other Society events that occur throughout the year, most of which take place in the Court building itself.

What benefit does one receive when joining the Society's Board? Its "John Marshall Circle" (besides a "limited edition Constitution Box [with] an interior fitted with velvet fabric and trim that were part of the draperies that formerly adorned the [SCOTUS] Courtroom"[25])? Proximity. Though it's likely we may never know if an attorney or business leader or other individual donating to the Society and participating in its events changed justices' views or votes in any given case, that point almost doesn't matter, since the perception problem is so clear.[26]

Frankly, the argument in favor of the Society's perpetuation is flimsy at best. The Library of Congress can handle any archival materials the Society possesses. Staff hired by the Court can run the gift shop in place of those hired by the Society. The offices of the Marshal and the Clerk office can organize lecture series. Other Society milestones[27] since its 1974 founding do not vouch for its continued existence, especially if, as it appears, it's being used for access.

Conclusion

There are plenty of reasons for Congress to act now to improve ethics and related regulations at the Supreme Court (and investigate its favored nonprofit). Waiting for the immediacy of the recent SCOTUS scandals to subside would be not a responsible strategy.

As Sen. Kenneth Keating (R-N.Y.) said after a major scandal rocked the Senate in the early 1960s, "It always seems to require prodding from some unfortunate experience of some kind to ensure action."

With there having been a host of "unfortunate experiences" regarding judicial ethics at the Supreme Court these last few years, Congress can't wait to act.

Thank you again the opportunity to share this statement.

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[24] *See* the Society's list of "Annual Lecture Speakers" (link). *See also* "The Daily" (a *New York Times* podcast), "A Secret Campaign to Influence the Supreme Court," Nov. 29, 2022 (link). According to interviewee Rev. Rob Schenck, "At [Supreme Court Historical Society] events, often all nine justices would enthusiastically participate."

[25] *See* "Membership in the Society," Supreme Court Historical Society (link).

[26] Is it coincidence the general counsel of General Dynamics is a Society board member at a time when the company's IT division signs a five-year, $298 million contract with the judiciary (link)? What other connections exist between the Board and the work of the third branch? These are questions worth asking.

[27] For example, in the early 2000s the Society extensively (link) and successfully lobbied Congress to pass a law to mint John Marshall silver dollars, the proceeds of which, as much as $4 million, went to the Society's coffers; *see* Public Law 108-290.

Mr. BISHOP. Mr. Chair, may I be recognized for a unanimous consent request as well?

Mr. JOHNSON of Georgia. The gentleman is so recognized.

Mr. BISHOP. Thank you, Mr. Chair. I'd like to submit for the record several more articles.

This is from *Newsweek*, "The Baseless 'Recusal' Attack on Clarence Thomas"; from *Newsweek*, "40 Years of Attacks and Slurs Against Justice Thomas"; from the *Washington Examiner*, "The Media's War on Clarence and Ginni Thomas"; and from the *Washington Examiner*, "The Ginned-Up Case Against the Thomases"; and one more from *The Federalist*, "Politico Launches Attack on SCOTUS Justices' Working Spouses."

Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. Without objection, so ordered.

[The information follows:]

MR. BISHOP FOR THE RECORD

newsweek.com

The Baseless 'Recusal' Attack on Clarence Thomas | Opinion

Mark Paoletta

7–9 minutes

The legacy corporate media has launched an unprecedented smear campaign against Justice Clarence Thomas and his wife, Ginni, falsely claiming that Justice Thomas is violating ethics laws in light of his wife's political activities. Some have even advocated impeaching Justice Thomas for failing to recuse. They are, in effect, demanding a new standard for recusal that has no place in the law or in past practice.

Many judges are married to people who work in politics and public policy, and they frequently decide cases on which their spouses have opined. The recusal statute requires judges to recuse if their families could financially gain from a decision or if a reasonable observer might question their impartiality.

D.C. Circuit Judge Nina Pillard, for example, voted not to rehear a case rejecting President Trump's refusal to produce his tax returns in response to a congressional subpoena. That was exactly what her husband, the ACLU's litigation director, advocated in an article reviewing the lower court decision.

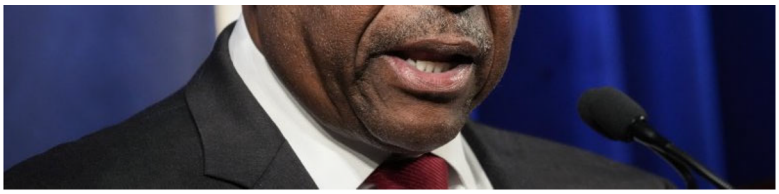
Ninth Circuit Judge Stephen Reinhardt, a liberal icon, participated in a case even after his wife—the chief of an ACLU chapter—commented on the lower court opinion. Her ACLU chapter even submitted a brief to the district court. Reinhardt defended his decision not to recuse, writing his wife's "views are hers, not mine, and I do not in any way condition my opinions on the positions she takes regarding any issues." Ethics experts defended Reinhardt's

decision, noting that "Judge Reinhardt is not presumed to be the reservoir and carrier of his wife's beliefs.... A contrary outcome would deem a judge's spouse unable to hold most any position of advocacy, creating what amounts to a marriage penalty."

The Supreme Court has long rejected this "marriage penalty." In light of the growing number of judges' spouses and family members practicing law, the Supreme Court issued a Statement of Recusal Policy in 1993, signed by seven Justices. Applying the recusal statute's criteria, the policy says a Justice should not recuse because of a family member who is not involved with the current litigation and who cannot receive compensation from the case's outcome.

While any lower court can substitute a recused judge with another judge, there is no one to replace a Supreme Court Justice who recuses. As reflected in the Court's recusal policy, "Even one unnecessary recusal impairs the functioning of the Court...deprives litigants of the nine Justices to which they are entitled [and] produces the possibility of an even division on the merits of the case."

Consistent with the Court's policy, even though Justice Ruth Bader Ginsburg's husband, Marty Ginsburg, practiced law at a firm that represented parties before the Supreme Court, Justice Ginsburg never recused herself. Law professor Jane Ginsburg, the Justice's daughter, wrote an article about a case pending before the Supreme Court. The petitioner cited Jane's article in its brief, and Justice Ginsburg voted for the result advocated by her daughter.



WASHINGTON, DC - OCTOBER 21: Associate Supreme Court Justice Clarence Thomas speaks at the Heritage Foundation on October 21, 2021 in Washington, DC. Clarence Thomas has now served on the Supreme Court for 30 years. He was nominated by former President George H. W. Bush in 1991 and is the second African-American to serve on the high court, following Justice Thurgood Marshall. Drew Angerer/Getty Images

Marty Ginsburg solved a complex tax problem for his client, Ross Perot's company EDS, and Perot endowed a chair named after Marty Ginsburg at Georgetown University Law Center. When Perot and EDS appeared several times before the Supreme Court, Justice Ginsburg did not recuse. Nor was she required to.

If reporters mean to tighten recusal standards, they should prepare to levy a marriage penalty on all judges' spouses, not just the Thomases.

But the press now singles out Justice Thomas, calling on him to recuse because of his wife's activities. Ginni Thomas is a longtime conservative activist who works with groups that take public positions on issues and sometimes even file amicus briefs at the Supreme Court. But unlike the spouses and children of other judges, Ginni does not practice law, much less write briefs. She merely builds conservative coalitions to pursue shared *political* aims. None of her activities require Justice Thomas to recuse.

Even so, the press criticized Ginni Thomas for honoring conservative leaders at an awards luncheon, because those individuals subsequently filed amicus briefs at the Supreme Court. Historically, this has not required recusal. Ginsburg once donated an autographed copy of her VMI opinion to the pro-abortion NOW Political Action Committee, which auctioned off the opinion at a fundraiser in 1997. Moreover, in 2004, she spoke at a lecture named after herself for the NOW Legal Defense Fund, on whose

board she served in the 1970s. Two weeks before that lecture, Justice Ginsburg voted in favor of a position advocated by the NOW Legal Defense Fund in an amicus brief.

None of those activities required Ginsburg to recuse, but the press has attacked Thomas for "stok[ing] concerns of a hyperpartisan court" by attending conservative events. Thomas' critics conveniently ignore the numerous instances of liberal Justices attending similar events, such as Justice Sotomayor giving speeches to the liberal American Constitution Society.

These recent stories have also ignored Justice Ginsburg's partisan attack on Donald Trump during the 2016 presidential campaign. The Justice called him "a faker" and criticized him for not disclosing his tax returns. She even voiced concerns about Trump being president. The day after he was elected, Ginsburg again objected by wearing a collar that traditionally signaled she would be dissenting in a case, though there were no cases handed down that day. Yet, she sat on a case challenging a congressional subpoena for President Trump's tax returns, and she decided plenty of other cases involving President Trump and his administration. No one talked of impeaching Justice Ginsburg for her conduct.

The media are weaponizing baseless ethics charges to smear a conservative black Justice. Thomas infuriates them because he expresses views they consider unacceptable for a black man to hold, and because an increasing number of Justices are aligned with those views and may be ready to issue rulings that undercut longstanding liberal precedents. But going after his wife is despicable. And it won't work.

Mark Paoletta served as a lawyer in the George H.W. Bush White House Counsel's Office and worked on Justice Thomas's confirmation. He most recently served as General Counsel for the Office of Management & Budget in the Trump Administration, and he worked on the confirmations for Justices Gorsuch and Kavanaugh. He is a partner at Schaerr Jaffe LLP. You can follow him on Twitter at @MarkPaoletta
The views expressed in this article are the writer's own.

newsweek.com

Forty Years of Attacks and Slurs Against Justice Thomas | Opinion

Mark Paoletta

8–9 minutes

Much of the black Democratic leadership in this country has been on a 40-year crusade to destroy Justice Clarence Thomas, calling him an "Uncle Tom" because his views are supposedly anathema to most black Americans. But in fact, they are the ones out of step with black Americans.

This was on full display when I testified last month before Congress at a hearing on the Supreme Court. At the hearing, I asserted that "the Left hates Justice Thomas because he is a black conservative who has never bowed to those who demand that he must think a certain way because of the color of his skin." I was surprised when Democrat Hakeem Jeffries, a member of the Congressional Black Caucus, asked me, "What evidence do you have to support that incendiary charge?"

I responded that Democratic congressman Bennie Thompson, chairman of the House Homeland Security and January 6th committees, had called Justice Thomas an "Uncle Tom" in a 2014 interview. If given the time, I could also have pointed out Representative Thompson's assertion in the same interview that Justice Thomas "doesn't like black people, he doesn't like being black."

I noted that Rep. Thompson defended his use of the "Uncle Tom" slur because Justice Thomas supports voter ID laws and opposes affirmative action, but that polling indicates black Americans agreed with Thomas on these issues. Rep. Jeffries dismissed the

statement, cutting me off to say that Rep. Thompson "is entitled to free speech." When I asked Rep. Jeffries if he wanted another example of the Left's hatred toward Justice Thomas, he chose to quit while he was behind and moved to another witness. Those other witnesses confirmed under questioning from Rep. Matt Gaetz that "Uncle Tom" is a racial slur in every use.

The examples of attacks on Justice Thomas for daring to think differently—for refusing to assent to the views liberals demand of black Americans—could fill a book. Justice Thomas was excluded completely from the National Museum of African American History and Culture when it was first opened in 2016. The NAACP, a civil rights organization, opposed Thomas' nomination to the Supreme Court. In 1991, Juan Williams, a liberal journalist who is the author of a book on Justice Thurgood Marshall, wrote an op-ed titled "Open Season on Clarence Thomas," about the Left's attacks. "Here is indiscriminate, mean-spirited mudslinging supported by the so-called champions of fairness: liberal politicians, unions, civil rights groups and women's organizations," Williams wrote. "They have been mindlessly led into mob action against one man."

