

**TESTIMONY BEFORE
THE SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT, AGENCY ACTION, AND
FEDERAL RIGHTS
HEARING ON
ENSURING AN IMPARTIAL JUDICIARY: SUPREME COURT ETHICS, RECUSAL, AND
TRANSPARENCY ACT OF 2023**

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Chairman Whitehouse, Ranking Member Kennedy, and members of the Subcommittee, thank you for the opportunity to testify before you on the urgent need for improvements to the Supreme Court’s recusal regime.

My name is Donald Sherman, and I am the Executive Vice President and Chief Counsel of Citizens for Responsibility and Ethics in Washington (“CREW”), a non-partisan non-profit organization committed to ensuring the integrity of our government institutions and promoting ethical governance. I appear today on behalf of CREW to urge you to address the glaring problems in the Supreme Court’s ethics regime by passing the Supreme Court Ethics, Recusal, and Transparency Act (“SCERT Act”). It is far past time that the highest court in our constitutional system is held to the highest ethical standards.

You are holding this hearing at a perilous time in American history. Over the past two years, the high court has experienced a series of ethical scandals that have tarnished public faith in an institution whose entire existence depends on public support.¹ As the *Wall Street Journal* reported in 2021, over a nine-year period, more than 130 federal judges presided over more than 650 cases in which they had a material financial interest in one of the parties.²

¹ Just one indicator of this concern is recent polling finding that Americans’ disapproval of the Supreme Court has been rising, with 58% now having an unfavorable opinion of the high court, the highest disapproval rating since Gallup began polling the question twenty years ago. See Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historic Lows*, Gallup (Sep. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.

² 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 Street Journal* (Sep. 28, 2021), <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial>

In just the last six months, the public learned of a decades-long campaign whereby individuals purchased unparalleled access to the Supreme Court, and may have obtained information about the Court's decision in *Burwell v. Hobby Lobby Stores Inc.* prior to it being publicly released.³ Additionally, recent reporting revealed that Justice Clarence Thomas accepted hundreds of thousands in dollars in gifts and travel from Harlan Crow, a billionaire political benefactor who has donated "millions of dollars to groups dedicated to tort reform and conservative jurisprudence."⁴

While these scandals have unearthed uniquely unethical activity, they did not occur in a vacuum. They are, rather, the latest manifestations of the ethical quagmire that is undermining the Supreme Court and the entire federal judiciary. No single justice is the reason the highest court in the land has the lowest bar for ethical compliance and accountability. This is rather the result of years of bipartisan benign neglect and absence of accountability.

For decades, liberal and conservative judges and justices have routinely and publicly tested the limits of the judiciary's absurdly weak rules, while activists and advocates, regardless of motivation or ideology, have found troubling ways to exploit every gap they can find. Justices across the ideological spectrum have repeatedly failed to recuse themselves from cases in which a reasonable person would question their ability to remain impartial.

For example, liberal icon former Justice Ruth Bader Ginsburg repeatedly heard cases from which she likely should have recused.⁵ For instance, she chose to hear various cases involving her husband's law firm—including cases involving Marty Ginsburg's client Ross Perot and Mr. Perot's company, EDS, even though Perot helped organize support for her confirmation to the D.C. Circuit and endowed a chair named after Mr.

[-interest-11632834421](https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192); Coulter Jones, Joe Palazzolo and James V. Grimaldi, *Federal Judges or Their Brokers Traded Stocks of Litigants During Cases*, Wall Street Journal (Oct. 15, 2021), <https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192>.

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 Joshua Kaplan, Justin Elliott, and Alex Mierjeski, *Clarence Thomas and the Billionaire*, ProPublica (Apr. 6, 2023), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>. Taken together, Justice Thomas's ethical violations are so substantial that they caused my organization to call for his resignation. See Noah Bookbinder Letter to Justice Clarence Thomas (May 9, 2023), <https://www.citizensforethics.org/wp-content/uploads/2023/05/Clarence-Thomas-Resignation-Letter.pdf>.

⁵ See, e.g., Mark Paoletta, *The Hypocrisy of Supreme Court Ethics Journalism*, Wall Street Journal (Oct. 8, 2022), https://www.wsj.com/articles/the-hypocrisy-of-supreme-court-reporting-politico-barrett-client-law-firm-disclosure-rbg-scalia-11665175010?st=kip6f2w9tf3qcpq&reflink=article_email_share.

