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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

August 3, 2023

The Honorable John G. Roberts, Jr.
Chief Justice
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

Dear Chief Justice Roberts:

We write regarding recent interviews that Justice Samuel Alito granted to the *Wall Street Journal*. By opining on the constitutionality of legislation under consideration by the U.S. Senate and agreeing to sit for interviews conducted in part by an attorney with a case currently pending before the Court, Justice Alito violated a key tenet of the *Statement on Ethics Principles and Practices* (hereinafter *Statement on Ethics*) to which all Supreme Court Justices purport to subscribe¹ as well as the Code of Conduct for U.S. Judges. We therefore urge you to take appropriate steps to ensure that Justice Alito will recuse himself in any future cases concerning legislation that regulates the Court, as well as *Moore v. United States*.

Since 2011, you have argued that the Supreme Court can police its own ethical conduct. Yet, this year has been marked by revelation after revelation of justices receiving lavish gifts that they failed to disclose as required by law or otherwise using their offices and taxpayer-funded resources for personal gain. Instead of restoring public confidence in the Court's ethical standards and adopting a binding and enforceable code of conduct, the Court instead issued the *Statement on Ethics*. Just over three months later, Justice Alito has already twice violated this admittedly limited *Statement on Ethics* by "creat[ing] an appearance of impropriety in the minds of reasonable members of the public."²

Last Friday, the *Wall Street Journal* published an interview with Justice Alito.³ In this interview, Justice Alito stated: "I know this is a controversial view, but I'm willing to say it. No provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period."⁴ While this view is plainly incorrect,⁵ we are even more concerned that Justice Alito has

¹ See Attachment to Letter from the Honorable John G. Roberts, Jr., Chief Justice, U.S. Supreme Court, to the Honorable Richard J. Durbin, Chair, Senate Committee on the Judiciary (April 25, 2023) (hereinafter "*Statement on Ethics*").

² *Id.*

³ David B. Rivkin & James Taranto, [Samuel Alito, the Supreme Court's Plain-Spoken Defender](#), WALL ST. J. (Jul. 28, 2023).

⁴ *Id.*

⁵ Congress has substantial authority to regulate the Supreme Court and exercises it consistently, controlling, for example, the Court's size (28 U.S.C. § 1), the time and place of the Court's sitting (28 U.S.C. § 2), and the justices' oath of office (28 U.S.C. § 453). Congress has also on numerous occasions enacted ethics legislation that applies to the justices, including the Ethics in Government Act, the Federal Gift Statute, the Foreign Gifts and Decorations

publicly prejudged a matter that could come before the Court in the future.⁶ The *Statement on Ethics* defines an “appearance of impropriety” as “when an unbiased and reasonable person who is aware of all relevant facts would doubt that the Justice could fairly discharge his or her duties.”⁷ Canon 3(A)(6) of the Code of Conduct for U.S. Judges likewise provides that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.”⁸ Justice Alito demonstrated his understanding of these ethical canons during his 2006 confirmation hearing, where, among other similar testimony, he stated, “I wouldn’t want to prejudge any constitutional question that might be presented to me.”⁹ And yet, we now have Justice Alito publicly remarking on the constitutionality of pending legislation—comments that unquestionably engender doubt that he could fairly discharge his duties should this question come before the Court.

Moreover, this interview was conducted in part by David Rivkin. Mr. Rivkin is a partner at BakerHostetler LLP and is on the team representing plaintiff-appellants in the case *Moore v. United States*, whose dismissal at the district court level was affirmed by the Ninth Circuit.¹⁰ On February 21, Mr. Rivkin and this team sought certiorari for their clients on this case,¹¹ which the Supreme Court granted on June 26.¹² While this case has been pending before the Court, Justice Alito twice sat for interviews with Mr. Rivkin, once in April and again in July.¹³ Mr. Rivkin’s access to Justice Alito and efforts to help Justice Alito air his personal grievances could cast doubt on Justice Alito’s ability to fairly discharge his duties in a case in which Mr. Rivkin represents one of the parties. The relationship between Justice Alito and Mr. Rivkin is also concerning because Mr. Rivkin is counsel for Leonard Leo with regard to this Committee’s investigation into Mr. Leo’s actions to facilitate gifts of free transportation and lodging that Justice Alito accepted from Paul Singer and Robin Arkley II in 2008.¹⁴ This violates the *Statement on Ethics* by creating an appearance of impropriety.

As you wrote in 2011, “[j]udges must exercise both constant vigilance and good judgment to fulfill the obligations they have all taken since the beginning of the Republic.”¹⁵ Due to the aforementioned violations of the *Statement on Ethics*, which Justice Alito himself signed, we believe that he has exercised neither. Recusal in these matters is the only reasonable way for Justice Alito to prevent further damage to public confidence in the Court.

Act, and the Federal Recusal Statute.

⁶ The Senate Committee on the Judiciary marked up and voted out the *Supreme Court Ethics, Recusal, and Transparency (SCERT) Act* for consideration by the full Senate on July 20, 2023.

⁷ *Statement on Ethics* at 2:14-15.

⁸ Code of Conduct for U.S. Judges, Canon 3(A)(6).

⁹ Transcript of January 12, 2006 Senate Judiciary Committee Hearing.

¹⁰ *Moore v. United States*, 36 F.4th 930 (9th Cir. 2022).

¹¹ Petition for Writ of Certiorari, *Moore v. United States*, No. 22-800 (Feb. 21, 2023).

¹² *Moore v. United States*, No. 22-800, 2023 WL 4163201 (Jun. 26, 2023).

¹³ See James Taranto & David B. Rivkin, Jr., [Justice Samuel Alito: ‘This Made Us Targets of Assassination,’](#) WALL ST. J. (Jul. 28, 2023); David B. Rivkin & James Taranto, [Samuel Alito, the Supreme Court’s Plain-Spoken Defender,](#) WALL ST. J. (Jul. 28, 2023).

¹⁴ See Letter from Senators Sheldon Whitehouse and Richard J. Durbin to Leonard Leo, Chairman, CRC Advisors (Jul. 11, 2023).

¹⁵ [2011 Year-End Report on the Federal Judiciary](#) 11 (Dec. 31, 2011).

This episode again illustrates why legislation establishing stronger, enforceable ethics standards for the Court is of paramount importance. The Court is mired in an ethical crisis of its own making, yet its only response has been a weak statement on ethics that Justice Alito has apparently ignored. It is unacceptable for the highest court in the land to have the lowest ethical standards, and because the Court has abdicated its responsibility to establish its own standards, Congress must act.

Thank you for your prompt attention to this request.

Sincerely,



Richard J. Durbin
Chair



Dianne Feinstein
United States Senator



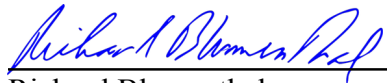
Sheldon Whitehouse
United States Senator



Amy Klobuchar
United States Senator



Christopher A. Coons
United States Senator



Richard Blumenthal
United States Senator



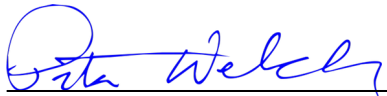
Mazie K. Hirono
United States Senator



Cory A. Booker
United States Senator



Alex Padilla
United States Senator



Peter Welch
United States Senator

cc: The Honorable Lindsey O. Graham
Ranking Member