In 1998, Judge Leon Higginbotham, a black judge formerly on the Third Circuit, furiously tried to prevent Justice Thomas from speaking at the National Bar Association, an organization for black lawyers. Perhaps even more egregiously, an issue of *Emerge* magazine published an illustration of Justice Thomas shining the shoes of Justice Antonin Scalia. On the cover, it depicted him as a lawn jockey. Hodding Carter, a white Southerner who served in the Jimmy Carter White House, wrote in 1986 that, "as a Southerner, Mr. Thomas is surely familiar with those 'chicken-eating preachers' who gladly parroted the segregationists' line in exchange for a few crumbs from the white man's table. He's one of the few left in captivity." As Justice Thomas noted in his memoir, *My Grandfather's Son*, "Not a single civil rights leader objected to this nakedly racist language."

WASHINGTON, DC - MARCH 30: MoveOn activists call for the impeachment of Justice Clarence Thomas outside of the U.S. Supreme Court on March 30, 2022 in Washington, DC. Paul Morigi/Getty Images

Even more disgusting, during Thomas's 1991 confirmation, significant voices in the black community said that the justice hated black people because he married a white woman. Russell Adams, chairman of Howard University's department of Afro-American studies, said, "His marrying a white woman is a sign of his rejection of the black community." Barbara Reynolds, a *USA Today* columnist, wrote Thomas has "already said no to blacks; he has already said if he can't paint himself white, he'll think white and marry a white woman."

Justice Thurgood Marshall was married to an Asian-American woman. James Earl Jones, Michael Jordan, Sidney Poitier, Richard Pryor and Quincy Jones all married white women, and no civil rights leader said anything remotely similar to this despicable smear. Incoming Justice Ketanji Brown Jackson is married to a white man, and no one would begrudge her for it—nor should they. But for the Left, it's okay to claim that Justice Thomas hates black people because he married a white woman.

The message is clear: Thomas is a traitor to his race because he thinks his own thoughts.

In truth, it's Rep. Thompson and others in black congressional

leadership who are out of step with the black community. Nearly 70 percent of black Americans support voter ID requirements, and 62 percent oppose race being a factor in college admissions. On abortion, only 32 percent of black Americans think the practice should be legal under all circumstances. Only 28 percent of black Americans support Defund the Police. Last but not least, 81 percent of black parents support school choice. It seems that a lot of the rank-and-file members of the black community also think their own thoughts, rather than those assigned them by the Left's leadership.

Why would the NAACP oppose school choice, depriving so many black families of an option to provide their children a good education? Perhaps because the NAACP received funding for many years from a variety of teachers' unions, which reject market competition through school choice to protect failing teachers. Justice Thomas zeroed in on this in his memoir. During his confirmation, he was shown a letter from the AFL-CIO to the NAACP which requested that the NAACP oppose Thomas to give the AFL-CIO cover to oppose him. Thomas wrote, "What saddened me was the fact that an organization whose independence had once been a byword in the Deep South had been reduced to doing the bidding of the AFL-CIO." And adding insult to injury, labor unions have long been rife with racism toward rank-and-file black Americans.

Perhaps left-wing leaders need to peddle the false narrative that Justice Thomas is a sell-out because they are funded by large majority-white organizations and adopt positions that are more in line with paternalistic and patronizing white progressives. They need to smear Justice Thomas because he represents a threat to the extreme views they advocate.

It is despicable that Black leaders continue to smear Justice Thomas. He was born into poverty under state-enforced segregation in the Deep South and now serves on the Supreme Court. He is our longest-serving black Justice, and he writes more opinions a year than any Justice and stands at the pinnacle of the

legal world. Liberal leadership will continue to smear him because he is a transformational jurist who will never bow to leftism. In truth, it is Justice Thomas who represents the views of average black Americans—and whose jurisprudence aims to defend the liberty and justice of all Americans, despite the Left and much of the black leadership waging war against them.

Mark Paoletta served as a lawyer in the George H.W. Bush White House Counsel's Office and worked on Justice Thomas's confirmation. He most recently served as General Counsel for the Office of Management & Budget in the Trump administration, and he worked on the confirmations for Justices Gorsuch and Kavanaugh. He is a partner at Schaerr Jaffe LLP. He is the co-author of the forthcoming book, Created Equal: Clarence Thomas in His Own Words*, which will be published this June. You can follow him on Twitter at @MarkPaoletta*

The views expressed in this article are the writer's own.

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The media's war on Clarence and Ginni Thomas

Mark Paoletta

13–17 minutes

For 30 years, Justice Clarence Thomas has remained unbowed by the Left's political, and often race-based, attacks. With a growing majority of Supreme Court justices more aligned with Thomas's jurisprudence, and with major rulings coming this spring and next term on abortion, affirmative action, and guns, the attacks on Thomas have focused on his wife, Ginni. Having failed to intimidate Thomas on his judicial opinions, the new tack is aimed at forcing his recusal from cases.

The supposed standards now being applied to Justice Thomas and his wife are either invented from whole cloth or distorted beyond recognition. The *New Yorker's* Jane Mayer struck first in late January, continuing her long vendetta against Thomas, dating back to her error-filled 1994 book *Strange Justice*, which played on the racist tropes that Thomas was merely the black hand puppet of the white Justice Antonin Scalia. Mayer, quickly echoed by journalists from the *Washington Post*, CNN, the *New Republic*, ABC, the *Nation*, and just this week the *New York Times*, seeks to portray Ginni Thomas's public policy work as a threat to the Supreme Court in order to pressure Thomas to recuse himself from any case that Ginni, or any of the groups she has worked with, has even commented on.

The *New Republic's* Michael Tomasky, for example, wrote that because Ginni publicly opined that Obamacare was "a disaster," Thomas was required to recuse himself from that case. Despite the

fact that having a spouse with (gasp!) opinions has never been the basis for recusal by any other justice or judge, Tomasky argues that Thomas should be impeached for failing to recuse himself from cases involving Obamacare and others.

The relevant part of the judicial recusal statute requires federal judges to recuse from cases when a family member is a party to a case, when the judge knows a family member has "an interest that could be substantially affected by the outcome of a proceeding," or when a judge's "impartiality might reasonably be questioned."

Ginni Thomas is a conservative activist who works to bring conservative leaders and groups together to collaborate and share information to produce effective messaging on issues of concern. It's all coalition-building and PR. She does nothing in the legal space. At times, these groups may take public stands on matters that come before the court, or file amicus briefs (expressing the two cents of groups that are not formal parties to the case) in the Supreme Court. But none of those actions have required Thomas to recuse, and there is ample precedent for not recusing.

The *Times* story claims that the Thomases "have worked in tandem from the bench and the political trenches to take aim at targets" such as abortion and affirmative action, making much of the fact that they "have a shared Thomas philosophy," quoting Justice Thomas as saying his wife is "the rock of my life" and that his brutal confirmation hearings "meld[ed] us into one being." What should be a beautiful story about a strong marriage is turned into some kind of troubling conspiracy.

The fact that Ginni Thomas is out there in the public square should make no difference, but the *Times* portrays her political activism as an "unprecedented conundrum for the Supreme Court." That's simply not true.

The late Judge Stephen Reinhardt, for example — a liberal icon on the 9th Circuit — was married to Ramona Ripston, executive director of the ACLU of Southern California. In 2011, Reinhardt

properly refused to recuse from a challenge to Proposition 8, the same-sex marriage amendment to the California Constitution. The ACLU/SC had filed an amicus brief in the lower court in that case, and his wife had spoken out on the case publicly.

Reinhardt wrote that his wife's "views are hers, not mine, and I do not in any way condition my opinions on the positions she takes regarding any issues." Reinhardt concluded that a reasonable person would not believe he would be partial simply because of his wife's or her organization's views. When Reinhardt voted exactly as his wife and the ACLU/SC had advocated, nobody accused him of being a puppet of his wife, and left-leaning members of the press applauded this working couple arrangement.

Professor Stephen Gillers, whom Mayer claims as the gold standard of judicial ethics experts, filed a brief defending Reinhardt, writing: "[A] spouse's views and actions, however passionately held and discharged, are not imputed to her spouse, and Judge Reinhardt is not presumed to be the reservoir and carrier of his wife's beliefs. ... A contrary outcome would deem a judge's spouse unable to hold most any position of advocacy, creating what amounts to a marriage penalty." This language could not be more supportive of Ginni Thomas's right to pursue her lifetime work of public advocacy while her husband serves as a justice.

The Reinhardt/Ripston case is significantly closer to the recusal line than anything Clarence and Ginni Thomas have ever encountered. Yet in the Mayer piece, Gillers hypocritically attacks Ginni Thomas for her work.

D.C. Circuit Judge Nina Pillard likewise has sat on cases in which her husband, David Cole, the ACLU's national legal director, has publicly advocated a specific outcome. For example, Cole praised a judge's decision rejecting President Donald Trump's refusal to comply with a congressional subpoena to produce his taxes. The D.C. Circuit panel affirmed this ruling, and then Judge Pillard considered whether to rehear the case en banc. Pillard voted against the rehearing, thereby allowing the decision, which her

husband had supported, to stand.

Cole also wrote critically on the confinement conditions of enemy combatants held at Guantanamo Bay. Judge Pillard sat on two cases in which she voted in favor of the claims of Guantanamo detainees. Under the Left's manufactured standard, Pillard should have recused. I am not aware of a single article that has raised concerns about Pillard not recusing from cases regarding matters on which Cole or the ACLU has commented.

Both Mayer and CNN's Pamela Brown claim Ginni Thomas has behaved differently than other Supreme Court spouses, asserting that when Ruth Bader Ginsburg joined the D.C. Circuit in 1980, her husband, Marty Ginsburg — "one of the country's most successful tax lawyers — left his firm and turned to teaching." Not quite. Marty Ginsburg did indeed leave his law firm in New York, and promptly joined a major law firm, Fried Frank, in Washington, D.C. He practiced law there until he retired in February 2009.

Fried Frank filed at least three amicus briefs before the Supreme Court while Marty Ginsburg was a member of the firm, and Justice Ginsburg never recused herself. And in *KSR International Co. v. Teleflex Inc.* (2007), Fried Frank represented KSR, which won the case, 9-0. Justice Ginsburg did not recuse.

And if family connections or viewpoints are the concern, Jane Ginsburg, Justice Ginsburg's daughter and a law professor, wrote an article specifically on a case pending before the Supreme Court (*Aereo*), and the petitioners cited her work several times. Justice Ginsburg voted consistent with what her daughter advocated, in a 6-3 opinion.

Another complaint is that Ginni Thomas's organization gave awards to conservative leaders for their activism, some of whom subsequently filed amicus briefs with the court, and Justice Thomas did not recuse. In 1998, Justice Ginsburg donated a personally autographed copy of her VMI opinion to a fundraiser for the pro-abortion group NOW PAC. In 2004, Justice Ginsburg accepted an

invitation from the pro-abortion NOW Legal Defense Fund, on whose board she had previously served, to speak in a lecture program named after Ginsburg. Two weeks earlier, she had voted in support of a NOW Legal Defense Fund amicus brief. Ginsburg rejected calls to recuse, stating there "is no one to replace us. It makes it quite important that we not lightly recuse ourselves."

To be clear, none of these cases required recusal. But they would under the distorted recusal standards now being proposed for Justice Thomas. And wherever a genuinely fair observer might eventually draw the line, Justice Ginsburg's various failures to recuse present far more questions than anything Ginni Thomas, a nonpracticing attorney, and Justice Thomas have done.

