

March 31, 2023

The Honorable Chris Van Hollen
Chair
Subcommittee on Financial Services
and General Government
Senate Committee on Appropriations
United States Senate
Washington, D.C. 20510

The Honorable Bill Hagerty
Ranking Member
Subcommittee on Financial Services
and General Government
Senate Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Chair Van Hollen and Ranking Member Hagerty:

We write to request your support for including in the Fiscal Year 2024 Financial Services and General Government Appropriations bill language directing the Supreme Court of the United States to adopt more stringent and transparent ethics rules, as well as meaningful procedures to enforce those rules.

Fairness and impartiality are the core of the Constitution's promise of an independent judiciary. The power of the federal judiciary comes from the public's confidence that judges will rule honestly and with due respect to all those who enter the courtroom. When the public no longer trusts the courts to live up to these ideals, it undermines the pursuit of justice and disrupts the Constitution's delicate balance of power. Nowhere in the federal judiciary is vigilance against even the appearance of impropriety more important than at the highest court in the land.

For these reasons, the public's plummeting confidence in the Supreme Court, and the Court's unwillingness to address some of the roots of this distrust, are deeply worrying. Over the past two years, the public's trust in the Court has decreased to historic lows.¹ Despite these trends, the Supreme Court has consistently refused to adopt much-needed ethics reforms to address the allegations of misconduct that have no doubt contributed to the public's waning confidence.

Two incidents from the last year alone demonstrate the pressing need for major ethics reforms at the Supreme Court. In one instance, a Supreme Court justice—possibly in violation of federal law—declined to recuse himself from cases implicating his spouse's political activities.² In

¹ Chris Cillizza, *Trust in the Supreme Court is at a record low*, CNN (Sept. 29, 2022), <https://www.cnn.com/2022/09/29/politics/supreme-court-trust-gallup-poll/index.html>; Alison Durkee, *Trust in Supreme Court Drops to New Low, Poll Finds as Ethics Bill Moves Forward in House*, Forbes (May 12, 2022), <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/?sh=649376d247b7>; Pew Rsch. Ctr., *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, (Sept. 1, 2022), <https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/>.

² Nina Totenberg, *Legal ethics experts agree: Justice Thomas must recuse in insurrection cases*, NPR (Mar. 30, 2022), <https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases>; Marcia Coyle, *Ethics Scholars Question Justice Thomas' Participation in Arizona Election Order*, Law.com (Nov. 14, 2022), <https://www.law.com/nationallawjournal/2022/11/14/ethics-scholars-question-justice-thomas-participation-in-arizona-election-order/>.

another, allegations emerged of a 20-year, \$30 million private lobbying campaign led by wealthy activists. These activists offered justices gifts to “embolden” the justices to write increasingly partisan opinions, and may have induced the leak of the Court’s decision in a 2014 case.³

The Supreme Court has responded to most of these serious allegations by ignoring them entirely. When the Court has addressed some of these allegations, it has incorrectly dismissed them as uncorroborated and refused to investigate further.⁴ More generally, justices and Court officials have said that ethics reforms are unnecessary because the justices “consult” the code of conduct that binds all other federal judges.⁵ These assurances do nothing to rectify misconduct that contravenes that code and that the Court has not investigated, much less addressed publicly.

Ethics reform at the Supreme Court has consistently enjoyed strong bipartisan support among legal academics,⁶ the American Bar Association,⁷ members of Congress,⁸ federal judges,⁹ and the

³ Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. Times (Nov. 19, 2022), <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html>; Peter S. Canellos & 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>; Jo Becker & Julie Tate, *A Charity Tied to the Supreme Court Offers Donors Access to the Justices*, N.Y. Times (Dec. 30, 2022), <https://www.nytimes.com/2022/12/30/us/politics/supreme-court-historical-society-donors-justices.html>.

⁴ See, e.g., Letter from Ethan Torrey, Legal Counsel, to Sen. Sheldon Whitehouse & Rep. Henry “Hank” Johnson (Nov. 28, 2022), available at <https://int.nyt.com/data/documenttools/letter-from-scotus-counsel/e3dd2fbf4eda3dd0/full.pdf>.