Ginsburg at Georgetown University Law Center.⁶ So did the recently retired Justice Stephen Breyer, who twice failed to recuse from cases in which he owned stock in one of the parties—first in *FERC v. EPSA*, despite owning shares in Johnson Controls, a party on the EPSA side (he would later sell his stock), and again in *Feng v. Komenda and Rockwell Collins, Inc.*, when he owned shares in Rockwell’s parent company, United Technologies Corp.⁷

In fact, every currently-serving Supreme Court justice has participated in a case that could at least raise questions about their partiality.⁸

For instance: Chief Justice Roberts, Justice Gorsuch and Justice Jackson appear to have participated in cases in which they owned stock in one of the parties or otherwise had a material financial interest.⁹ Justice Barrett refused to recuse from *Americans for Prosperity Foundation v. Bonta* mere months after AFPF’s sister organization spent more than \$1 million supporting her nomination and confirmation.¹⁰ Justice Sotomayor chose not to recuse from *Nicassio v. Viacom International and Penguin Random House*, despite having earned close to \$2 million in royalties from PRH since she joined the Court.¹¹ Justice Kavanaugh chose to participate in *Facebook v. Duguid*, despite his close friendship with a high-level Facebook executive who had “helped quarterback” his nomination and confirmation to the Supreme Court.¹² And Justice Kagan did not recuse from *U.S. v. Briones, Jr.*, a juvenile life-sentence case, an earlier version of which she had previously helped litigate as Solicitor General.¹³ While we do not pass judgment on whether the Justices should have recused in these specific situations, these examples highlight the need for clear rules and an independent process that guide every justice’s conduct when making recusal determinations.

⁶ See Stephen Labaton, *The Man Behind the High Court Nominee*, New York Times (June 17, 1993), <https://www.nytimes.com/1993/06/17/us/the-man-behind-the-high-court-nominee.html>.

⁷ See Fix the Court, *Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests* (May 11, 2023), <https://fixthecourt.com/2022/12/recent-times-justice-failed-recuse-despite-clear-conflict-interest/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Gabe Roth, *AFP spent loads of money to get a justice confirmed. Now AFP is a litigant. No one’s recusing. That’s a problem.*, Los Angeles San Francisco Daily Journal (Apr. 20, 2021), <https://www.dailyjournal.com/articles/362335-afp-spent-loads-of-money-to-get-a-justice-confirmed-now-afp-is-a-litigant-no-one-s-recusing-that-s-a-problem>.

¹¹ Fix The Court, *OT 19 Recusal Report* (Jul. 21, 2020), <https://fixthecourt.com/wp-content/uploads/2021/01/OT19-recusal-report-july-2020.pdf>.

¹² Maxwell Tani and Andrew Kirell, *Facebook Executive Joel Kaplan “Helped Quarterback” His Pal Brett Kavanaugh’s SCOTUS Nomination*, The Daily Beast (Nov. 22, 2019), <https://www.thedailybeast.com/facebook-executive-joel-kaplan-helped-quarterback-his-pal-brett-kavanaughs-supreme-court-nomination>.

¹³ Scott S. Harris, Clerk of the Supreme Court, Letter to Elizabeth B. Prelogar and Melanie Lynn Bostwick (May 6, 2021) (alerting counsel of Justice Kagan’s failure to recuse), <https://fixthecourt.com/wp-content/uploads/2021/05/Letter-to-Counsel-in-No.-19-720.pdf>.

And, of course, there's Justice Thomas. As I previously told the House Committee on the Judiciary in 2022, Justice Thomas's failure to recuse himself from Supreme Court cases relating to the 2020 election, despite his spouse's active support of and communications with Trump administration officials about former President Trump's unprecedented efforts to overturn the 2020 election, was an egregious violation of the laws and norms of ethical behavior.¹⁴ This ethical failure is just one in a long series; for instance, similar ethics issues arose when Virginia Thomas reportedly received \$200,000 in consulting fees from the personal foundation of an individual who filed an amicus brief with the Supreme Court regarding President Trump's Muslim ban,¹⁵ and due to her service on the advisory board for an organization that filed an amicus brief in an affirmative action case that will be decided by the Supreme Court any day now.¹⁶

Each of these incidents, from Justice Thomas's and Justice Ginsburg's willingness to hear cases implicating their spouse's activities, to Chief Justice Roberts and Justice Breyer's failure to recuse from cases in which they had financial interests, though not on equal footing, show why the Supreme Court needs a binding code of conduct and why a transparent and impartial recusal process must be a key part of that endeavor. Justice Thomas's pattern of conduct is at an entirely different level of seriousness than that of his conservative and liberal current and former colleagues and requires different consequences—but the issues all of these justices have run into makes clear the need for significant reform in the Court's ethics regime.

