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"What's Wrong with the Supreme Court: The Big Money Assault on Our Judiciary"

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Thank you, Chairman Whitehouse and Ranking Member Kennedy, for the opportunity to testify at this important hearing. My name is Benjamin Todd Jealous, president of People For the American Way, a national organization dedicated to building a democratic society that implements the ideals of freedom, equality, opportunity, and justice for all. Throughout my career as a community organizer, an investigative reporter, and a civil rights leader, including as president of the NAACP, the role of the Supreme Court has been a constant for me. I was inspired by key rulings that helped promote justice, like the landmark decision in *Brown v. Board of Education* and the ruling that helped put teeth into Congress' law banning job bias in the *Griggs* case.

Since John Roberts became Chief Justice of the Supreme Court, however, the Court has too often harmed our democracy and our rights, a trend that has become even worse with the addition of justices nominated by former President Trump. America has increasingly witnessed pro-corporate and special interest judicial activism from the Court, often promoted by big money, which has restricted or overruled acts of Congress and past precedent and damaged the rights of all Americans. Today I want to focus on the Roberts-Trump Court's impact in three key areas: undermining voting and democracy; elevating the interests of big corporations over the rights of the people; and turning the shield of protections for religious liberty into a sword that is increasingly being used to harm others and get special exemptions from important laws.

Voting and democracy

At the urging of large corporations and others, the Roberts Court has damaged democracy through its decisions on campaign financing. This includes the infamous 5-4 *Citizens United* ruling in 2010, which overruled prior precedent and held that laws passed by Congress that prohibited independent campaign expenditures by corporations somehow violated the First Amendment. The late Justice John Paul Stevens, who was known for his "indelible" commitment to the First Amendment, was powerful in his dissent for the four moderate justices. The majority's opinion, he wrote, "threatens to undermine the integrity of elected institutions across the Nation," because a "democracy cannot function effectively when its constituent members believe laws are being bought and sold."

Justice Stevens was right. *Citizens United* and related rulings by the Court have had a devastating effect. In a recent report concerning the decade since *Citizens United,* the Center for Responsive Politics found that there has been an "explosion of big money and secret spending" on elections, including "nearly one billion dark money dollars." A Brennan Center report found that as a result of the Court's rulings, a "tiny sliver" of the wealthiest Americans "now wield more power than at any time since Watergate," while "many of the rest seem to be disengaging from politics." And as Demos has found, an election system that is skewed so heavily toward wealthy donors perpetuates racial bias and the racial wealth gap. For example, the top 10% of wealthy Americans are 90% white, while the rest of the country is less than 70% white. And more than 90% of federal contributions in 2012 above $200 came from white neighborhoods.

This case is also a prime example of judicial activism by the Roberts Court. In particular, to arrive at its conclusion in *Citizens United*, the Court reached out to decide an issue that was not before it as the case developed below. As originally presented and argued to the Supreme Court, the case asked the limited question of whether a conservative group could show an anti-Hilary Clinton film without violating campaign finance laws. After the case was argued, however, the Court directed the parties to submit briefs and re-

argue it on whether it might be necessary to overrule prior decisions that had upheld the constitutionality of congressional campaign finance laws. And in fact, that is exactly what the 5-4 majority proceeded to do, without any additional fact-finding by a lower court. As Justice Stevens bluntly put it in his dissent, the majority "changed the case to give themselves an opportunity to change the law."

Moreover, the result in this case was made possible by a change in the Court's make-up with Justice Alito replacing Sandra Day O'Connor, one of the authors of *McConnell v. FEC*, a key precedent that was largely overruled in *Citizens United*. As O'Connor is reported to have said, "Gosh, I step away for a couple of years and there's no telling what's going to happen."

And some far-right advocates want to go even further. Even though eight justices in *Citizens United* made clear that disclosure of campaign contributions and spending is perfectly legal, some have argued that such disclosure is unconstitutional. Some of them base this on the Court's decision in the 1950s in *NAACP v. Alabama*, where the Court ruled it was unconstitutional for the state to demand that the group disclose "the names and addresses of all its Alabama members," as part of a state effort to stop it from conducting any activities in the state. There is a big difference between requiring disclosure of the NAACP's membership lists in a state that is hostile to it and requiring disclosure of major donors or contributions and expenditures in a political campaign.

Many of the same powerful forces that backed *Citizens United* also have a vested interest in suppressing the votes of people of color, women, and young people because those voters won't support the anti-consumer, anti-worker, and other agendas of these corporate special interests and will support worker protections and environmental regulation. And, in fact, a few years after *Citizens United,* the Roberts Court focused its attention on voting rights.