Meanwhile, the *Nation's* Elie Mystal invents a new definition of ex parte communications to smear the Thomases, and gets his facts wrong. Mystal cites news reports of recently released emails from Ginni Thomas indicating that Justice Thomas had spoken with Florida Gov. Ron DeSantis, and Mystal then notes that Florida had sued the Biden administration over COVID mandates. According to Mystal, "legal ethics 101" holds that a judge is not allowed to speak with a litigant, without the other party present, about *anything* if a case is pending before a court. Nonsense. The ex parte rule forbids a judge from speaking with a litigant *about the case* if the other party is not present. But the notion that judges and justices can never converse ex parte with other public officials or anyone else about anything at all if they are named parties in litigation is absurd. In addition, the emails released are dated June 2021, and Florida did not file its suit until October 2021 — based on Mystal's evidence, there was no pending case.

Ginni Thomas has worked with various groups and coalitions that have separately filed amicus briefs before the Supreme Court. Such "friends of the court" briefs provide the opinions of nonparties on issues presented in potentially precedent-setting cases. Thousands of such briefs are filed by individuals and organizations every year at the Supreme Court, with some high-profile cases

netting more than 100 amicus briefs filed.

Mayer's piece cites Democratic Sen. Sheldon Whitehouse, who has repeatedly charged that conservative justices vote in lockstep and are influenced by amicus briefs funded by dark money, that amicus briefs "are astonishingly effective in terms of the win rate." This entire narrative is false and hypocritical. As an initial matter, amicus briefs are filed on all sides of various issues, with liberal groups being just as active as conservative groups. Furthermore, the notion that the mere expressions of opinion in amicus briefs somehow control or coerce justices is absurd. According to Paul Collins, an expert on amicus briefs whom Mayer quotes in her piece, "the influence of amicus briefs on litigation success is rather marginal." A recent study shows that the Supreme Court cites government amicus briefs more consistently than any outside interest group. What's more damning to the Left's false narrative is that the same study shows conservative justices cite amicus briefs the least in their opinions, and liberal justices, led by Ginsburg (over the last decade) and Elena Kagan, cite them the most. In the end, however, the influence of amicus briefs turns on the substance and persuasiveness of their content, not the identities of the amicus groups or the source of their funding.

One unsettling aspect of the current attacks on Justice Thomas is the unsubtle view that Thomas is intellectually dependent on the white people around him. Thomas is the most independent-minded justice to sit on the court, voting by himself in dissent in his first conference meeting in 1991 and persuading several other justices of his views. Thomas has written the most opinions per year of any other justice. His superb memoir, *My Grandfather's Son*, makes it abundantly clear that Thomas has fiercely resisted being told what to think or do his entire life. Yet the Left persists with this racist smear.

For example, in Philip Bump's piece in the *Washington Post*, he writes that "Mayer's piece dances around the question of how much influence Ginni Thomas has over her husband," and Bump

references a quote Mayer uses from a 1991 *Washington Post* piece: “The one person [Clarence] really listens to is Virginia.” And then Bump adds another quote from the 1991 story: “He depends on her for advice.” Bump (and Mayer) use these quotes to imply that Thomas is dependent on Ginni’s views and opinions for his views. Similarly, in Michael Kranish’s attack on the Thomases in the *Washington Post*, he gleefully quotes democratic operative Mark Fabiani wondering aloud whether there is “a single opinion that Justice Thomas has ever written that is inconsistent with his wife’s far right-wing views?”

The silver lining is that, despite these attacks, Justice Thomas sits at the intellectual pinnacle of the legal world, steadfastly adhering to his originalist-based jurisprudence that the court is increasingly adopting. Thomas is training scores of clerks (130 and counting), who are taking prominent roles in the law, including numerous judgeships, and who will carry on his intellectual legacy. No doubt to the chagrin of Jane Mayer, Elie Mystal, Michael Tomasky, Michael Kranish, Philip Bump, and the other critics who invent bogus charges against him, the world is coming around to Justice Thomas’s views on the law.

After 30 years, Justice Thomas’s critics know they are not really going to intimidate him. They want to discredit him and his wife, but they also want to send a signal to the other justices, and apostate persons of color more generally, that they’ll face similarly relentless attacks. Here’s hoping that other conservatives and all independent thinkers draw strength and courage from how Justice Thomas and Ginni Thomas have never given in to intimidation.

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The ginned-up case against the Thomases

Mark Paoletta

6–8 minutes

As the Jan. 6 committee gets ready to hold public hearings into the events of that date, it still needs to decide whether to interview Ginni Thomas about the leaked texts between her and then-White House chief of staff Mark Meadows, urging him to investigate reports of voter fraud in the 2020 elections. Nothing would expose the committee's partisanship more than hauling in the wife of Justice Clarence Thomas. Indeed, the committee would never consider wasting taxpayer funds to pursue a private citizen for her opinions.

But whatever the motivations, there is no basis for the committee to call Ginni Thomas. Contrary to false reporting by the *New York Times* and others, Ginni Thomas had no involvement in planning the rally. She attended the rally in the morning but left before then-President Donald Trump addressed the crowd because she was cold. She did not pay for any buses for the rally, and she did not play a mediating role with the group that had a permit to hold the rally. Neither her actions nor her texts had *any* connection to some citizens attacking the Capitol. In fact, one of her private texts to Meadows states that those individuals do not represent Trump supporters.

If merely expressing concerns about election fraud is a basis for being investigated, then scores of Democratic members of Congress should be investigated for raising such concerns about the 2000, 2004, and 2016 elections, all won by Republican

candidates. In 2004, 31 Democratic representatives objected to certifying George W. Bush's electoral votes from Ohio. If passed, that objection would have denied him 20 electoral votes — and the presidency. When Democrats do this, the media hail them as heroes who have the courage to call out voter fraud and suppression. Indeed, Stacey Abrams has become a media darling by claiming that she lost the 2018 Georgia governor's race to Republican Brian Kemp because of voter fraud and suppression.

President Joe Biden even nominated the Abrams campaign's general counsel, Dara Lindenbaum, to be a commissioner on the Federal Election Commission despite Lindenbaum's having filed a complaint challenging the validity of the 2018 Georgia election.

After Bush's victory in 2000, congressman Alcee Hastings refused to certify his state of Florida's electoral votes because of "overwhelming evidence of official misconduct, deliberate fraud, and an attempt to suppress voter turnout."

Congressman Jerry Nadler, the current chairman of the House Judiciary Committee, issued a statement after Bush won the 2004 election, claiming that with respect to Bush's victory in Ohio, "the right to vote has been stolen from qualified voters — stolen through corruption, through political cynicism, through incompetence, and through technical malfunction … [and] voting machines that invalidate valid votes." He urged Congress to investigate.

After Trump's 2016 victory, Democratic Rep. Jim McGovern said, "The electors were not lawfully certified, especially given the confirmed and illegal activities engaged by the government of Russia designed to interfere with our election."

The Democrats and their corporate media allies also have seized on Ginni Thomas's texts to demand that her husband recuse from any case regarding the 2020 elections. I have written previously on the recusal laws and precedents, and Clarence Thomas has no reason to recuse from any case regarding the 2020 elections or the events of Jan. 6. Ginni Thomas is not a party or litigant to any case,

and her “interest” in these cases is even less than the “interest” of Judge Stephen Reinhardt's wife, who was the head of an American Civil Liberties Union chapter and had commented publicly on a case regarding a same-sex marriage ban. Reinhardt’s wife’s organization even filed an amicus brief in the lower court. Reinhardt refused to recuse, explaining that his wife had no “interest” in the case “beyond the interest of any American with a strong view concerning the social issues that confront this nation.” Judicial ethics experts supported Reinhardt’s decision. Ginni Thomas has even less “interest” in litigation regarding the 2020 election.

The Democrats and their media allies also claim that Clarence Thomas acted unethically when he did not recuse from a case in which Trump challenged Biden’s decision to waive executive privilege over Trump-era White House documents and turn them over to the Jan. 6 committee. The Left claims that because Clarence Thomas was the only justice to dissent, he was trying to cover up his wife’s texts, which might have been in these White House documents. That is ridiculous.

By its very terms, executive privilege applies only to *internal* communications between the president and his closest aides. Therefore, none of the documents at issue could have been Ginni Thomas’s communications.

There were good reasons for Clarence Thomas to vote to have the court hear arguments about whether executive privilege applied in this case. There is a need to balance Congress’s need for information with a potential chilling effect on candid advice to the president — any president — that will occur when internal communications are turned over to Congress. Clarence Thomas did not indicate he agreed with Trump’s argument, only that the court should hear the arguments. Meanwhile, congressmen have no concept of this concern because they have exempted themselves from virtually all disclosure and record-keeping requirements.

If Ginni Thomas were a Democrat and made these statements

about election fraud, perhaps she would have been nominated for a federal post like Lindenbaum. But because she is a conservative woman and married to Clarence Thomas, she is being smeared in the most despicable manner, with the press continuing to look for any issue to destroy her, even calling high school friends and searching for dirt under any rock. This assault must end now.

Mark Paoletta served as a lawyer in the George H.W. Bush White House Counsel's Office and worked on the confirmation of Justice Clarence Thomas. He most recently served as general counsel of the Office of Management and Budget in the Trump administration. He is a partner at the law firm Schaerr Jaffe in Washington, D.C. Twitter: @MarkPaoletta.

thefederalist.com

Politico Launches Attack On SCOTUS Justices' Working Spouses

Mark Paoletta

7–9 minutes

The corporate media and leftist activists have been engaged in a non-stop effort to undermine the public's trust in the Supreme Court as the court moves in a more conservative and originalist direction. Politico recently published a hit piece criticizing the justices for not disclosing their working spouses' clients in their annual financial disclosure form, claiming that by not disclosing these clients, the justices have heightened serious conflict of interest concerns about their participation in cases.

But these concerns are nonsense. The justices are required to disclose the same amount of information about their spouses as are members of Congress and executive branch officials. The left never had a problem with previous liberal justices not disclosing the clients of a spouse, but now Politico wants justices to live by a higher standard than any other public official. It's unnecessary and unfair.

Politico first attacks Justice Amy Coney Barrett for not disclosing her husband's clients at his law firm on her financial disclosure form, but Barrett complied with all legal requirements, and no other justice has previously disclosed a spouse's clients. Jesse Barrett's law firm does not have a Supreme Court practice nor has his firm ever represented a client before the Supreme Court.

Politico then spends much of its article unfairly attacking Jane Roberts, the wife of Chief Justice John Roberts, who works at a legal recruiting/placement firm. According to Politico's reporting,

Ms. Roberts has placed lawyers at law firms that have Supreme Court practices, and she is paid a percentage by the law firm of the recruited lawyer's first year of compensation.

Jane Roberts' lawyer recruiting and placement work doesn't trigger any recusal issue under the relevant law. She is not a party to litigation nor a lawyer appearing before the court, and there is no suggestion that she has a financial interest in any case.

Pursuant to the relevant financial disclosure law, the Ethics in Government Act, and guidance Chief Justice Roberts is only required to list the name of his wife's employer if the spouse receives more than $1,000 from that employer, and that's what he does. The law also provides that if the judicial "spouse is self-employed in business or a profession, only the nature of such business or profession need be reported." But now, Politico and its dependable left-wing judicial ethics experts, such as Professor Stephen Gillers and Gabe Roth from Fix The Court, an organization funded by left-wing dark money, claim that the court's integrity is at stake if justices do not disclose their spouse's clients.