Right now, the Supreme Court's recusal process, such that it exists, is opaque and guided entirely by the justices' individual sentiment. As the Court's recent "Statement on Ethical Principles and Practices" explained, "[i]ndividual Justices, rather than the Court, decide recusal issues," and, in so doing, are guided by a so-called "duty to sit" that, according to their interpretation, "precludes withdrawal from a case as a matter of convenience or simply to avoid controversy."¹⁷ As such, it

¹⁴ 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-HIC-Oral-Testimony-Draft.pdf>.

¹⁵ Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, *New Yorker* (Jan. 21, 2022),

<https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court>.

¹⁶ *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 20-1199 (U.S. Jan. 24, 2022).

¹⁷ Chief Justice John G. Roberts Letter to Sen. Richard Durbin (including a Statement of Ethics Principles signed by all nine Justices) (Apr. 25, 2023),

https://www.washingtonpost.com/documents/70adb490-28c6-4065-b929-6e2e9ab5b9a8.pdf?itid=lk_inline_manual_4.

produces seemingly random and contradictory results, leading the public to question whether the justices are able to effectively police their own behavior.

Since the Supreme Court will not effectively regulate itself, and will not even adopt consistent processes for all justices, Congress must step in. The SCERT Act takes a number of actions to respond to this crisis—each of which will help rebuild public confidence in the judiciary. In particular, the SCERT Act would reshape the Court’s recusal regime, bringing measures of transparency and accountability into an opaque and broken system. And while Congress cannot solve this problem by itself, these necessary steps can help to ensure that the high court is held to the high ethical standard its position of power demands.

1. The Supreme Court’s broken conflicts of interest and recusal regime

A. 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.¹⁸ In addition, by statute, a judge must recuse when they know that their spouse has “any . . . interest that could be substantially affected by the outcome of the proceeding.”¹⁹

However, under the Supreme Court’s current ethical framework, individual justices decide for themselves whether recusal is warranted under Section 455.²⁰ While Section 455 is lofty in its endeavors, there is no way to enforce it at the Supreme Court if an individual justice decides not to recuse under the statute in a given case.

Additionally, justices will often recuse from a case without offering any explanation. For example, in recent years, we’ve seen detailed recusal decisions released by Justices Kagan and Scalia, but far less from their colleagues. These nonpublic recusals reportedly occur in approximately 200 matters each year.²¹ 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 institution.

¹⁸ 28 U.S.C. § 455(a).

¹⁹ 28 U.S.C. § 455(b)(4).

²⁰ See 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>.

²¹ Gabe Roth, *Explaining the Unexplained Recusals at the Supreme Court*, Fix the Court (May 3, 2018), <https://fixthecourt.com/wp-content/uploads/2018/05/Recusal-report-2018-updated.pdf>.

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.

Executive branch employees are already subject to similar recusal standards by virtue of the criminal conflict of interest statute, 18 U.S.C. § 208, and the executive branch's standards of ethical conduct governing impartiality issues. These standards protect the integrity of the agency's decision-making process by requiring employees who are dealing with actual and apparent conflicts of interests to consult with an agency's ethics official.²² 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.²³

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."²⁴ It is notable that unlike the executive branch where employees can be terminated or reassigned or even lower courts where judges can be replaced, Supreme Court justices not only have life tenure, but have also argued that they should avoid recusal because they have a "duty to sit."

B. The Ethics in Government Act: 5 U.S.C. App.

The recusal statute under 28 U.S.C. § 455 identifies specific circumstances, such as when a spouse has a financial interest in a subject matter in controversy or in a party to the proceeding,²⁵ where recusal is required. These conflicts, however, may never come to light in the first place because of reporting loopholes in the Ethics in Government Act ("EIGA").

The Ethics in Government Act mandates certain federal officials, including Supreme Court justices, to file annual financial disclosure forms which detail outside income and spouses' sources of income, among other disclosures.²⁶ Conflicts arising from a

²² 5 C.F.R. § 2635.502.