The Voting Rights Act of 1965 may well be the most important piece of civil rights legislation in our country's history. The law was enacted and extended five times on a proudly bipartisan basis by Congress. A key provision of the law was Section 5, which

required jurisdictions with a history of racial discrimination in voting to pre-clear changes in voting laws or practices with the Justice Department to help ensure that they did not have a detrimental effect on minority voters. The year after the law was passed, the Supreme Court upheld the constitutionality of Section 5 in an 8-1 decision, in *South Carolina v. Katzenbach*.

In 2013, however, a narrow 5-4 Court majority led by Chief Justice Roberts tore the heart out of Section 5 and the Voting Right Act. Even though Congress had just extended Section 5 in 2006 on a bipartisan basis, after an extensive record of hearings containing comprehensive factual and other information on the continuing need for the law, Roberts wrote an opinion that ruled the coverage formula for Section 5 unconstitutional, effectively ending the pre-clearance requirement by judicial fiat. Roberts claimed that this result would not be harmful because voting discrimination had decreased since the law was passed. I will always remember what the late Justice Ruth Bader Ginsburg said in response in her dissent: throwing away preclearance "when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."

The reaction to the *Shelby County* ruling showed just how right Justice Ginsburg was. Literally within hours of the decision, Mississippi and Alabama began to enforce strict photo ID laws that had previously been barred because they had not been precleared. A comprehensive report by the Brennan Center for Justice found that states previously covered by Section 5 undertook "significant efforts to disenfranchise voters," including throwing as many as 2 million voters off the voting rolls. And as of the end of February, after an election that saw more Americans vote than in any other election in history, 43 state legislatures, including a number in places formerly covered by Section 5 are preparing to pass laws that will restrict the right to vote in a way that will seriously harm minorities, but will not be subject to crucial pre-clearance by DOJ.

It was no surprise that John Roberts wrote the *Shelby County* decision. One of the reasons that People For and many others opposed his confirmation back in 2005 was his record of "hostility" to laws protecting "voting rights" and other "fundamental rights

and liberties." But the Supreme Court's damage to voting rights has gotten even worse as justices nominated by former President Trump have taken the bench. Here are just three examples:

- Trump justice Neil Gorsuch provided the deciding vote in 2018 to reverse a lower court and uphold Ohio's purge of almost 100,000 voters in the *Husted* case. As Justice Sonia Sotomayor explained in dissent, the majority decision "entirely ignores the history of voter suppression" and "upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate" in the National Voter Registration Act.

- On the night before the Wisconsin primary last April, Trump justices Gorsuch and Kavanaugh were part of a 5-4 majority that reversed the lower courts and prevented tens of thousands of state voters from casting absentee ballots made necessary by the COVID-19 pandemic. Many African American voters like 79 year-old Rosie Redmond, who sat in her wheelchair at the front of the line at Riverside High School, voted anyway. As Justice Ginsburg wrote in dissent, the Court should not have required voters like Rosie to "brave the polls, endangering their own and others' safety," in order to vote.

- Just last week, the Supreme Court heard a case out of Arizona where a federal appeals court found that restrictive Arizona voting policies, such as prohibiting people from having others turn in their absentee ballots for them, violates Section 2 of the Voting Rights Act because it improperly "targets voters of color." I am always hopeful, but reports on the oral argument suggest that the right-wing majority is likely to overturn the lower court decision and may well make it more difficult to use Section 2 to challenge voting restrictions that disproportionately harm minority voters.

Siding with Big Corporations

Large corporations, of course, were among the primary advocates for and beneficiaries of decisions, like *Citizens United,* that have undermined our democracy and have helped make sure that this Congress remains all too supportive of their interests. But that was not enough. Corporations rely on the Court for rulings that will protect their interests in dealing with workers and consumers as well. That is why so much dark money was dedicated to preventing President Obama from filling Justice Scalia's seat, and then supporting President Trump's Supreme Court nominees. The result from the Roberts-Trump Court continues to be legal doctrines and decisions that, despite federal laws and constitutional provisions, harm workers and consumers as they help corporations.

With respect to workers, the Roberts Court has clearly done the bidding of corporations by undermining collective bargaining and organized labor, which have been key tools in limiting corporate power and helping workers help themselves. A crucial target of corporations and their far-right allies has been the Court's decision 45 years ago in the *Abood* case. The Court ruled there that a state could require, when individual workers in a unionized public sector workplace elect not to join the union, that they pay a "fair share" fee representing the benefits the union produces for them in improving wages and benefits. Otherwise, "free riders" could seriously undermine the financial stability and viability of unions.