In addition to attacking the chief justice and Justice Barrett, Politico attacks Justice Clarence Thomas and his wife Ginni for not disclosing her clients, and even makes a passing reference to Justice Ketanji Brown Jackson and her husband, who is a physician and has consulting clients in medical malpractice cases that are not disclosed on her disclosure forms.

But other justices have had spouses who have practiced law during their time on the court, and until now, there has been little if any controversy over it. In its 4,300-plus word investigative article, Politico never mentions Justice Ruth Bader Ginsburg, whose husband practiced law at a major law firm from the time she arrived on the court in 1993 until he retired in 2009. Justice Ginsburg never disclosed Marty Ginsburg's clients on her disclosure forms. Marty Ginsburg's law firm colleagues appeared before the Supreme Court many times, and Justice Ginsburg never recused herself. I do not recall the media nor Professor Gillers raising concerns about the

need to disclose spouses' clients when Justice Ginsburg's husband was practicing.

But now, in the Politico piece, Professor Gillers argues for a broader justice's spousal disclosure standard: "[W]hy should a justice's spouse not have to reveal a very large payment from a client that could substantially improve a justice's quality of life?"

The better question is what business is it of anyone's if that spouse's client does not have any case before the Supreme Court? And if a spouse's client has a case before the court and the spouse has a financial interest in the outcome of the case, the justice is required to recuse under the recusal law.

This new disclosure standard would violate client confidence and amount to a marriage penalty for working spouses of justices. A justice's spouse could not practice law, medicine, psychiatry, or any other profession where client confidentiality is important. And spouses in other professions would be unnecessarily put at a competitive disadvantage.

Moreover, this level of disclosure has never been required of any other public official in the executive and legislative branches which have an even greater effect on American citizens' lives through legislation and regulations. Pursuant to the same Ethics In Government Act, members of Congress (and staff) and executive branch officials also are only required to disclose the employer of their spouse if they make more than $1,000 from that source. And if that spouse is self-employed, the spouse still does not need to disclose clients. Thus, these officials' spouse's clients or income are not required to be disclosed. For example, Sen. Mazie Hirono's spouse is a lawyer who works at a law firm. On her 2022 disclosure form, Hirono simply lists the law firm name and that her spouse makes more than $1,000 from that firm.

Arguably, these congressional and executive branch spouses could make significant money from clients interested in federal legislation or regulations. But the ethics laws and rules were written with the

recognition that this type of disclosure is unnecessary and would likely make it unappealing to serve in government. Under this same law, lower court federal judges also do not have to disclose a spouse's clients or income.

Politico attempts to manufacture a false "conflict of interest" issue for the court by not disclosing that no other federal employee, from members of Congress to cabinet secretaries to lower court judges, is required to disclose the names of a spouse's clients. This is another despicable attempt by the left to smear the integrity of our justices as the court is beginning to overturn long-standing liberal precedents by holding them to an outrageous standard to which no other federal employee is subject. The justices should not be subjected to this more onerous standard, and any requirement for such disclosure would be a disservice to these working spouses, a disservice to the Justices, and a disservice to the court.

Mark Paoletta served as a lawyer in the George H.W. Bush White House Counsel's office and worked on the confirmation of Justice Thomas. He is a senior fellow at Center for Renewing America, and partner at Schaerr Jaffe.

- Amy Coney Barrett
- Clarence Thomas
- Congress
- disclosure
- ethics
- Ginni Thomas
- Media
- POlitico
- Ruth Bader Ginsburg
- SCOTUS
- Supreme Court
- supreme court justices

Mr. JOHNSON of Georgia. The gentleman is—or the gentlelady from Missouri, Representative Bush, is now recognized for five minutes.

Ms. BUSH. Thank you. St. Louis and I thank the Chair for convening this crucial hearing.

As I've listened to Reverend Schenck's testimony, I've been thinking about the people who aren't dining with Supreme Court Justices, who don't get to launch multimillion-dollar influence campaigns to strip away other people's freedoms, who don't have access to people in power, but who feel the pain of powerful decisions.

I'm thinking about nurses in Missouri who have to comply with comprehensive and mandatory ethics standards, as I had to as a nurse in Missouri, who's daily decisionmaking impacts low-income, marginalized communities.

I'm thinking about Black and Brown women dealing with life-threatening complications because a lawless, unaccountable Supreme Court gutted our fundamental right to reproductive healthcare.

So, when we talk about the Supreme Court, we're talking about life-or-death issues, especially for Black families like those in St. Louis. We're talking about equity. We're talking about morality and justice.

So, I want to ask, Professor Fredrickson, are you aware of any job, other than U.S. Supreme Court Justice, that has lifetime tenure and a six-figure salary with no binding Code of Ethics? You can just answer yes or no.

Ms. FREDRICKSON. I am not aware, no.

Ms. BUSH. Thank you.

Mr. Sherman, are you aware of any such job, yes or no?

Mr. SHERMAN. I am not. I am not, no.

Ms. BUSH. Thank you.

Professor Fredrickson, if Reverend Schenck's allegations about this anti-abortion influence campaign and Justice Alito leaking the *Hobby Lobby* decision are true, should Justice Alito have recused himself in reproductive rights cases like *Dobbs*?

Ms. FREDRICKSON. I mean, I think we should really focus on the fact here that I want to keep this hearing as much as we can to the substance of this bill. I think we would've avoided any of these issues had the Committee's interests, and the interests of the Committee in the past when Republican leaders moved forward on such legislation, to actually have some ethics rules for the Court that would constrain their acceptance of gifts, their acceptance of travel, and we wouldn't actually be in this situation.

Ms. BUSH. Right. I agree with that. Should he—okay. Should he have recused himself, though, is the question. This will just be a yes or a no.

Ms. FREDRICKSON. Yes.

Ms. BUSH. Okay. Thank you. I don't mean to cut you off, but I'm running low on time.

Reverend Schenck, I want to turn to you. The Supreme Court is encouraged to self-police its own ethics. Do you believe this system is working? It can be a yes or no or you can go a little deeper.

Mr. SCHENCK. Well, thank you, Representative Bush.

I'm not an expert in that field. What I can tell you is that whatever the current regime, it was no impediment to the work that I was doing.

Ms. BUSH. Let me just say thank you to everyone for your testimony and thank you to Reverend Schenck for how you've opened-up yourself to and was vulnerable for this hearing.

I urge every person in America to ask themselves, who do you know that has a lifetime six-figure salary job with no binding code of conduct? Why would we give these nine people that power?

Supreme Court Justices are human beings just as fallible and corruptible as any other person and they deserve to be held to the same standards. We absolutely need to pass Congressman Johnson's bill before the end of this year.

That is the bare minimum. Yes, we need to expose the corruption of right-wing, dark-money lobbying campaigns, like Operation Higher Court. What about the moral corruption of Justices themselves? How do we address credible allegations of sexual harassment and assault, credible, decades-long hostility to fundamental rights like voting and abortion, and a radical approach to the law that threatens to set us back decades and even centuries?

We need to limit the power of the Justices by expanding the Court, instituting term limits, and stripping its ability to take away fundamental rights.

Every day we do nothing about this rogue and dangerous institution is a day we are failing the people of St. Louis and people of this country.

Thank you, and I yield back.

Mr. JOHNSON of Georgia. The gentlelady yields back.

The gentleman from Ohio, the Ranking Member and incoming Chair of the Judiciary Committee, Mr. Jordan, is recognized for five minutes.

Mr. JORDAN. Thank you, Mr. Chair.

Mr. Paoletta, is it only conservative Justices who give lectures?

Mr. PAOLETTA. You'd think so by this conversation. But no, of course. Justice Sotomayor goes to the American Constitution Society and—

Mr. JORDAN. Oh, the group right next to you?

Mr. PAOLETTA. I think she was the head of it, right? But, yes. I support that, I think it's great. In fact, it's specifically permitted by the ethics code that they all want to apply to the Supreme Court. It actually, for lower court judges, the one that's on the books, says you can go to educational organizations.

So, The Federalist Society is an educational organization. It's a great organization. The ACS is still—is also a 501. It's not an advocacy group.

Mr. JORDAN. Well, so some of the Justices are maybe not as conservative as the ones that are being talked about today.

Mr. JONES. Will the gentleman yield?

Mr. JORDAN. Would Justice—

Mr. JONES. Will the gentleman yield?

Mr. JORDAN. Who's asking?

Mr. JONES. Over here, Mr. Jordan.

Mr. JORDAN. It's our last five, and I want to yield here, so—

Mr. JONES. Sure.

Mr. JORDAN. If we have some time, we will do it.

Mr. JONES. Sure.

Mr. JORDAN. So, the late Justice Ruth Bader Ginsburg, did she give lectures, did she do speeches, did she go on trips? Did she do some of those things too?

Mr. PAOLETTA. Yes. In fact, she actually spoke at the NOW Legal Defense Fund, which was an advocacy group that had probably hundreds, if not scores of briefs before the Supreme Court. There was a lecture named after her. She donated a signed VMI opinion, her opinion, for a fundraiser for NOW.

Mr. JORDAN. Really?

Mr. PAOLETTA. Yes. When she was—and when she was—

Mr. JORDAN. NOW certainly wasn't a pro-life organization, right?

Mr. PAOLETTA. No. Again, it wasn't a 501(c)(3).

Mr. JORDAN. Right.

Mr. PAOLETTA. It was an advocacy group that was litigating before the Supreme Court.

Mr. JORDAN. Important distinction.

Mr. PAOLETTA. Yes.

Mr. JORDAN. Thank you. Well, I appreciate that. I think that's important for us all to know, for the Committee to know.

I would yield my time to Mr. Bishop, and if there is anything left, we will yield to Mr. Jones.

Mr. BISHOP. All right. I thank the Ranking Member, soon to be Chair.

Mr. Schenck, you said something, it was followed up by one of the other Members, and I want to explore it for a minute.

So, you talked about this anecdote where Justice Thomas told you, "Keep it up, you're doing—you're having an impact," or something like that. Is that correct?

Mr. SCHENCK. Yes.

Mr. BISHOP. So, you were a member of the clergy, right, a pastor—

Mr. SCHENCK. Correct.

Mr. BISHOP. —interacting.

Do you believe that people in high office, including Supreme Court Justices, ought to have access to spiritual counsel?

Mr. SCHENCK. Yes.

Mr. BISHOP. Do you believe that if someone comes, say, in the Halls of Congress and wants to pray, or comes to my office and wants to pray with me, that I should suspect that they're trying to insinuate themselves for some political objective?

Mr. SCHENCK. No, but I think you should be discerning about it.

Mr. BISHOP. Yeah. Is there any reason to believe that the Justices are not discerning? In other words—let me withdraw the question and ask it this way.

Mr. SCHENCK. Yes.

Mr. BISHOP. If Justice Thomas says, you're having an impact, keep it up, wouldn't it be a fair interpretation of that statement to be, your prayers for us, your gathering with us to console us and offer prayer and praying for you, that those are having—they're enlivening the Court, they're bringing about a better atmosphere in which we can work and do our jobs, but it doesn't mean that you're influencing me in my decisionmaking?

Mr. SCHENCK. That's a hopeful statement, Congressman.

Mr. BISHOP. So, you take it as hopeful. The way you think of your spiritual relationship, as a man of the cloth, interacting with these officials, is that you were trying to manipulate them. Is that what I understand?

Mr. SCHENCK. There comes a time, Congressman, when politics begins to inform religion in a way, I think is corrupting to both. I witnessed—

Mr. BISHOP. I'm sure in some people's lives that's true, but I certainly hope it's not the case.

Mr. Paoletta, is that a fair reading of what goes on?

Mr. PAOLETTA. It's just—I don't believe a thing Mr. Schenck says. I don't even know if Justice Thomas said that. He's said something like that to students.