²³ *Id.*

²⁴ Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, *New Yorker* (Jan. 21, 2022), <https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court>.

²⁵ 28 U.S.C. § 455(b)(4).

²⁶ 5 U.S.C §§ 13101-13104.

justice's spouse's businesses, clients, or outside positions, however, are difficult to identify partly because they²⁷ are not always required to be disclosed under EIGA's current reporting regime. 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 spouse's earned income. Only the spouse's LLC or other business entity would need to be reported as the source of spousal earned income.²⁸ 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.²⁹ In the latter case, potential spousal conflicts of interest can be more easily identified.

2. The SCERT Act would bring needed transparency and accountability to the Supreme Court's recusal framework

Senator Whitehouse and Representative Hank Johnson developed and introduced the Supreme Court Ethics, Recusal, and Transparency Act to address many of the ethical problems plaguing the high court. The key element at issue in today's hearing is the SCERT Act's enhanced recusal provisions, which creates an ethical framework with concrete rules by which to order their lives and professional engagements.

The bill includes four overarching changes to the recusal and transparency rules, each of which CREW endorses.

First, it expands and clarifies elements of the recusal requirements in Section 455 in a few key ways. Specifically, it requires justices or judges to recuse themselves from cases in which a party or party affiliate has made lobbying contact with, or spent substantial funds in support of, the justice or judge's nomination, confirmation, or appointment. Moreover, it would require disqualification in cases where the justice or judge, or their spouse, minor child, or a business held by them, received gifts, income, or reimbursement from a party within six years of assignment to the case.

Second, the bill imposes a clear duty on justices and judges to be aware of their and their family's financial interests—and when such interests would be substantially affected by a case before them. This duty to know is bolstered by a duty to notify the

²⁷ 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).

²⁸ 5 U.S.C. app. § 102(e)(1)(A).

²⁹ *Id.*

parties in any circumstance where a justice or judge’s recusal may reasonably be required.

Third, it creates a judicial panel that would review a party’s certified disqualification motions and determine whether recusal is necessary. For the lower courts, the statute would create a reviewing panel composed of three lower court judges from different courts to review certified motions to disqualify. In recognition of the unique position occupied by Supreme Court Justices, the act would require that disqualification motions related to justices be referred to the entire Supreme Court, and allow the justice subject to the motion to explain their argument against recusal to their colleagues. Any decision made by a reviewing panel—and the rationale behind the decision—would be released publicly and published online.

And fourth, the bill would create new financial disclosure rules for parties to cases and *amici curiae*. As CREW has repeatedly stated, 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 justice accepts lavish gifts and other things of value from people who are affiliated with groups filing amicus briefs, obvious questions arise about whether a justice has the requisite impartiality or appearance of impartiality to participate in that case.³⁰ SCERT’s disclosure provisions are a necessary first step towards addressing these problems by requiring the public disclosure of (a) any gifts, income, or reimbursements given to a justice in the two years preceding commencement of the matter under consideration—as well as any lobbying contacts in support of a justice’s nomination, confirmation, or appointment; and (b) any person who contributed to the preparation or submission of an amicus brief, or contributed at least three percent of the gross annual revenue of the amicus curiae or more than \$100,000 in the previous calendar year (with some exceptions). Without knowing this information, it would be impossible to know when a justice might need to recuse, or to file a complaint if they do not.

Each of these changes would measurably improve the Supreme Court’s recusal regime and rebuild public faith in the Court’s integrity. Taken together, they would begin the process of transforming the way the justices approach their ethical

³⁰ See Statement of Noah Bookbinder, Hearing on Supreme Court Ethics Reform, Before the S. Comm. on the Judiciary (May 2, 2023), <https://www.citizensforethics.org/wp-content/uploads/2023/05/SIC-Clarence-Thomas-Judicial-Ethics-Testimony-050223.pdf>; Testimony of Donald Sherman, Hearing on Undue Influence: Operation Higher Court and Politicking at SCOTUS, Before the H. Comm. on the Judiciary (Dec. 8, 2022), https://www.citizensforethics.org/wp-content/uploads/2022/12/Donald-Written-HJC-Testimony-12_8.pdf; Testimony of Donald Sherman (Apr. 27, 2022), <https://www.citizensforethics.org/wp-content/uploads/2022/04/Sherman-HIC-Oral-Testimony-Draft.pdf>.

obligations. And while there are certain elements that could go even further—for instance, CREW supports banning all justices and judges from owning or trading individual stocks and bonds, and extending the criminal conflict of interest law to cover the courts as well as the executive branch—passing the SCERT Act would be a powerful and necessary step towards bolstering the independence of and reestablishing trust in the judiciary.

