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Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action, & Federal Rights

Ensuring an Impartial Judiciary:
Supreme Court Ethics, Recusal, and Transparency Act of 2023

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I. Introduction and Background Qualifications

Chairman Whitehouse, Ranking Member Kennedy, and members of the Subcommittee: Thank you for the invitation to testify regarding the Supreme Court Ethics, Recusal, and Transparency Act of 2023 (hereinafter "SCERT").

I am a Professor of Civil Procedure, Constitutional Law, and Federal Courts at the Maurice A. Deane School of Law at Hofstra University, where I have taught for thirteen years following full-time practice at the Brennan Center for Justice at the N.Y.U. School of Law. I am the co-author of *Judicial Conduct & Ethics*,[1] which is the leading desk reference treatise on judicial conduct and ethics. My C.V., including a list of recent publications, is available at https://law.hofstra.edu/directory/faculty/fulltime/sample/cv/cv.pdf. I am the author and co-author of multiple reports in the field of judicial conduct and ethics, along with numerous articles on the subject of judicial disqualification.[2]

There is a systemic failure in our judicial system which, without remedy, will continue to corrode the public's trust, and the courts' legitimacy.[3] In our polarized era, the tendency is to see nearly every issue through a partisan lens. Viewing robust judicial ethics rules in this manner is reductive at best. The acute problems are not limited to jurists of any particular ideological stripe.

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[1] Charles Geyh, James Alfini & James Sample, *Judicial Conduct & Ethics* (6th ed. 2020).

[2] *E.g*., James Sample, *Making Judicial Recusal More Rigorous* (Brennan Center 2010); James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards* (Brennan Center 2008); James Sample, Deborah Goldberg & David Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L. J. 503 (2007); James Sample & David Pozen, *Making Recusal More Rigorous*, JUDGES J., Winter 2007, at 17; James Sample, *Supreme Court Recusal: From Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95 (2013); James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, N.Y.U. ANN. SURV. AM. L. 727 (2011); James Sample, *Lawyer, Candidate, Beneficiary AND Judge? Role Differentiation in Elected Judiciaries*, 2011 UNIV. CHICAGO LEGAL F., 279. In Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009), the leading contemporary U.S. Supreme Court case on the topic of judicial disqualification, Petitioners, along with their lead counsel Theodore B. Olson, asked me to play the lead role in recruiting and coordinating amicus support, resulting in a broad coalition of support including from, inter alia, the ABA, numerous former state judges and justices, big businesses along with traditional adversaries from the labor and the plaintiffs' bar, and dozens of good governance groups from all ends of the political spectrum. In that same landmark litigation on judicial disqualification, I served as counsel of record on an amicus brief in support of Petitioners on behalf of the Brennan Center for Justice at the N.Y.U. School of Law and the Campaign Legal Center. My role in *Caperton* is summarized in *Laurence Leamer, The Price of Justice: A True Story of Greed and Corruption* (2013). In the public media, I have published articles about judicial ethics and disqualification in, inter alia, *The New York Times, The Wall Street Journal, Slate, Judicature, and Judges Journal*, and am regularly cited on recusal and related topics by publications including *The New York Times, The Washington Post, The Los Angeles Times, The National Law Journal, The Economist, ABC News, CBS News, and NBC News*, and myriad other local and national outlets. I have delivered scores of judicial ethics presentations nationally including, e.g., "The National Struggle to Maintain Fair and Impartial Courts," at the Summit of Judicial Leaders in San Francisco California (2006); "Recusal Reform," at the Judicial Independence Conference hosted by Fordham Law School and the Sandra Day O'Connor Project on the Judiciary at Georgetown University Law Center, Fordham Law (2008); "Threats to Fair and Impartial Courts," at the Wisconsin State Bar Annual Convention (2008); "Options for an Independent Judiciary in Michigan" Conference, featuring keynote speaker Justice Sandra Day O'Connor (2010); "Judicial Ethics, Political Activity and Beyond," at the ABA National Conference on Professional Responsibility in Memphis, Tennessee (2011); and "Judicial Ethics at the Appellate Level," at the American Academy of Appellate Lawyers in Denver, Colorado (2023).