One of the things that is lost here is that the Justices, and particularly Justice Thomas, meet with hundreds of students that come to the Supreme Court. He spends hours with them.

If you remember the quote that Justice Sonia Sotomayor said about Justice Thomas is that he talks to all the employees in the Court, from the janitor to the Justices.

Mr. BISHOP. Absolutely.

Mr. PAOLETTA. He knows about their families. He knows who is sick. He knows who is having a wedding.

You know how that comes about? Because he spends time talking to them. He does that with students, and they're legendary.

Mr. BISHOP. Mr. Paoletta—

Mr. PAOLETTA. Anyone up on the Court who actually knows the Justices knows he spends time with people a lot. So, these folks that—no, the other thing about Mr. Schenck, is, once you're a liar, it's tough to believe whatever you say. So, when he invents this thing that Mr. Jordan brought up about adding the word "Reverend," okay, a flat-out lie.

Mr. Schenck wrote that book and had a look back at that phrase, okay, and he deliberately entered it in, and there's no other way to interpret that, that he looked at that phrase, he added "Reverend" and then he added this bogus story about winking to his brother about hearing the word "Reverend."

So, when he says that Justice Thomas says that, I don't even believe it.

Mr. BISHOP. To be sure. I don't know which is more despicable, though, lying here or engaging in that sort of interaction with people on the pretense of being a pastor.

I yield back.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

This concludes today's hearing. We thank all the Witnesses for your participation.

Without objection, all Members will have five legislative days to submit additional written questions for the Witnesses or additional materials for the record.

Without objection, the hearing is adjourned.

[Whereupon, at 3:40 p.m., the Committee was adjourned.]

APPENDIX

AMERICAN ARBITRATION ASSOCIATION

EMPLOYMENT ARBITRATION TRIBUNAL

TATIANA SPOTTISWOODE,	)	
	)	
Claimant/Counter-Respondent,	)	
	)	
v.	)	Case No. 01-17-0007-4093
	)	
ZIA CHISHTI and SATMAP INC. d/b/a AFINITI,	)	
	)	
Respondents/Counter-Claimants.	)	
	)	

AWARD OF ARBITRATOR

I, Ronald G. Birch, the undersigned arbitrator, having been designated in accordance with the employment agreement entered into by the above-named parties and dated April, 2016, and having been duly sworn, and having duly heard the proofs and allegations of the parties, and Claimant, Tatianna Spottiswoode being represented by Michael Zweig, Esq., et.al. from the law firm of Loeb & Loeb, LLP, and Respondents, Zia Chishti and Afiniti U.S., jointly represented by William Taylor, Esq., et. al. from the law firm of Zuckerman Spaeder LLP, hereby FIND AND AWARD as follows:

I. JURISDICTION

This matter is properly before this Arbitrator pursuant to the arbitration clause in Claimant's employment agreement and the agreement of the parties.

II. BACKGROUND

This case involves claims under Title VII of the Civil Rights Act and the DC Human Rights Act, including gender discrimination, sexual harassment, and hostile work environment, lodged by Ms. Spottiswoode against Afiniti, her former employer, and Zia Chishti, Afiniti's CEO and

Chairman of the Board, plus common law claims alleging assault and battery and infliction of emotional distress against Mr. Chishti alone, and a claim of negligent supervision on the part of Afiniti. Ms. Spottiswoode bases her claims against Mr. Chishti upon a 17-month course of sexual advances by him, culminating in an assault and battery during sex in Brazil on the night of September 15-16, 2017, and the failure of Mr. Chishti or anyone else at Afiniti to take any meaningful measures to implement a sexual harassment policy or otherwise put protective measures in place to guard against harassment of Ms. Spottiswoode or other Afiniti employees.

III. CREDIBILITY

Before summarizing the key background facts underlying the allegations, the descriptions offered by Mr. Chishti and Ms. Spottiswoode of nearly every meeting or conversation they had differ, sometimes a little, but often substantially. When critical testimony is in conflict, the trier of fact needs to assess the credibility of respective witnesses, particularly when they are the principals in the matter. This task is uniquely within the province of the arbitrator, acting as factfinder, who observes the testimony unfold in real time, and relying on common sense, experience, the demeanor of the witnesses, and the factors that we all use in our day-to-day decision making, ultimately reaches a conclusion as to the truth of the matter.

In this case, I found that the testimony of Ms. Spottiswoode was for the most part credible. Conversely, I found that the testimony offered by Mr. Chishti was often tailored to meet the needs of his defense and divorced from reality.

For example, addressing a severe bruise on Ms. Spottiswoode's arm, Mr. Chishti testified that she had bitten herself while they were having intercourse. Dr. Karl Williams, a forensic witness testified that the bruise was not a bite mark. In further example, in August of 2017 the parties met in a park and had a protracted and meaningful discussion about their relationship, its

boundaries, and their respective expectations. Subsequently, Mr. Chishti sent two emails to Ms. Spottiswoode, explicit and lurid in nature, setting out his very different perceptions of the meeting which to him were the real subtext of what she was thinking. It was my impression that Mr. Chishti often created such alternative narratives, and may have come to believe them.

He repeatedly expressed his "love" for Ms. Spottiswoode during the course of their relationship, in a letter for her sent to her attorney, and at the hearing.. Yet, this is belied by the fact that during the entire course of his pursuit of Ms. Spottiswoode, he had a long-standing girlfriend to whom he frequently demeaned Ms. Spottiswoode. When his love letter to Ms. Spottiswoode was discovered by his girlfriend on his computer, he told her that Ms. Spottiswoode was a liar trying to extort money from him. Further, his conduct throughout her employment with Afiniti appears characterized not by love, but by a need for conquest and domination over her. The veracity of his love is also put in doubt by the fact that Mr. Chishti was accused by another young female co-worker during the same time period he was making sexual advances toward Ms. Spottiswoode, of behavior remarkably similar to some of the sexual advances aimed at Ms. Spottiswoode. These are only a few of numerous examples leading me to find that he was less than truthful on big matters, small matters, and facts that did not fit his narrative.

IV. PRE-EMPLOYMENT RELATIONSHIP

Mr. Chishti was a business associate of Ms. Spottiswoode's father and had become a close friend of her family by the time she was twelve. He acted as a family friend and mentor to her, but has conceded that he became sexually interested in her as soon as they met when she was twelve or thirteen. Indeed, he determined to pursue that interest when she was of legal age, a course of conduct that has brought us to this proceeding.

When Ms. Spottiswoode was finishing college and applying to graduate schools, he invited her on an all-expenses paid ski trip, an invitation she accepted based, in part, upon the false pretense that a handsome young relative who was about her age, would be included in the group. After graduation, he took her to Ibiza, Spain with friends and Afiniti employees. That trip was the start of a short-lived romance, where rough sex was typically accompanied by heavy drinking and drug use. The evidence indicates Ms. Spottiswoode was attracted to him, voluntarily participated in sex, including the use of a riding crop and choker produced by Mr. Chishti, and enjoyed the relationship for a time, but that she had a quick change of heart and terminated it only ten weeks after it started. Mr. Chishti knew, at that time, that she did not feel the same love that he professed to feel for her, and that indulging in alcohol and drugs was a necessary accompaniment if the sex he desired was to be had.

They continued to meet as friends, each flirting somewhat with the other, but with her generally responding to his alcohol-induced attempts to introduce sex back into the relationship by telling him that was not what she wanted. They eventually came to discuss her working instead of going to graduate school. To attract her to his company, Afiniti, Mr. Chishti let her know the company was planning to go public, and that it would make her a "million bucks" if she was there at the time an IPO was issued. Ms. Spottiswoode accepted a position as a data analyst in the New York office. At the time, Chishti was a wealthy, charismatic, successful, powerful 44-year old business man, the CEO of Afiniti, the company he founded after building and selling another substantial company; Spottiswoode was a 22-year old college graduate starting her first full-time job. She accepted a position at Afiniti US, the latest iteration in a series of companies owned, operated or controlled by Chishti. It is headquartered in Washington, DC and Ms. Spottiswoode joined the small New York office.

V. EMPLOYMENT RELATIONSHIP

I find that during the course of her tenure with Afiniti US, Ms. Spottiswoode was subjected to an unrelenting onslaught of sexual overtures from Mr. Chishti, her CEO. When she was too firm in saying no, which she consistently did, she would be punished by long periods of noncommunication. The very person who controlled her future with the company had the unique ability to punish her.

Mr. Chishti was not Ms. Spottiswoode's direct supervisor at Afiniti. However, I find that as CEO of the company he was able and did provide her with helpful assistance during her early months at the company. For example, he got her involved in a project in which she had expressed an interest, helped her learn a computer program used at Afiniti, checked with her superiors on her progress and went back to her with favorable reports, and claimed to have suggested a raise.

This assistance was accompanied by almost immediate resumption of his sexual overtures. Ms. Spottiswoode tried to draw boundaries. She refused his attempts to discuss her sex life. She rejected his offer to buy her some expensive work outfits as inappropriate. Although she for some time considered going with him on a vacation to Cuba where he would certainly expect sexual relations, she ultimately cancelled shortly before the departure date. Mr. Chishti was furious about the cancellation, and abruptly stopped talking to Ms. Spottiswoode.

She initiated the next contact several months later. The two next saw each other at a December 2016 conference in Dubai, about 5 months later. Prior to the conference she became apprehensive about seeing Mr. Chishti again, knowing from his continued silence that he was still angry with her. While the testimony regarding Mr. Chishti and Ms. Spottiswoode's complete interaction at the outset of the conference is muddled, I find two facts to be clear: (1) during an after-work social event on the first evening of the conference, Mr. Chishti, who was drunk, put his

hand inside Ms. Chishti's pants on her rear in front of some of their colleagues, and (2) at the same conference he engaged in similar sexual misconduct directed at another young female Afiniti employee, [redacted] who was sent home early after complaining to him the next day. Neither the incident with Ms. Spottiswoode nor [redacted] was reported by Mr. Chishti or any of the eyewitnesses through proper channels. However, [redacted] later resigned and filed a demand against Chishti that Afiniti ultimately settled. Accordingly, I find Afiniti had actual knowledge of Mr. Chishti's sexual misconduct, yet did nothing to prevent a future recurrence.

Only a month later, during a Mexico City client meeting, an undeterred Mr. Chishti texted Ms. Spottiswoode, telling her to be prepared for "serious debauchery – Degenerate evil." Later, in front of colleagues on this work-sponsored trip, he dug his nails into her hand and called her "a total bitch" when she rejected his attempt at hand holding.

Upon returning from Mexico City, on Jan. 29, 2017, Ms. Spottiswoode sent Mr. Chishti an e-mail laying out her thoughts about the name-calling incident and several prior instances of inappropriate, non-consensual actions. In same message, she advised that

> I like my job but I don't think that these interactions are good for either of us. They certainly are not good for me, despite the overwhelmingly positive nature of this week's experiences. So I'm not sure where you stand this morning, and I'll leave Afiniti if you want me to. But I definitely shouldn't go on any more of these trips if they make you uncomfortable and if they continue to put me in the position of either being groped by or called names by my boss. I hope you understand that, because that has to be first before our friendship.

Mr. Chishti challenged her descriptions of those accounts, but acknowledged that it increased his anger at her, and said the decision to stay or leave was entirely her own. Then, he again cut off communications with her for several months. When Mr. Chishti renewed contact in July 2017, after agreeing to a "truce," he insisted that she "speak the truth," acknowledge that he has never

assaulted her, fix her behavior, and apologize. She clearly told him that she would not apologize, she told him she meant what she said, and that he needed to show respect for her and her feelings.