I also note that the SCERT Act’s recusal regime thoughtfully balances the importance of protecting the integrity of the Supreme Court’s decision-making with the complexities of the court’s unique composition and structure. We recognize that asking a justice to recuse from a case is fundamentally different from asking a district court judge to recuse: as Chief Justice Roberts noted, “lower court judges can freely substitute for one another...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.”³¹ Justice Scalia famously declined to recuse himself from a case involving a White House energy task force headed by Vice President Cheney, whom Justice Scalia had recently accompanied on a duck-hunting trip in 2003.³² The consequences, Justice Scalia said, of a justice recusing themselves “out of an abundance of caution” would “utterly disabl[e]” the court which risks leaving the Court with divided a four-four decision.³³ It is also noteworthy that one way to avoid recusal questions is by taking significant prophylactic measures to avoid conflicts in the first place. For example, if, as CREW has advocated, the Supreme Court adopted a binding code of conduct that barred justices, their spouses, and dependent children from owning and trading individual stocks or similar assets, then the justices would not have to worry about recusal decisions based on these financial assets.³⁴

The SCERT Act’s recusal framework was carefully designed to address Justice Scalia’s concern about recusal. Crucially, the SCERT Act’s panel structure allows for Supreme Court justices to weigh the importance of having a fully constituted court rule on the matter when considering a party’s motion to disqualify. The bill’s enhanced recusal requirements do not amount to a significant expansion of what Section 455 already requires; and the enforcement of those requirements would still rest with the judicial panel. That structure more than compensates for any worry that enhanced

³¹ Chief Justice John G. Roberts, *2011 Year-End Report on the Federal Judiciary* (Dec. 31, 2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

³² M. Margaret McKeown, *Politics and Judicial Ethics: A Historical Perspective*, Yale L.J. (Oct. 24, 2021), <https://www.yalelawjournal.org/forum/politics-and-judicial-ethics-a-historical-perspective>.

³³ Order Denying Motion to Recuse, *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 916 (2004) (No. 03-475) (Scalia, J., mem.).

³⁴ See Testimony of Donald Sherman (Apr. 27, 2022), <https://www.citizensforethics.org/wp-content/uploads/2022/04/Sherman-HIC-Oral-Testimony-Draft.pdf>.

recusal requirements might “disable” the Court and undercut its role in our constitutional structure. It is a measured compromise between imposing a rigorous set of recusal standards and allowing the court to continue using a broken patchwork of unenforceable rules and regulations.

It is my and CREW’s strong and considered position that when questions about the Court’s impartiality are at issue, recusal needs to be the justices’ default position rather than the exception.³⁵ Whether or not Justice Scalia should have recused, the fact that he responded publicly at all and pulled back the curtain to explain his decision-making process is a novelty in and of itself that should be applauded.³⁶ But it should not be a novelty. While we were heartened to see Justice Kagan’s recent decision to offer a brief explanation of her decision in recuse in *Holland v. Florida*, other justices have not followed suit. This ad hoc process that rests on the justices’ individual prerogatives undermines the impartial and consistent administration of justice. It is time for Congress to act. In the SCERT Act, we have a measured response that builds modest ethical guardrails into a system that lacks any.

3. The SCERT Act is a constitutional exercise of Congressional authority

The SCERT Act does not raise serious separation of powers concerns. Congress’s power to subject the Supreme Court to basic ethics rules, including by imposing recusal rules, or a Code of Conduct, is supported by the Constitution’s structure and text, as well as centuries of practice.³⁷

³⁵ See Statement of Noah Bookbinder (May 2, 2023), <https://www.citizensforethics.org/wp-content/uploads/2023/05/SJC-Clarence-Thomas-Judicial-Ethics-Testimony-050223.pdf>.