[3] Raymond J. Lohier, Jeffery S. Sutton, Diane P. Wood & David F. Levi, *Losing Faith: Why Public Distrust in the Judiciary Matters – and What Judges Can Do About It*, BOLCH JUD. INST. AT DUKE LAW (2022) https://judicature.duke.edu/wp-content/uploads/2022/09/FAITH_Summer2022-1.pdf.

Indeed, the illustrative instances of concern detailed in Part IV of this submission range from Justices Scalia and Gorsuch to Justices Ginsburg and Kagan. All of whom are iconic jurists. With extraordinarily rare exception, the problem is not the people. Though brilliant, Supreme Court Justices *are* human. They make mistakes. The problem is the ad hoc, uneven system. The repeated failure of justices nominated by Democratic and Republican Presidents alike, to recuse themselves in cases when – if they were lower court judges they would have to recuse – is a problematic gap that Congress can and should address. Fair, impartial courts, with rigorous processes and enforcement mechanisms benefit *all* Americans, regardless of partisan differences.

While reasonable minds can disagree on the close calls in individual cases, it is unreasonable to conclude that the Supreme Court's systemic, repeated failure – and even its steadfast refusal – to police itself in the area of judicial ethics is anything other than a serious concern. The Supreme Court's years of ineffectual lip service, and years of increasingly egregious, even brazen disregard for basic norms of judicial ethics, conflict with the Court's obligation to maintain the appearance of impartiality. That is significant. Not only does the appearance of partiality affect the litigants, it is detrimental to the rule of law and public confidence in the Court.[4] As the Supreme Court has explained, "justice must satisfy the appearance of justice."[5] The Eighth Circuit described it this way: "[I]t is essential to protect the judiciary's reputation for fairness in the eyes of all citizens. This reputational interest is not a fanciful one; rather, public confidence in the judiciary is integral to preserving our justice system."[6]

I applaud and recommend the legislation before the Committee today. There has never been a more pressing time to implement a Code of Conduct for the Supreme Court. The great experiment that is American democracy is inherently fragile. It is held together by the goodwill, trust, and faith of the American people. Supreme Court approval ratings are at historic lows.[7] Given the Court's unwillingness to adopt or enforce rigorous rules of ethics, recusal, and transparency, it is within the purview of Congress to legislate to protect and promote due process. SCERT does just that, and it does so without jeopardizing the Court's decisional independence. SCERT is necessary, measured, and constitutional. This submission addresses each of those characteristics.

Robust judicial ethics rules and enforcement procedures are proper remedies. They are also consistent with measures applicable to all other state and federal judges in the country. SCERT embraces a comprehensive approach, ensuring that the highest court in the land is held to the same high standards that apply to all other federal courts. SCERT would reduce conflicts of interest and ethical concerns by updating outdated recusal laws and transparency requirements for *all* courts and by requiring the Supreme Court to finally adopt its own binding - as opposed to purely voluntary and aspirational - code of conduct. The Act would also mandate that the Supreme Court create a transparent, standardized process for receiving ethics or misconduct complaints, and it would establish procedures for resolving such complaints.

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[4] *Cf.* Greg Stohr, *Supreme Court Approval Rating Slides as Clarence Thomas Faces Ethical Controversies*, Bloomberg (May 24, 2023) https://www.bloomberg.com/news/articles/2023-05-24/supreme-court-approval-slides-as-clarence-thomas-s-ethics-issues-mount#xj4y7vzkg.

[5] Offutt v. United States, 348 U.S. 11, 14 (1954).

[6] Wersal v. Sexton, 674 F.3d 1010, 1022 (8th Cir. 2012) (citing Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship")).

[7] *See* Stohr, *supra* note 4.