In early August 2017, Mr. Chishti arrived to New York. After she rejected his suggestion that she come to his hotel room to do cocaine, expressing her anxiety and concerns about sleeping with him and the power dynamics, they had dinner and walked in Central Park. Ms. Spottiswoode explained that she didn't want sex with him as he did with her, and she thought he got the message. Nevertheless, between that time and the trip to Brazil, he began sending her sexually-charged e-mails and texts. He retold the story of the dinner and park meeting with his "perceptions" of her true intent in a fictionalized form, including that she felt a need "for his cock in her loins" and "craved his fingers in her pussy and ass." In a later e-mail, he expressed his feelings, that "he was thinking of grabbing her throat, pushing her to the ground" and forcing her to have sex.

While Ms. Spottiswoode was conflicted and expressed some ambivalence, she nevertheless repeatedly expressed her substantial anxiety and concerns about any resumption of a sexual relationship, and her fear of his wrath if she rejected him. He simply dismissed those concerns, responding to her panic attack with the assurance that "two drinks and a rail [of cocaine] will likely fix" her anxiety.

VI. BRAZIL TRIP

The trip to Brazil was, to Ms. Spottiswoode, the most important event during her tenure at Afiniti

As a data analyst, she was working closely with the Brazil team on some troubled accounts. A meeting was scheduled, to be conducted by Mr. Chishti, with the entire Brazil team.

The meetings went well, but the aftermath did not. The first night in Brazil, Ms. Spottiswoode told him she did not want to have sex with him, "I have never wanted sex less than

rite now. I just don't want 2 be ur like employee slut person...". He acceded to her wishes, but also let her know that he did not see any relationship between them as feasible if they did not have sex soon.

Ultimately, after much drinking and cocaine use, and Mr. Chishti's dismissal of her text asking him to just let her sleep, she gave in to his demands for sex. Photos of the injuries inflicted show numerous bruises and scratches on her arms, buttocks, thigh, shoulder bone, neck, and face, consistent with repeated, forceful hits and choking. While Ms. Spottiswoode and Mr. Chishti provided differing accounts of the number of times he hit her on the face, whether he did it with a flat hand or a fist, and the possibility that some of those injuries were self-inflicted, I find from the testimony that this beating was far more serious than any of the prior rough sex. Mr. Chishti himself admitted he had never before hit her in the face, or inflicted the number of severe bruises and cuts as he did that night, explaining "there's a first time for everything". Further, although she told him repeatedly he was hurting her, he continued until she saw stars. I find the number of times he hit her in the face and whether he did it with a flat hand or fist are irrelevant. What is important is that this beating was the straw that broke the camel's back, after a 17-month campaign in which he consistently made light of all her attempts to say no.

Ms. Spottiswoode's roommate examined her upon her return the following day, and her testimony confirms that there was a beating. Additionally, the day after returning home, Ms. Spottiswooode went to an emergency room. I find from the photos, emergency room records, the roommate's examination, and a review by Dr. Karl Williams, a specialist in forensic pathology, that a serious beating evidenced by blunt force trauma, involving "a great deal of force and aggression, with apparent anger" took place.

With her physical injuries, and fear of Mr. Chishti, Mr. Spottiswoode determined that she could not return to work at Afiniti. She promptly notified Afiniti that she required indefinite medical leave and was unable to return to work.

VII. POST-EMPLOYMENT

Since the incident in Brazil, Ms. Spottiswoode has suffered emotionally from a range of symptoms evidencing post-traumatic stress disorder (PTSD) tied to her interactions with Mr. Chishti. Symptoms identified by Ms. Spottiswoode and confirmed by her roommate at the time included uncontrollable crying, recurrent nightmares related to Mr. Chishti, and anxiety about her safety. Her therapist at the time, Dr. Ann Sellew, diagnosed her with PTSD that waxed and waned but did not go away.

Dr. Louise Fitzgerald, the forensic psychologist who evaluated Ms. Spottiswoode in connection with this proceeding a little more than a year after the Brazil incident, similarly found that Ms. Spottiswoode continued to suffer from severe PTSD resulting from Mr. Chishti's assault, and that she was still traumatized, depressed, and unable to get through a normal work day. She found the severity was not only due to the nature of Mr. Chishti's actions, but due to the fact that Spottiswoode was very vulnerable, having had a long history of depression that was also exacerbated by his actions. I do not find that Ms. Spottiswoode's prior mental illness raises doubts about the source of her PTSD as the Afiniti parties suggest. To the contrary, I find that her prior mental illness left her more fragile and, accordingly, more likely than others to experience an extreme adverse response to Mr. Chishti's conduct.

Dr. Fitzgerald also determined, based upon several tests, that Ms. Spottiswoode was not malingering. Her review of results of tests performed by Dr. Neil Blumberg, a forensic psychologist retained by Afiniti, but not called as a witness at the hearing, showed that he had

similarly found severe PTSD. Dr. Fitzgerald further found, applying her substantial experience in the field to the totality of the circumstances, that the PTSD was likely to take 5-10 years to resolve itself, meaning it would take that amount of time for her to return to a normal level of psychological functioning.

I find Dr. Fitzgerald's report and testimony in connection with Ms. Spottiswoode's PTSD to be reliable, flowing logically from the results of the tests she administered, her interviews with Ms. Spottiswoode, and her consideration of Ms. Sellew's notes and records.

Afiniti's knowledge and actions.

A number of Afiniti employees knew of the relationship that Mr. Chishti and Ms. Spottiswoode had before she became an employee, and some of them knew of his continuing feelings for her. Plus, supervisory Afiniti employees had observed the incidents where Mr. Chishti put his hand in Ms. Spottiswoode's pants and where he called her a bitch. Yet no one reported any of this to HR, the Legal Department, or another responsible party at Afiniti. Nor did Mr. Chishti himself report any of Ms. Spottiswoode's expressed concerns or protestations to HR. To the contrary, he himself determined that because there was no sexual harassment, there was nothing to report.

Additionally, before the incident in Brazil, but during the course of Ms. Spottiswoode's employment at Afiniti, a sexual harassment complaint was lodged against Mr. Chishti by another young female Afiniti employee, [redacted]. While the company settled those claims, which involved some conduct similar to that alleged by Ms. Spottiswoode, it took no steps after that incident to prevent a recurrence of similar conduct in the future. It did not reprimand Mr. Chishti or provide him with any sexual harassment training or coaching of any sort.

Nor did anyone suggest that Ms. Spottiswoode report her concerns of harassment to HR, the Legal Department, or any other proper authority. To the contrary, after the Mexico City incident, Ms. Spottiswoode sought advice about the situation from Michel Portenier, the Afiniti Vice President in charge of the New York office where she worked. Although Portenier was deposed, Afiniti did not call him as a witness at the hearing. However, Portenier set out three options – leave the company, ask a third party to talk with Chishti, or avoid Chishti, especially when he's drunk. Of these, he thought that avoidance was the best option.

Afiniti has pointed to written anti-harassment policies in its Code of Conduct which briefly states only that sexual harassment in any form will not be tolerated, other policy documents setting out various generally-applicable employee complaint procedures, and in a specific and detailed Anti-Harassment Policy instituted on July 27, 2017. Although Afiniti did not call Betsy Koch, its Global Head of HR, as a witness at the hearing, it emphasizes that Ms. Spottiswoode did not reach out to Ms. Koch with her complaints about Mr. Chishti, which might have allowed the company to respond to the offensive conduct. However, the record does not show any written anti-harassment policy being distributed to Afiniti's employees at any time and the specific Anti-Harassment Policy, was not adopted until July of 2017, or uploaded to the Afiniti intranet until mid-August 2017. Equally important, it was not until August 30, 2017, two weeks before the Brazil incident, that employees were even notified generally in one section of the Afiniti newsletter about the availability of revised company policies. The anti-harassment policy was not among those specifically mentioned. No training on preventing or reporting harassment was ever provided for supervisors or other employees at any time. Thus, I find that Ms. Spottiswoode, like others at Afiniti, lacked any real awareness of the existence of policies and procedures for reporting

harassment, and certainly had no obligation whatsoever to report it to HR or others given the advice she received when she did report the harassment to Mr. Portenier.

VIII. DISCUSSION OF CAUSES OF ACTION

The various claims turn on the following issues:

1. Whether Mr. Chishti's sexual advances were unwelcome?

2. Whether Mr. Chishti's sexual advances were either pervasive or severe in nature?

3. Whether acceptance of the sexual conduct was a condition that affected a term, condition, or privilege of Ms. Spottiswoode's employment (*quid pro quo*), or unreasonably interfered with her work performance (hostile work environment)?

4. Whether Ms. Spottiswoode suffered a constructive discharge from Afiniti?

5. Whether Afiniti is liable for Mr. Chishti's actions?

6. Whether Mr. Chishti's actions on the night of September 15-16, 2017, in Brazil involved an intentional attempt to cause a harmful or offensive contact, and apprehension of such a contact (assault) and offensive contact directly or indirectly resulted in battery?

7. Whether Mr. Chishti's conduct was so extreme and outrageous that it intentionally or recklessly caused her severe emotional distress, or negligently caused her serious and verifiable distress?

1-4. Whether Mr. Chishti's sexual advances constitute sexual harassment under Title VII or the DC Human Rights Act.

To prove a discrimination claim based on sexual harassment under either Title VII of the Civil Rights Act against Afiniti or under the DC Human Rights Act against either Mr. Chishti or Afiniti, Ms. Spottiswoode must prove that (1) she was a member of a protected class; (2) she was subjected to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment affects a term, condition, or privilege of her employment. *Brokenborough v. Dist. Of Columbia*, 236 F. Supp.3d 41, 51 (D.D.C. 2017), *citing Richardson v. Petasis*, 160 F.Supp.3d 88, 123 (D.D.C. 2015). The dispute here surrounds the second and fourth elements –

whether Mr. Chishti's advances were unwelcome or consensual, and whether those actions affected her employment. If the alleged harassment was linked to a tangible *quid pro quo*, then Afiniti would have strict liability for Mr. Chishti's actions. *Faragher v. Boca Raton*, 524 U.S. 775, 790-91 (1998), *citing Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752-753 (1998), *citing Meritor, supra*; *Lutkewitte v. Gonzales*, 436 F.3d 248, 258 (D.C. Cir. 2006). If, on the other hand, the harassment did not have a tangible economic work-related effect, then the offensive conduct must be sufficiently severe or pervasive to alter the working conditions and create a hostile work environment evidenced by the totality of the circumstances. *Ellerth, supra*, 524 U.S. at 752; *Brooks v. Grundmann*, 748 F.3d 1273, 1276 (D.C. Cir. 2014); *Jones v. Dist. Of Columbia*, 314 F.Supp.3d 36, 61 (D.D.C. 2018). Finally, while either type of sexual harassment is deemed to be a form of gender (sex) discrimination, which requires only disparate treatment on the basis of sex, *Leach v. Amtrak*, 128 F.Supp.3d 146, 156 (D.D.C. 2015), sexual harassment fits less neatly into that category and it adds nothing to the case to identify gender discrimination as a separate cause of action.

Welcomeness. In determining whether Mr. Chishti's advances were welcomed by Ms., Spottiswoode, I did not look at single lines of text, some of which can be read to suggest consent and others to suggest a lack of consent when viewed out of context. Rather, I considered the various conversations and meetings in their entirety, as well as the entire timeline of Mr. Chishti and Ms. Spottiswoode's relationship, to get a full picture of what happened here. While Ms. Spottiswoode was like a moth attracted to a flame, at times drawn to Mr. Chishti, looking at the overall course of conduct, I find that Mr. Chishti's sexual advances were not welcomed by Ms. Spottiswoode. Indeed, she told him on numerous occasions that she wanted a professional not a

sexual relationship. As a mature man, twice her age and the CEO, he should have respected those wishes, not preyed on any underlying attraction to him that she had until he broke her will to resist.