Over the last decade, the Roberts Court began to chip away at and then overturned this important decision. A report you helped prepare last year, Mr. Chairman, traces the history in more detail. In a classic example of judicial activism, Justice Alito invited legal challenges to the *Abood* principle. In the 2012 case of *Knox v. SEIU*, Justice Alito "opened the floodgates" by suggesting that the Court's rationale for fair share fees was "something of an anomaly", issuing an open "invitation" to anti-union advocates to challenge *Abood*. The Roberts Court couldn't quite get the votes it needed, until corporations and far right interests made sure that it was Trump nominee Neil Gorsuch, not Obama nominee Merrick Garland, who replaced the late Justice Scalia on the Court.

Just a year after he was confirmed, Gorsuch provided the deciding fifth vote to overturn *Abood* in *Janus v. AFSCME,* where the majority ruled that fair share fees somehow violated the First Amendment. Justice Elena Kagan's dissent referred to the majority as "black-robed rulers overriding citizens' choices" by improperly "weaponizing the First Amendment," overturning a decision "entrenched in this Nation's law – and its economic life for over 40 years," and preventing "the American people," through their state and local officials, from "making important choices about workplace governance" concerning "millions of workers."

The Roberts Court has done much more to stack the deck against workers in their dealings with corporations. For example:

- Betty Dukes, on behalf of herself and more than 1.5 million other female Wal-Mart workers, filed suit against the corporation for sex discrimination in pay and promotions. Lower courts said that the lawsuit could go forward, but a 5-4 Roberts Court majority ruled that the case could not proceed as a class action. Justice Ginsburg pointed out the "far reaching" harm of the decision, because it suggested that the individual differences among the women preclude the use of the important class action mechanism, despite the evidence that "gender bias suffused Wal-Mart's company culture" and harmed the entire class of female employees there.

- In the *Epic Systems* case in 2018, Trump Justice Gorsuch wrote a 5-4 opinion empowering corporations to force workers to agree to arbitrate claims against them individually, rather than using collective arbitration. As Justice Ginsburg wrote in dissent, the majority improperly held enforceable these "arm-twisted, take-it-or leave-it contracts" that require employees to resolve "wage and hour disputes only one-by-one." This clearly violates federal labor law, she continued, which "does not countenance such isolation of employees."

- In the *Encino Motorcars* case, the 5-4 Roberts Court ruled that 100,000 service advisors who work for auto dealerships are not entitled to overtime pay under federal law. Justice Ginsburg explained in dissent that the majority had improperly added "an exemption of its own creation" to federal labor law guaranteeing overtime pay.

The Roberts Court has also made it much more difficult for consumers to get justice for corporate misconduct. For example:

- Vincent and Liza Concepcion sued AT&T Mobility for falsely claiming that its wireless plan included free cell phones. Their individual case would have produced less than $35 in damages, but by filing it as a class action, they sought to hold the corporation accountable for misconduct harming numerous consumers. The company claimed that they had to arbitrate their claim individually under their contract, even though California state law specifically prohibited such provisions in consumer contracts. The lower courts agreed with them, but a 5-4 Roberts Court decision reversed. Justice Stephen Breyer's dissent pointed out that the majority's decision would prevent any meaningful remedy for such frauds. One commentator suggested that the ruling was a "tsunami that is wiping out existing and potential" consumer class actions.

- Going all the way back to 1911, the Supreme Court had ruled that it automatically violated the federal antitrust laws for a manufacturer to fix minimum prices for the resale of its products. But in 2007, a 5-4 Roberts Court majority in the *Leegin* case overruled that decision and held that a company could argue that such fixed minimum prices are legal. Justice Breyer pointed out in dissent that the majority had wrongly decided to overrule a "clear and simple price-related antitrust rule that the courts have applied for nearly a century," and would "raise the price of goods at retail" for consumers.

- In *American Express Company v. Italian Colors Restaurant*, a case combining antitrust and arbitration issues, a number of small restaurants filed a class action against American Express, contending that the corporation was violating antitrust laws and effectively raising prices for consumers by requiring the restaurants to accept debit and credit cards with higher fees. The restaurants also argued that Amex had improperly used its monopoly power to force them to sign agreements that mandated impractical one-on-one arbitration to settle such claims. Although the lower courts allowed the case to proceed, five Roberts Court justices reversed. As Justice Kagan explained in her dissent, allowing a company like Amex "to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse" is a "betrayal of our precedents, and of federal statutes like the antitrust laws."

There are many more instances where the Roberts Court has sided with big business over the interests of ordinary Americans. In fact, Mr. Chairman, you and others found eighty cases between 2005 and May 2020 where the Roberts Five justices delivered rulings that favored big business and other special interests. And there is every good reason to fear that there are more to come.