II. Federal Law Requires Both the Appearance and Reality of Impartial Justice

Section 455(a) of Chapter 28 of the U.S. Code states the following: "Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify [herself] in any proceeding in which [her] impartiality might reasonably be questioned."[8] Section 455(b)(5)(iii) further states that a Judge shall also disqualify herself where she or her "spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person" "[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding."[9]

The standard in section 455 is, by its terms, objective.[10] Indeed, if anything, section 455 layers an excess of caution on top of that objectivity, by emphasizing that disqualification is required whenever the judge's impartiality "*might* reasonably be questioned."[11] Yet the objective standard is combined with a nettlesome tension: it is applied subjectively by the judge or justice in his or her own case. That flaw, especially when combined with the erosion of non-partisan ethics norms, produces uneven and haphazard enforcement at best. Further, chronically opaque recusal processes undermine public confidence in the judicial system.[12]

Similarly, Canon 3C(1)(d)(ii) and (iii) of the Code of Conduct for United States Judges[13] provides the following: A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such person is . . . acting as a lawyer in the proceeding," or "known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." The Code of Conduct for United States Judges exists for the purpose of preserving and promoting both the appearance and the reality of impartial justice.

Canon 2A directs that "a judge should act at all times in a manner that 'promotes public confidence in the integrity and impartiality of the judiciary.'"[14] The Code reinforces the notion that, because judges are human beings, there is a class of cases in which the judge may incorrectly believe himself or herself to be impartial. Thus, the only way to preserve a litigant's right to adjudication before an impartial judge is to require that a judge recuse from a case, not only when he or she consciously perceives his or her own partiality, but also when there exists a reasonable appearance of partiality.

Holding judges accountable to the standards of the Code is necessary to follow the Supreme Court's edict that "to perform its high function in the best way, justice must satisfy the appearance

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[8] 28 U.S.C.S. § 455(a).

[9] 28 U.S.C. § 455(b)(5)(iii).

[10] 28 U.S.C. § 455(a); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

[11] §455(a) (emphasis added).

[12] *See* Raymond J. Lohier, Jeffery S. Sutton, Diane P. Wood & David F. Levi, *Losing Faith: Why Public Distrust in the Judiciary Matters – and What Judges Can Do About It*, BOLCH JUD. INST. AT DUKE LAW (2022) https://judicature.duke.edu/wp-content/uploads/2022/09/FAITH_Summer2022-1.pdf.

[13] As the Committee is aware, the Supreme Court takes the position that justices may voluntarily consult, but are not subject to, the Code.

[14] *Id*.

of justice."[15] It is for this reason that the Code states that an independent and honorable judiciary is "indispensable" to justice in our society: "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges." Therefore, United States judges should "maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved."[16]

III. The Supreme Court Ethics, Recusal, and Transparency Act of 2023

As Part IV of this memo details further, in recent years, the entire federal judiciary, including, but not limited to the Supreme Court, has been rocked by revelations of judges and justices failing to comply with various aspects of 28 U.S.C. §455, by the non-disclosure of expensive gifts, lack of transparency regarding rationales for recusals or non-recusals, coordinated judicial lobbying by 'dark-money' amici curiae, and routine failures to abide by the most basic rules of ethical judicial conduct. The proposed Act takes measured, reasonable steps to remedy these problems.

SCERT is not radical, nor, when considered relative to the judiciary as a whole, is it particularly innovative. Indeed, SCERT aims to rectify the radical circumstance in which one, and only one, court approaches judicial ethics rules on an entirely voluntary, self-determined, aspirational basis. SCERT represents an important, necessary step to *level up* the processes and rules for the Supreme Court so as to bring the Court in line with the rules for lower courts; in line with the baseline ethics rules for Congress; and in line with the baseline rules for the executive branch.

Notably, eight of the current nine justices served on courts in which they were all required to comply with ethics rules previously. It is hardly burdensome to extend regulations and recusal rules upwards when almost all of the current Justices complied with them previously when serving on lower courts. Is it unfortunate that such legislation is necessary? Yes. Is it especially unfortunate that such a leveling up is needed for the branch of government that, in theory, should be held to even higher ethical standards than the constituent branches? Absolutely. Fortunately, though, SCERT adroitly addresses the unfortunate needs.