Mr. Chishti and Afiniti steadfastly insist otherwise, pointing to flirtatious and positive reciprocal texts, as well as her voluntary submission to rough sexual intercourse that involved some pain. First, in determining whether Mr. Chishti's sexual conduct was welcome, I must focus on whether the advances were welcome, not whether her actual participation in sexual intercourse with him was voluntary. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Second, it is not essential that Ms. Spottiswoode definitively reject each and every one of Mr. Chishti's overtures to establish that his sexual overtures were unwelcome.

It is well-accepted that women respond in various ways to unwelcome harassment, especially when the conduct is evidenced by a superior at work. External reactions such as appeasement, diversion, enduring or ignoring advances, are as likely as, or even more likely than, outright rejection. *See, e.g.*, *Morton v. Steven Ford-Mercury of Augusta*, 162 F.Supp.2d 1228, 1239 (D.Kan. 2001). Thus, I do not find the presence of some level of ambivalence or attraction on Ms. Spottiswoode's part toward Mr. Chishti, as Ms. Spottiswoode occasionally evidenced here, which caused her to temper her responses to him, to serve the overall course of conduct welcome and to override her repeated assertions that she did not want a sexual relationship.

Severe or Pervasive Actions. A single act of harassment, such as the beating that occurred in Brazil on the night of September 15-16, 2017, is sufficiently egregious that even by itself, ignoring all that preceded it, would satisfy the severity prong of the test. Alternatively, Mr. Chishti's overall unrelenting course of sexual advances was pervasive, permeating the entire relationship he had with Ms. Spottiswoode throughout her tenure at Afiniti. Nearly every time he

met or expected to meet with Ms. Spottiswoode, he made sexual overtures. Determined to assert power and dominion over her, he simply would not accept no for an answer.

Effect on employment. Afiniti and Mr. Chishti take the position that there was no adverse tangible employment action taken by them against Ms. Spottiswoode, or indeed any adverse consequences incurred, because of her refusals to submit to Mr. Chishti's demands. In other words, that she does not have an actionable claim because she wasn't fired, demoted, or had her pay and benefits adjusted. She not only kept her job, but did well in her position.

I find Ms. Spottiswoode was well aware that Mr. Chishti, even if he had not previously instructed anyone at Afiniti to fire her or take any other adverse action against her, had the absolute power as CEO to do so. Moreover, a constructive discharge or termination would suffice under her Title VII and DCHRA-based claims to establish the requisite effect on her continued employment and success at Afiniti.

Constructive discharge. A constructive discharge or termination constitutes an adverse employment action. *Samuel v. Metro. Police Dep't*, 258 F. Supp. 3d 27, 46 (D.D.C. 2017) (quoting *Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010). The test is objective: a constructive discharge results from conduct that creates such intolerable work conditions that a reasonable person in the employee's position is effectively compelled to resign. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004); *Samuel, supra*; *Veitch v. England*, 471 F.3d 124, 130 (D.C. Cir. 2006). Thus, it requires aggravating factors that would have prevented the employee from seeking remediation while still on the job. *See Veitch, supra*; *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997).

I find that a reasonable young woman in Ms. Spottiswoode's position would have felt compelled to resign after the being beaten by her employer's CEO. Even though Mr. Chishti was

based in a different geographic location and was not her direct supervisor, his ability to continue harassing her through all the channels of communication that existed prior to the Brazil beating still existed unimpeded. Additionally, the potential existed for forced interactions when he came to the New York office or when they both attend far-flung meetings and conferences together, as happened a number of times during her tenure at Afiniti. The mere existence of the Brazil beating, shows the precariousness of her position and that she could not simply avoid him while the matter was investigated in-house. I find that a resignation was her only reasonable option.

IX. AFINITI'S LIABILITY.

Vicarious liability. Under Title VII and the DCHRA, an employer is ordinarily vicariously liable for harassment by the victim's supervisor. Even though Mr. Chishti was not Ms. Spottiswoode's direct supervisor, it goes without saying that he was a responsible higher up in the supervisory chain of command. In many ways, the testimony has shown that Mr. Chishti was Afiniti US. I find that he was a supervisor insofar as his position as Afiniti's CEO gave him authority to take tangible employment actions affecting her employment. *See Vance v. Ball State Univ.*, 570 U.S. 421 (2013).

The Afiniti parties contend that they should be able to take advantage of the *Faragher/Ellerth* affirmative defense to the Title VII and DCHRA claims. *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Under this defense, in the absence of any tangible adverse employment action, an employer is not liable if "it exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher, supra*, 524 U.S. at 807; *Ellerth, supra*, 524 U.S. at 765.

I don't find this defense available to Afiniti in this case. Reasonable care means that an employer established, disseminated, and enforced an anti-harassment policy and complaint procedure and takes other reasonable steps to prevent and correct harassment. Afiniti's specific Anti-Harassment Policy did not even exist until August of 2017, nearly 16 months after Ms. Spottiswoode came to work at Afiniti. Further, Afiniti's paper policy prohibiting sexual harassment and setting out a mechanism for reporting misconduct did not rise to the level of reasonable care because personnel were never actively made aware of the policy and no training was provided with respect to the subject matter. The policy is particularly inadequate because it did not cause Afiniti to discipline or take any other specific action to correct Mr. Chishti's sexually-harassing conduct, even after Ms. [redacted] complaint.

Under all of these circumstances, I cannot find Ms. Spottiswoode's failure to follow the reporting procedures set forth in those policies in any way unreasonable, particularly when Mr. Portenier failed to tell her of those procedures or even of the possibility of making a complaint to HR or the Legal Department against Mr. Chishti. Nor do I find Ms. Spottiswoode's failure to respond to Ms. Koch's outreach after the Brazil incident to be unreasonable. At this juncture it was simply too late to avoid harm through a proper investigation of Mr. Chishti's actions.

Negligent supervision. While I previously dismissed the negligent supervision claims against all individual defendants, the claim is still active with respect to Afiniti. Although some courts dismiss negligent supervision claims when based upon the same conduct as the Title VII claim, that is not uniformly so. Moreover, the negligent supervision claim here is not premised upon vicarious liability, as was the Title VII claim. It could exist independent of Mr. Chishti's actions in connection with Ms. Spottiswoode, based upon the lack of any distributed and enforced sexual harassment policy or training either before or after the [redacted] incident. Thus, Afiniti

could be liable based upon a negligent supervision theory if it knew or should have known that any employee behaved in a dangerous or otherwise incompetent manner, yet failed to adequately supervise that employee. *Leach v. Nat'l R.R. Passenger Corp.*, 128 F.Supp.3d 146, 156 (D.D.C. 2015); *Kohler v. HP Enter. Servs., LLC*, 212 F.Supp.3d 1, 23 (D.D.C. 2016). Either actual or constructive notice would suffice, provided that the lack of proper supervision caused the harm.

Such a failure to exercise the requisite supervisory authority exists in the present case. Afiniti did not adequately monitor sexual harassment within the company generally and did not monitor Mr. Chishti's conduct after Ms. Spottiswoode reported it to Mr. Portenier, an Afiniti Vice President, or even after Mr. Chishti was charged with and settled a sexual harassment claim from another young female Afiniti employee. I find that Ms. Spottiswoode's conversation with Mr. Portenier, the incidents in Dubai and Mexico, plus the totally separate harassment claim against Mr. Chishti, provided Afiniti with constructive knowledge, and likely actual knowledge, of Mr. Chishti's offensive conduct that it should have acted to stop. In short, Afiniti negligently abdicated its duty to adequately supervise Mr. Chishti, allowing him unimpeded to place Ms. Spottiswoode in the precarious position she found herself in on the night of September 15 in Brazil.

X. ASSAULT AND BATTERY.

A civil assault and battery exists if a party makes "an intentional and unlawful attempt or threat, either by words or acts, to do physical harm to the victim" and the intentional act causes a harmful or offensive bodily contact. *Acosta Orellana v. CropLife Int'l*, 711 F. Supp. 2d 81, 92 (D.D.C. 2010); *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 529 (D.D.C. 1981); *Evans-Reid v. Dist of Columbia*, 930 A.2d 930, 937 (D.C. 2007). There is no doubt that Mr. Chishti intentionally caused physical harm to Ms. Spottiswoode in Brazil on the night of September 1516, 2017 as evidenced by the numerous bruises and scratches seen on various parts

of her body after the event. The Afiniti parties contend that this was not a batter because Ms. Spottiswoode's words and conduct were reasonably understood by Mr. Chishti as consent. I find that her consent to sex, to the extent she could conceivably legally consent in her inebriated and drugged condition, is not consent to the physical beating he gave her that went far beyond any rough sex involved in prior encounters. Ms. Spottiswoode told him repeatedly that he was hurting her and she wanted him to stop. He ignored her protestations.

XI. INFLICTION OF EMOTIONAL DISTRESS

Ms. Spottiswoode alleges both the negligent and intentional infliction of emotional distress by Mr. Chishti. A claim based upon intentional acts requires extreme and outrageous conduct which intentionally or recklessly causes the plaintiff severe emotional distress. *Newmeyer v. Sidwell Friends Sch.*, 128 A.3d 1023, 1037 (D.C. 2015). The Afiniti parties emphasize that context, including the relationship between the parties, matters, citing *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 163 (D.C. 2013). A negligence-based claim requires that (1) the plaintiff was in the zone of physical danger, which was (2) created by the defendant's negligence, (3) the plaintiff feared for her own safety, and (4) the emotional distress so caused was serious and verifiable. *Rice v. District of Columbia*, 774 F.Supp.2d 25, 33 (D.D.C. 2011).

I find that Mr. Chishti's conduct in Brazil was sufficiently outrageous in character and extreme in degree, going beyond all possible bounds of decency, to support a claim of intentional infliction of emotional distress. Ms. Spottiswoode simply did not consent to the beating that continued notwithstanding her requests that he stop. I do not find the prior interactions between the parties, even her acquiescence to some rough sex, undermine that conclusion. The conduct on September 15-16, 2017, was of a different magnitude. Further, Mr. Chishti knew or should have known that such a beating would cause a vulnerable woman like her severe emotional distress.

Thus, I find he acted recklessly and in a way that was likely to result in the level of distress found by the mental health professionals who examined her.

XII. DAMAGES.

Ms. Spottiswoode seeks recovery for her economic losses including back pay and front pay, and out-of-pocket costs; compensatory damages for her physical and emotional injuries, and punitive damages, in an amount not less than $50 million.[1] The Afiniti parties have noted that Ms. Spottiswoode's compensatory and punitive damages against the company under Title VII are limited by the statute to a maximum of $300,000. However, there is no similar cap on damages under the DCHRA. Nor are the damages so limited on her tort claims for assault and battery and infliction of emotional distress against Mr. Chishti, and negligent supervision against Afiniti.

Compensatory damages both reimburse victims for their economic out-of-pocket expenses caused by the wrongful conduct and compensate them for any emotional harm suffered. These two categories are discussed below.

Economic loss. Ms. Spottiswoode retained an expert, Kristen Kucsma, to evaluate the economic losses she suffered from Mr. Chishti and Afiniti's misconduct. Ms. Kucsma looked at several scenarios, and found the present value of her losses to fall within a range of $124,177-$1,650,623.[2] This would include losses of backpay beginning February 28, 2018, the last day Afiniti paid compensation to Ms. Spottiswoode, and continuing through the date of the hearing of $49,188.00 and frontpay, assuming regular raises, ranging from $281,880.00 through January 31, 2023, to reflect her reduced earnings in future years, less an estimated $15,000.00 per year that she

[1] An additional claim seeking a declaratory judgment pertaining to the enforceability of the Arbitration Agreement and Ms. Spottiswoode's Employment Agreement have been resolved. Order No. 4.