For example, in the *Gundy* case in 2019, Justice Alito essentially invited efforts to revive the so-called non-delegation doctrine, a right-wing idea used during the early days of FDR and the New Deal to invalidate laws that the far right Court in those days thought delegated too much authority to administrative agencies. As Justice Kagan warned, revival of that doctrine would mean that "most of Government is unconstitutional" because Congress today necessarily gives "discretion to executive officials to implement its programs," including programs to protect workers, consumers, and all of America against corporate misconduct. As a PFAW analysis last year demonstrated, this strategy even threatens programs like the ACA, Medicare and Social Security.

Religious Liberty: A Shield, Not a Sword

Throughout its history, People For the American Way has been a strong supporter of both constitutional and federal statutory protections for religious liberty. As the late Chief Justice Burger, who was no liberal, stated for himself and seven other justices in *Thornton v. Caldor* in 1985, however, it would be improper and violate the Establishment Clause of the First Amendment to recognize an "absolute and unqualified right" to free exercise of religion by some people, "no matter what burden or inconvenience this imposes" on others. In other words, religious liberty protections are a shield for people of faith to practice their religion, but not a sword that can be used to harm others.

Unfortunately, the Roberts Court, including Trump justices, has ignored Chief Justice Burger and in many ways has transformed religious liberty protections from a shield into a sword. This really got started with the Court's 5-4 ruling in 2014's *Hobby Lobby* case. The majority there held that a for-profit corporation could refuse to provide contraceptive coverage to employees as required by the ACA because of its religious objections. As Justice Ginsburg pointed out in dissent, the result is to allow employers to use their own religious beliefs to "deny legions of women who do not hold their employers' beliefs access to contraceptive coverage." It also violated the principle recognized by Chief Justice Burger, she pointed out, that you can't use your own religious beliefs to impose substantial burdens on other people---to turn religious liberty protection into a sword rather than a shield. As Justice Ginsburg colorfully put it, "your right to swing your arms freely stops just where the other man's nose begins."

As a PFAW report released after *Hobby Lobby* documented, transforming religious liberty protections into a sword to help discriminate in the name of religious liberty has been a major Religious Right objective for decades. And with the addition of Trump justices, the Roberts Court went even further. For example:

- The Trump Administration tried to expand *Hobby Lobby* through a rule that said that virtually any company could refuse to provide contraceptive coverage to

employees on religious or moral grounds. The Roberts Court approved that rule in 2020 in the *Little Sisters* case. As Justice Ginsburg pointed out in dissent, the ruling contradicted the principle that the "religious beliefs of some" cannot be used to "overwhelm the rights and interests of others who do not share those beliefs." In its "zeal to secure religious rights to the nth degree," the dissent went on, the Court was threatening the contraceptive coverage rights of "between 70,500 and 136,400 women" across the country.

- The Court also ruled in the *Guadalupe* case in 2020 that two religious schools were exempt from federal laws banning job discrimination based on age and disability when they fired two lay teachers for those reasons. Justice Sotomayor pointed out in dissent that the decision allows such institutions to strip away legal protections from all employees who they "think" play an "important religious role." The result, she warned, is that religious schools and other institutions can "discriminate widely and with impunity" against "over a hundred thousand secular teachers" and others based on "race, sex, pregnancy, age, disability, or other traits protected by law."

- In several cases after Trump Justice Amy Coney Barrett replaced the late Justice Ginsburg, the Supreme Court has also granted special exemptions to churches in order to exempt them from rules temporarily banning indoor gatherings because of the COVID-19 pandemic. Several of these rulings, including two in response to challenges brought by churches in California, were issued without even having oral argument or issuing full opinions by the Court majority explaining its reasoning. As Justice Elena Kagan explained in dissenting from the *South Bay United* order earlier this year, the majority's "special exception" for worship services "defies our case law, exceeds our judicial role, and risks worsening the pandemic."

Conclusion

The problem of right-wing judicial activism on our current Supreme Court is a serious one. It has been spurred by big money and by the far right, and it has already caused serious harm to voting and democracy, to the rights of the people vs. big corporations, and to religious liberty and civil rights. As documented in PFAW's *Confirmed Judges, Confirmed Fears* series, we have seen similar problems as a result of the many Trump judges on the federal appellate courts as well. Action by Congress and the President is crucial to address these troubling concerns, including passing the For the People Act, which has support from bipartisan majorities of Americans. We also need prompt filling of future lower court and Supreme Court vacancies with fair-minded judges, judicial ethics reform for federal judges including the Supreme Court, and possible federal judicial reform measures including judicial term limits and potentially adding seats to the Supreme Court. People For the American Way looks forward to working with this Subcommittee, the entire Congress, and the President on these crucial issues.

Thank you very much.