A. Enforcement of Basic Ethics

Section 455 uses the mandatory word "shall," while also providing judges and justices with standards for fact evaluation. The standards, as opposed to bright-line rules, allow judicial officers "to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard."[17] Characterized optimistically, jurists are regularly forgetting the fact discovery process.[18] Characterized more cynically, they have ample reason for apathy as they know they will not be held accountable. SCERT will provide jurists with a clearer view of

[15] In re Murchison, 349 U.S. 133, 136 (1995) (internal quotations omitted).
[16] *Id*. at 2.
[17] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-94 (1976).
[18] Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA, Apr. 6, 2023, https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow.

the pathway to an ethical decision by ensuring that the factual discovery element of the existing standards is not ignored.

Section 4(b) of SCERT puts the Justices in charge of ascertaining their own personal and fiduciary financial interests, the personal financial interests of their close family, and any other interest of such persons that could be substantially affected by the outcome of a matter. Section 4(a) of the Act amends Section 455(b) to require Justices or judges to disqualify themselves from cases when they know of a party or party affiliate that has made lobbying contact with or spent substantial funds in support of the Justice or judge's nomination, confirmation, or appointment. Section 4(a) also requires disqualification when the Justice's close family or personal business has received gifts, income, or reimbursement from a party within six years of assignment to the case — offering the American public strengthened impartiality and its appearance.

B. Transparency

The public's trust in the Court is essential. The essentiality of that trust does not square with lavish, undisclosed luxuriating via the largesse of private benefactors, and particularly not when those benefactors not only have direct interests before the Court, but also have derivative interests in connecting their friends to their beneficiaries on the bench.

Federal law already requires certain disclosures and transparency,[19] but vis-a-vis the Justices, those laws lack the meaningful enforcement that SCERT facilitates. The proposed law requires (1) courts to immediately notify parties when it becomes clear that a judge may be conflicted, (2) written explanations for all recusal decisions, and (3) the Federal Judicial Center to conduct biennial studies of how well the judiciary is complying with federal recusal laws. The Act would also require the Supreme Court to create a transparent and standard process for receiving ethics or misconduct complaints and establish procedures for resolving such complaints. This should all contribute to the goal of Section 455, per the Court itself,[20] to avoid even the appearance of impropriety.

SCERT also brings greater transparency to determining the identities and interests of those trying to influence the court. It requires amici curiae and their parties to disclose any gifts, income, or reimbursements they have recently provided to a judge in a case, while also mandating that the Administrative Office of the Courts conduct an annual audit to ensure compliance with this section. SCERT would even ensure that the Supreme Court and lower courts develop rules clarifying when an amicus curiae's connection to a judge might cause the court to strike an amicus curiae brief.

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[19] Ethics in Government Act of 1978, Pub. L. No. 95-521, §302(a), 92 Stat. 1824, 1861 (1978) (current version at 5 U.S.C. §13104) (requiring various federal officials to disclose, inter alia, non-governmental income, gifts, and reimbursements).

[20] *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988); MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/.

SCERT would thus reduce the ability of highly organized, dark-money-financed amici to lobby judges in a manner that obscures the identities and interests of those who fund them.[21]

Chairman Whitehouse himself has incisively detailed the current common practice:

> [A] network of groups that receive common amicus funding and often have ties to the parties in interest . . . regularly file briefs before the Court with no disclosure of their common funding or connections to the parties. This practice of judicial lobbying through amicus influence poses ethical issues representative of today's political climate, in which dark money abounds, compromising our courts.[22]

In our current, flawed system, Justices are expected to self-evaluate their biases, balance their roles as fair jurists, and do so in a manner that, whatever their own subjective view of their impartiality, also *appears* to others to be objectively reasonable.[23] It should come as no surprise that the results of such a system are uneven and inconsistent, even to the point in which, given analogous circumstances, some Justices recuse while others do not. SCERT requires jurists to either recuse themselves or have the question referred to an impartial panel of randomly selected judges. In the case of the Supreme Court, the "panel" consists of the other Justices of the Supreme Court.