⁵ See, e.g., 2011 Year-End Report on the Federal Judiciary, at 4-5, <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>; Rich Gardella, *Why Don’t Supreme Court Justices Have an Ethics Code*, NBC News (Apr. 11, 2017), <https://www.nbcnews.com/news/us-news/why-don-t-supreme-court-justices-have-ethics-code-n745236>; Robert Barnes & Ann E. Marimow, *Supreme Court justices discussed, but did not agree on, code of conduct*, Wash. Post (Feb. 9, 2023), <https://www.washingtonpost.com/politics/2023/02/09/supreme-court-ethics-code/>; Letter from Ethan Torrey, Legal Counsel, to Sen. Sheldon Whitehouse & Henry “Hank” Johnson (Nov. 7, 2022), available at <https://www.whitehouse.senate.gov/imo/media/doc/2022.11.7%20-%20Letter%20to%20Chairman%20Whitehouse%20and%20Chairman%20Johnson.pdf>.

⁶ Letter from Legal Ethics Scholars to Hon. John Roberts (Feb. 3, 2022), available at <https://www.scribd.com/document/556480364/Scholars-Letter-on-SCOTUS-Ethics-Code#>; Presidential Commission on the Supreme Court of the United States, *Final Report*, Dec. 2021, at 217, 221, available at <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

⁷ Am. Bar Assoc., *Supreme Court Justices Should Follow Binding Code of Ethics, ABA House Says*, (Feb. 27, 2023), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/feb-23-wl/scotus-ethics-0223wl/.

⁸ See, e.g., Judiciary ROOM Act of 2018, H.R. 6755 (115th Cong.); Courthouse Ethics and Transparency Act, S. 3059 (117th Cong.); Sen. Chuck Grassley, Press Release, *Grassley, Sensenbrenner See Need For Inspector General For the Judiciary*, (Jan. 31, 2007), <https://www.grassley.senate.gov/news/news-releases/grassley-sensenbrenner-see-need-inspector-general-judiciary>; Letter from Sens. Sheldon Whitehouse & Lindsey O. Graham to Hon. John G. Roberts & Scott S. Harris (Feb. 4, 2021), available at <https://www.whitehouse.senate.gov/imo/media/doc/2.4.2021%20Whitehouse-Graham%20SCOTUS%20travel%20%20gift%20disclosure%20letter.pdf>; Letter from Sens. Sheldon Whitehouse & John Kennedy to Hon. Merrick Garland & Hon. Donald W. Washington (June 4, 2021), https://www.whitehouse.senate.gov/imo/media/doc/210604_DOJ%20Letter%20-%20Marshals%20Records%20Request.pdf.

⁹ Nate Raymond, *Most judges in survey support U.S. Supreme Court having ethics code*, Reuters (June 22, 2022), <https://www.reuters.com/legal/government/most-judges-survey-support-us-supreme-court-having-ethics-code-2022-06-22/>.

public.¹⁰ Much-needed, good-governance reform at the Court would help root out misconduct and restore the public’s faith that the justices will live up to their oath to “administer justice without respect to persons,” to do “equal right to the poor and to the rich,” and to “faithfully and impartially discharge and perform all the duties incumbent” upon them as Justices of the Supreme Court of the United States.¹¹

The Supreme Court has the tools and authority it needs to develop and implement these changes, including adopting a code of conduct, creating fairer and more transparent recusal rules, and setting up procedures—based on longstanding procedures in the lower courts—to receive and investigate complaints of judicial misconduct. The only obstacle keeping the Court from adopting these reforms is the Court’s own unwillingness to see them through.

