TESTIMONY OF CAROLINE FREDRICKSON
BEFORE THE COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
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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]

With respect to recusal rules, all federal judges, including the Justices, are subject to statutory standards that require recusal in specified situations. The statute, 28 U.S.C. § 455, requires a judge or Justice to recuse "in any proceeding in which his impartiality might reasonably be questioned."[xvii] Additionally, the statute mandates recusal when the judge or Justice has a financial interest in the proceedings or personal knowledge of disputed facts.[xviii] Decisions on recusals are reviewable on appeal and are treated as orders in the case, except, however for decisions by Justices. Moreover, Justices rarely give reasons for a recusal or failure to recuse.

To establish a better method to police conflicts of interest, reformers have proposed the following requirements: a statement of the basis for a recusal or failure to recuse and a formal process of review by other members of the Court of recusal decisions. These reforms would enhance transparency and accountability as well as remedy the appearance of self-interested rulings that can damage the public image of the Court. There are already other mechanisms to police certain decisions made by individual Justices. For example, when a party makes an application to an individual Justice for an extension of a filing deadline or a temporary stay, a denial can be reviewed by another Justice under Supreme Court Rule 22.[xix]

III. **The "Supreme Court Ethics, Recusal, and Transparency Act of 2022" (H.R. 7647)**

This Committee has already moved to address these issues. 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 both the justices and their employees, ensuring that justices cannot pick and choose their ethical obligations without being bound by a single, uniform code." At that time, the Committee recognized that "[r]ecent ethical lapses by justices appointed by presidents from both parties underscores the urgent need of this legislation." In light of the recent developments, it is more urgent than ever to address this problem.

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

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.