[2] These numbers were set forth in a revised report submitted by Ms. Kucsma on the last day of the hearing, Feb. 22, 2019.

could earn through January 31, 2023 for a total of $271,068.00. I do not find Ms. Spottiswoode to be entitled to compensation related to the potential IPO as requested, as any amounts she might have made from that event are too speculative.

Ms. Spottiswoode has also included as recoverable out-of-pocket costs, the cost of twice-weekly therapy sessions with Dr. Sellew in an amount ranging between $137,875 and $275,750, depending upon the number of years such intensive therapy is needed. Since I find that the extensive therapy was necessitated in large part by the conduct underlying this proceeding, some recovery for the treatment is necessary. Due to the uncertainty in the length of time the symptoms will persist at current levels, however, I am conservatively awarding $137,875 for 5 years of therapy. This is the low end of the time that Dr. Fitzgerald indicated the PTSD is likely to persist.

Physical injury. Mr. Chishti beat Ms. Spottiswoode in a manner that resulted in bruises, scratches, and contusions on her numerous body parts, as well as her face, injuries observed and confirmed by her roommate that were sufficient to cause her to go to the emergency room. Those injuries also caused several weeks of physical pain and suffering during the healing process, and required additional therapy. I find that $100,000 from Mr. Chishti is appropriate compensation for those injuries.

Emotional injury. While Ms. Spottiswoode's recovery from the physical injuries caused by Mr. Chishti was relatively quick, the emotional harm caused will be far more extensive and long-lasting. As discussed above, she has and is experiencing PTSD as a result of Mr. Chishti's conduct, and that condition is projected by Dr. Fitzgerald, an expert in such matters, to last for somewhere between 5 and 10 years. I have determined that an award of $2,000,000 against Mr. Chishti is an appropriate amount to compensate her for this life-changing emotional harm. In reaching this figure in the absence of any standard formula, I have considered the persistence of

his sexual advances and the severity of the harm caused during the incident in Brazil, her fragile constitution, her need for extensive professional treatment to work through the emotional distress caused, and the fact that both the severity and likely duration of the emotional harm was confirmed by a forensic psychologist.

Punitive damages. In order to recover punitive damages under Title VII, the DCHRA, or DC common law, Ms. Spottiswoode must prove that Mr. Chishti and/or Afiniti acted with "malice" or evil intent. "Malice" means conduct which was intended by the defendant to cause injury to the plaintiff, or despicable conduct done with a willful and knowing disregard for the rights or safety of others. *Pendarvis v. Xerox Corp.*, 3 F.Supp.2d 53, 57 (D.D.C. 1998); *Martini v. Fannie Mae*, 977 F.Supp. 464, 476 (D.D.C. 1997). The requisite state of mind may be inferred from all the facts and circumstances of the case.

The Afiniti parties find an absence of the requisite degree of malice for Mr. Chishti, because he allegedly reasonably believed that the conduct was consensual, the injuries were not as serious as Ms. Spottiswoode makes them out to be, and the conduct overall was consistent with past practice. As noted above, I found the sexual conduct in Brazil, culminating in the beating, to be unwelcome and not consensual, and find the protestations that he reasonably believed it to be consensual not credible. As discussed in connection with the assault and battery and intentional distress claims, Mr. Chishti intended to injure Ms. Spottiswoode and acted with a willful and knowing disregard for her rights and safety. At no time has Mr. Chishti expressed remorse, concern for the Claimant, or an acknowledgement that this form of behavior would not be repeated. Punitive damages in this matter may serve to deter future misconduct.

With respect to Afiniti, Respondents seek to relieve Afiniti of punitive damages, because the company allegedly made a good faith effort to prevent discrimination in the workplace. As

discussed several times above, I find that Afiniti did not take any meaningful action to prevent discrimination in the form of sexual harassment from happening. The company's conduct evidenced conscious disregard of the rights of its employees.

Afiniti showed knowledge of and indifference to federally protected rights under Title VII and PCHRA. In determining an adequate punitive damages award, I have considered the amount of compensatory damages, the reprehensibility of Mr. Chishti's misconduct and his decision not to report Ms. Spottiswoode's concerns to HR or the Legal Department so the company could deal with Ms. Spottiswoode's complaints, plus Mr. Chishti and Afiniti's total failure to put meaningful protective measures in place to prevent sexual harassment by Mr. Chishti or any other employees, as well as the amount needed to deter similar conduct in the future given Mr. Chishti's wealth and Afiniti's financial well-being. Based upon this analysis, I find that an award of $2,000,000 in punitive damages against Mr. Chishti in connection with his misconduct is warranted and necessary to deter future misconduct. Further, I find that my award against Afiniti in the sum of $250,000 for negligent supervision and $750,000 as punitive damages is warranted for its failure to take necessary steps that might have prevented the misconduct and to ensure that effective procedures were in place for dealing with sexual harassment allegations.

XIII. HOLDING AND AWARD

I have carefully applied the applicable legal standards to the interactions between Mr. Chishti and Ms. Spottiswoode during the relevant time period. For the reasons discussed above, I find that Mr. Chishti is liable to Ms. Spottiswoode under the DC Human Rights Act based upon either a *quid pro quo* or hostile work environment theory, and that Afiniti is liable to Ms. Spottiswoode on the same theories under Title VII or the DC Human Rights Act. Although Ms. Spottiswoode may have been flirtatious, ambiguous, or even seemingly reciprocated Mr. Chishti's

advances on occasion, I find overall that she made it clear that his sexual conduct towards her was unwelcome. Moreover, the beating Mr. Chishti gave her on September 16, 2017, was inconsistent with and far more severe than any conduct to which she might previously have consented.

Further, while neither Mr. Chishti nor Afiniti affirmatively took any adverse tangible employment action against her, I find that Mr. Chishti's conduct on the night of September 15-16, 2017 served as a constructive discharge satisfying the tangible employment action *quid pro quo* requirement. Alternatively, his action that night was severe and his entire course of sexual advances were persistent enough to make Afiniti an intolerably hostile workplace.

I also find that Afiniti is vicariously liable for Mr. Chishti's conduct because it failed to exercise reasonable care to prevent and correct promptly his sexually harassing behavior. Afiniti's paper policies were not effectively distributed to employees, the specific Anti-Harassment Policy was not even adopted until shortly before the Brazil incident, and no sexual harassment training was provided to any employees. Under those circumstances, plus the failure of the head of Afiniti's New York office to advise her to file a complaint with HR or the Legal Department, or to advise them himself of Ms. Spottiswoode's complaints, there were no preventive or corrective opportunities of which she reasonably failed to take advantage. Separately, I find the same conduct establishes the common law tort of negligent supervision and retention by Afiniti.

I also find that the physical injuries inflicted on Ms. Spottiswoode on the evening of September 16, 2017, rose to the level of an assault and battery. Mr. Chishti intentionally caused her physical injury that was a harmful and offensive bodily contact. Additionally, I find intentional infliction of emotional distress insofar as Mr. Chishti should have known that his extreme and outrageous actions, would cause Ms. Spottiswoode, a vulnerable young woman half his age, severe emotional distress.

Based upon these findings, Ms. Spottiswoode is entitled to the following relief from either Mr. Chishti, Afiniti, or both as stated:

- $408,943.00 consisting of $271,068 in back pay and front pay, and $137,875 for out-of-pocket costs for therapy from Mr. Chishti.
- $100,000.00 for physical injury and related pain and suffering from Mr. Chishti.
- $2,000,000.00 from Mr. Chishti for the emotional injuries caused.
- $2,000,000.00 from Mr. Chishti for punitive damages.
- $1,000,000.00 from Afiniti consisting of $250,000 in actual and $750,000 in punitive damages related to its failure to take any meaningful steps to prevent sexual harassment from happening.

XIV. APPORTIONMENT OF FEES

The agreement between the parties mandates that the arbitrator award reasonable fees and costs to the prevailing party.

I award Afiniti Fifteen Thousand Eight Hundred Forty Three Dollars and Sixty Cents ($15,843.60) for the fees incurred in securing the dismissal of individual directors and Betsy Koch. Afiniti's request for additional sums for independent counsel retained subsequent to my order dismissing them from this matter is denied. This amount shall be an offset to the award of fees to Spottiswoode.

Afiniti advanced Forty Six Thousand One Hundred Forty Nine Dollars and Ten Cents ($46,149.10) to provide daily transcripts to the claimant. Its claim for reimbursement is denied, since it would then be added as a cost incurred by Spottiswoode.

As the prevailing party in this matter is Ms. Spottiswoode, she is entitled to an award of reasonable fees and costs. She has asked for fees of Four Million Seventy Two Thousand Three Hundred and Eighty Six Dollars ($4,072,386.00) and costs of (Two Hundred Twenty Seven Thousand Three Hundred Fifty-Six Dollars and Ninety-Eight Cents ($227,356.98).

As to fees, the Spottiswoode request is unreasonable.

The Afiniti parties submitted a fee request of Eight Hundred Two Thousand Six Hundred Nineteen Dollars and Seventy Nine Cents ($802,619.79).

Ms. Spottiswoode prayed for an award of Fifty Million Dollars ($50,000,000.00). She is being awarded about twelve percent (12%) of that amount. Numerous motions were filed by both parties. The prevailing party on each of the motions was fairly even.

It is my determination that Ms. Spottiswoode is entitled to One Million Two Hundred and Fifty Thousand dollars ($1,250,000) as reasonable fees, less Fifteen Thousand Eight Hundred Forty Three Dollars and Sixty Cents ($15,843.60) awarded relative to the directors, and costs of One Hundred Ninety Seven Thousand Dollars ($197,000.00) for a total of fees and costs of One Million Four Hundred Thirty One Thousand Two Hundred Fifty Six Dollars and Forty Cents ($1,431,256.40).

XV. AWARD

For the reasons stated herein, and on the basis of the record and evidence in this arbitration, the Arbitrator orders and awards as follows:

1. As against Respondent, Zia Chishti, the Arbitrator awards Ms. Spottiswoode Four Million Five Hundred Eight Thousand Nine Hundred Three Dollars ($4,508,903.00), which includes compensation for her economic losses, payment for continuing medical care, the physical harm and emotional injuries she has endured, as well as punitive damages in connection with his continued course of conduct during her tenure in Afiniti and in connection with his conduct on the evening of September 15-16, 2017 in Brazil;

2. As against Afiniti, the Arbitrator awards Ms. Spottiswoode the sum of One Million Dollars consisting of Two Hundred Fifty Thousand Dollars ($250,000.00) in actual damages and Seven Hundred Fifty Thousand Dollars ($750,000.00) in punitive damages for its failure to

institute proper reporting controls to prevent sexual harassment, particularly after being put on earlier notice;

3. As against Afiniti, Ms. Spottiswoode is awarded attorney Fees and costs in the amount of One Million Four Hundred Thirty One Thousand Two Hundred Fifty Six Dollars and Forty Cents ($1,431,256.40);

4. Each of these amounts shall bear interest at the rate of six percent (6%) per annum for any amounts unpaid after fifteen (15) days from the date of this award;

5. The fees of the American Arbitration Association totaling $2,950.00, and the fees of the Arbitrator totaling $158,807.50 shall be borne as incurred.

6. All claims not specifically addressed herein are denied.

I, Ronald G. Birch, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

Dated this 19 day of April, 2019.

RONALD G. BIRCH, Arbitrator