³⁶ See John Crawley and Kimberly Strawbridge Robinson, *Alito, Kagan Top Justices in Supreme Court Recusal ‘Black Box’*, Bloomberg Law (Feb. 13, 2023), <https://news.bloomberglaw.com/us-law-week/alito-kagan-top-justices-in-supreme-court-recusal-black-box-1> (reporting that virtually all of the more than 750 recusals identified in a review of court orders lacked an explanation of why the justices avoided participating). See also Kaelan Deese, *Justice Kagan’s recusal could signal ‘new practice’ for Supreme Court transparency*, Washington Examiner (May 25, 2023), <https://www.washingtonexaminer.com/policy/courts/kagan-recusal-could-signal-new-practice-scotus-transparency> (citing Justice Kagan’s citation in a rejection of the case *Holland v. Florida*, in which she indicated her reasoning for not partaking in the consideration or decision of the petition, citing her status as a former government employee).

³⁷ Joanna R. Lampe, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations*, Cong. Rsch. Serv. (Apr. 6, 2022), <https://sgp.fas.org/crs/misc/LSB10255.pdf> (“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.”).

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.³⁸ Congress has changed the size of the Supreme Court by statute on several occasions.³⁹ Congress also has the authority to raise justices’ salaries, and, in extraordinary cases, remove justices via impeachment.⁴⁰ And Congress has exercised its constitutional authority to regulate Supreme Court justices’ professional conduct through the nation’s criminal laws: Justices may not condition any official action—for instance a vote in a case or a decision to grant *certiorari*—on the receipt of “anything of value.”⁴¹ Though they interpret and sometimes strike down the law, Supreme Court justices are not above it.

Congress’s tradition of regulating the ethical conduct of Supreme Court justices stretches back to the beginning of the republic. And, as Professor Amanda Frost explained in her testimony to the full committee in May, “starting with the Judiciary Act of 1789, Congress has required every judge and justice to ‘solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me.’” Congress chose these words to ensure that federal judges adjudicate cases fairly and impartially—the same goals that underlie the current ethics legislation.⁴² Many of the laws that the SCERT Act would expand have been operative on the Supreme Court for more than half a century without challenge; for instance, Section 455 has applied to Supreme Court justices as well as lower federal court judges for 75 years, the Ethics in Government Act for 45 years, and the Ethics Reform Act for 34.⁴³ All of these laws “support the sound

³⁸ 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.”).

³⁹ 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 (2005); Joanna R. Lampe, “Court Packing”: Legislative Control over the Size of the Supreme Court, Cong. Rsch. Serv. (Dec. 14, 2020), <https://crsreports.congress.gov/product/pdf/L/SB/LSB10562>.

⁴⁰ 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.”).

⁴¹ 18 U.S.C. § 201.

⁴² Testimony of Prof. Amanda Frost, Hearing on Supreme Court Ethics Reform, Before the S. Comm. on the Judiciary (May 2, 2023), <https://www.judiciary.senate.gov/imo/media/doc/2023-05-02%20-%20Testimony%20-%20Frost.pdf>. See also An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789); and 28 U.S.C. § 453 (establishing the nearly identical oath used today).

⁴³ *Id.*

operation of the Court” –as do the comparatively reserved requirements in the SCERT Act.⁴⁴

CREW believes that imposing these and other ethical requirements on Supreme Court justices is constitutional, appropriate, and necessary.

Conclusion

The judiciary is built on a foundation of public trust. Without the power of the purse or the authority to enforce the laws that it interprets, its credibility is its currency. That credibility is eroding. Over the past several years the Court subjected the American people to scandal after scandal, leading the public’s confidence in the judiciary to plummet. These troubling incidents were preventable, if not predictable, given the Court’s lax ethics and recusal systems. The Supreme Court’s 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.

Supreme Court justices are afforded the immense responsibility of passing final judgment on matters of life and death, educational equity, voting access, reproductive health, separation of powers, and the rule of law. In addition, they enjoy the singular privilege of lifetime tenure. In return, it is certainly reasonable to demand that these men and women uphold the highest principles of ethics and accountability. That they are seemingly unwilling to do so speaks to arrogance on the part of the justices and negligence from the other branches despite unprecedented ethical scandals.

Congress must act quickly to help restore credibility and public trust to our judiciary. The SCERT Act, with its focus on recusal, is a critical, measured, and constitutionally appropriate step towards that goal.

An independent judiciary is the backbone of the rule of law. In the face of significant ethical failures by the justices, and continued recalcitrance to the public’s calls for change, Congress has an obligation to pass legislation that protects our democracy and implements necessary judicial ethics reform. Though justices and judges interpret the law, they are not above it.

⁴⁴ *Id.*

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