The Act reduces the burden, not to mention the psychological challenges of individual Justices unilaterally judging their own cases, via a mechanism analogous to a tried and true tool by which our legal system objectifies inquiries: formal consideration by the individual justice's peers. This system would be consistent with the practices of many state supreme courts, in which state high court justices often review recusal matters involving their colleagues.[24] Similarly, as Professor Charles Geyh has noted, federal circuit judges regularly review the decisions of district court judges not to recuse.[25]

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[21] *See* Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, POLITICO & THE TRACE, (Aug. 5, 2022) https://www.politico.com/interactives/2022/nra-supreme-court-gun-lobbying/.

[22] Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J. (2021)

[23] Charles G. Geyh, *Why Judicial Disqualification Matters. Again.*, 30 Rev. of Litig. 671, 708 (2011) (discussing judges' psychological ability to assess their own bias); Debra Lyn Bassett, *Three Reasons Why the Challenged Judge Should Not Rule on A Judicial Recusal Motion*, 18 N.Y.U. J. Legis. & Pub. Pol'y 659, 611–662 (2015); Matthew Menendez & Dorothy Samuels, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, BRENNAN CTR. FOR JUST. 1, 4 (2016), https://www.brennancenter.org/sites/default/files/publications/Judicial_Recusal_Reform.pdf [hereinafter *Brennan Center Report*]. https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf. ((Furthermore, when a judge is faced with a recusal motion that presents information already in the judge's ken, but about which the judge did not recuse *sua sponte,* "[the judge] is being asked to admit that she has already failed in her ethical obligation to recuse herself.).

[24] *See* Amanda Frost, *Supreme Court Ethics Reform* 10 (testimony to 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 (citing *State v. Allen*, 322 Wisc. 2d 372, 453-458 (2010) (summarizing state supreme court practices).

[25] *See* CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 99-109 (3d ed. 2010).

IV. Select Examples Illustrative of Concerns

Ethical concerns regarding conflicts of interest permeate the history of the Court, dating back to its early origins. It is worth noting that, even in the landmark case of *Marbury v. Madison*, Justice Marshall wrote the majority opinion in a decision where both he and his brother stood to gain or lose tremendously from the outcome. Despite the historical existence of conflicts, in recent decades both the severity, regularity and accompanying controversy of conflict-of-interest circumstances have increased significantly, due in part to the flaw that the Justices themselves have the final word in evaluating their own cases, without oversight or consequence.

I recommend a resource compiled by "Fix the Court" of instances in which the current, unilateral, justice-as-arbiter-in-his-or-her-own-case system fell short of even minimal compliance.[26] For present purposes, I include below brief summaries of relatively recent ethical concerns. This is not to say that the wrong recusal decision was reached in each instance included below, but rather, merely to highlight the fundamental flaws of the current process. The examples below show that concerns are genuine, and not limited to justices of any one ideological bent. Indeed, fairness, impartiality, the appearance of impartiality, and confidence in the courts are fundamental, non-partisan due process interests.

A. Justice Scalia

Many called for Justice Antonin Scalia to recuse from the 2004 case of *Cheney v. United States District Court for District of Columbia* where his close friend, Vice President Dick Cheney was a party.[27] *Cheney* was amplified after details regarding a duck hunting trip were released to the public. The Sierra Club, an opposing party, argued that Justice Scalia's impartiality "might reasonably be questioned," thus satisfying the standard for recusal.[28] Justice Scalia's friendship with the Vice President, coupled with the hunting trip immediately prior to the petition for certiorari, raised concerns as to the appearance of favoritism.[29] Justice Scalia dismissed ethical violation allegations, claiming that any alone time he could have spent with the Vice President was so short as to be rendered insignificant, and that, while he did fly on Air Force 2, he had purchased round trip tickets beforehand and had accepted the flight strictly out of convenience.[30] To be clear, as far back as 2013, I am on record as applauding the transparent manner in which Justice Scalia provided the American people with the reasoning behind his decision not to recuse himself in the case. *That* aspect of the duck-hunting saga is a model of the transparency that SCERT embraces and encourages. The saga writ large, however, nonetheless illustrates valid concerns.