In the absence of such willingness, Congress has broad authority to compel the Supreme Court to institute these reforms, which would join other requirements already legislatively mandated.¹² And Congress’s appropriations power is one tool for achieving these changes. During recent “interbranch disputes” between Congress and “a recalcitrant Executive Branch,” some courts have encouraged Congress to “withhold appropriations,” which can act as a “powerful incentive” for action within the executive branch.¹³ Nothing in the Constitution mandates that the judiciary be treated any differently when Congress is faced with judicial recalcitrance.¹⁴

Accordingly, we respectfully urge you to include the following language in the FY 2024 Financial Services and General Government Appropriations bill:

“Of these funds, \$10 million cannot be obligated unless the Chief Justice notifies the Committee on Appropriations of both Houses of Congress that the Supreme Court has put into effect a public code of ethics for justices of the Court, including policies addressing, at a minimum, circumstances requiring disqualifications and recusals, the receipt and disposition of requests related to disqualifications and recusals, and the publication of such dispositions and the reasons therefor; and

¹⁰ Sabrina Jacobs, *Voters Are Split on Their Perception of the Supreme Court, but Support a Code of Ethics for Justices*, Data for Progress (Apr. 19, 2022), <https://www.dataforprogress.org/blog/2022/4/19/voters-are-split-on-their-perception-of-the-supreme-court-but-support-a-code-of-ethics-for-justices>; C-SPAN & Pierrepont Consulting & Analytics, LLC, *New C-SPAN/Pierrepont Survey: Public Attitudes About the U.S. Supreme Court*, (Mar. 15, 2022), <https://static.c-span.org/files/pressCenter/NEW+C-SPAN+Pierrepont+Supreme+Court+Survey.pdf>; Fix the Court, *New Poll: Greater Transparency at SCOTUS May Be the Only Thing the Left and Right Agree On*, (June 12, 2018), <https://fixthecourt.com/2018/06/stateofscotus/>.

¹¹ Supreme Court of the United States, *Oaths of Office*, <https://www.supremecourt.gov/about/oath/oathsofoffice.aspx>.

¹² See *An Ethical Judiciary: Transparency and Accountability for 21st Century Courts: Hearing Before the Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts. of the S. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Amanda Frost).

¹³ *Comm. on the Judiciary v. McGahn*, 951 F.3d 510, 519, 528-529 (D.C. Cir. 2020) vacated en banc, 968 F.3d 755 (D.C. Cir. 2020); *Comm. on the Judiciary v. McGahn*, 968 F.3d 755, 781, 792 (D.C. Cir. 2020) (en banc).

¹⁴ Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 45 Mercer L. Rev. 835, 845-846 (1995) (“There are no well-accepted arguments that the judicial branch should have the same near total independence to govern itself that individual judges must have in deciding a case or controversy. . . . Settled constitutional practice demonstrates that branch independence is consistent with Congress’s exercise of its authorization, appropriation, and oversight powers, as well as its authority to regulate judicial rule-making authority, internal disciplinary procedures, and general administrative operations.”).

procedures, modeled after the procedures set forth in chapter 16 of title 28, United States Code, for receiving and investigating complaints alleging violations of such public code of ethics or other misconduct by justices of the Court.”

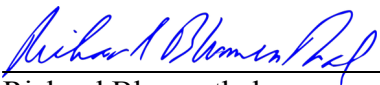
Sincerely,



Sheldon Whitehouse
United States Senator



Cory A. Booker
United States Senator



Richard Blumenthal
United States Senator



Mazie K. Hirono
United States Senator



Peter Welch
United States Senator



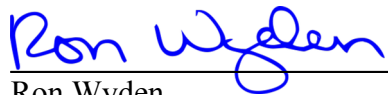
Sherrod Brown
United States Senator



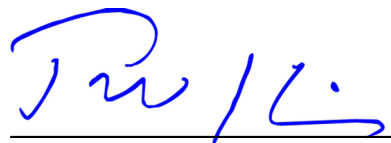
Mark R. Warner
United States Senator



Michael F. Bennet
United States Senator



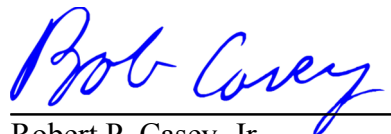
Ron Wyden
United States Senator



Tim Kaine
United States Senator



Bernard Sanders
United States Senator



Robert P. Casey, Jr.
United States Senator



Alex Padilla
United States Senator



Elizabeth Warren
United States Senator



Jeffrey A. Merkley
United States Senator