B. Justice Ginsburg

Justice Ruth Bader Ginsburg faced calls by Republican members of Congress to

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[26] *Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interest*, FIX THE COURT (May 11, 2023) https://fixthecourt.com/2023/05/recent-times-justice-failed-recuse-despite-clear-conflict-interest/ (updated periodically).

[27] Cheney v. U.S. Dist. Court, 541 U.S. 913 (2004) (Scalia, J., mem.).

[28] *Id*.

[29] *See id.*

[30] *Id.*

preemptively recuse herself from all future litigation before the Court involving abortion, because of her work with the NOW Legal Defense Fund.[31] Just fifteen days after agreeing with an amicus brief filed by NOW, Justice Ginsburg introduced a lecture series in partnership with the fund titled "Fourth Annual RBG Distinguished Lecture Series on Women and the Law"[32] and donated signed copies of her most historic decisions to charity events for the fund.[33] Justice Ginsburg was also quoted saying that certain potential appointments to the Court would not "advance" human or women's rights.[34] Affiliations with cause-oriented legal groups can, in some circumstances, create a loss of public faith in the rule of law. While not necessarily an easy call as far as ethical violations go, Justice Ginsburg failure to recuse in cases related to the NOW Fund arguably crossed the line of whether her "impartiality might reasonably be questioned."[35]

Justice Ginsburg was also heavily criticized for commenting on then-presumptive Republican presidential nominee Donald Trump. In three separate media interviews, Justice Ginsburg referred to Trump as a "faker" and stated that she "[couldn't] really imagine what it would be like if he became president."[36] The Justice walked back her comments in a brief statement issued by the Court, admitting that she made a mistake and stating that "Justices should avoid commenting on a candidate for public office."[37] Still, her comments represented yet another instance where actions taken by a Supreme Court Justice raised serious ethical concerns. It is worth noting here that the judicial code binding the lower federal courts prohibits judges from endorsing or speaking about political candidates.[38]

C. Justice Gorsuch

Justice Neil Gorsuch, alongside two other investors operating as "Walden Group LLC," sold a forty-acre tract of land in Colorado to the chief executive of a law firm that has had at least twenty-two cases before the Court since the transaction.[39] In the twelve cases in which Justice

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[31] Jimmy Moore, *Supreme Court Justice Ginsburg Under Fire for Close Ties to Women's Advocacy Group*, TALON NEWS (Mar. 12, 2004, 9:53 AM PST), http://www.freerepublic.com/focus/f-news/1096378/posts.

[32] Ginsburg commented on the lecture series while explaining her refusal to recuse herself on issues over which the NOW Legal Defense Fund took an interest: "I think and thought and still think it's a lovely thing. Let the lecture speak for itself." As one of the nation's leading supporters of abortion rights, it is no mystery that the message would be to "protect and preserve a constitutional right to abortion." Peter S. Canellos, *Outspoken Justices Cloud High Court's Appearance*, BOSTON GLOBE, June 15, 2004, at A3.

[33] Sandra Pullman, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU (Mar. 7, 2006), http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff#end.

[34] Jed Babbin, *J'Recuse,* THE A.M. SPECTATOR (Sept. 26, 2005, 12:08 AM), http://spectator.org/archives/ 2005/09/26/jrecuse; *see also Second Day of Hearings on the Nomination of Judge Roberts,* N.Y TIMES, Sept. 13, 2005, *available at* http://www.nytimes.com/2005/09/13/politics/politicsspeciall/13text-roberts.html? pagewanted= all (transcribing the colloquy between then-U.S. Senator Biden and then-Chief Justice Nominee Roberts).

[35] 28 U.S.C. §455.

[36] Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret For Criticizing Donald Trump*, THE NEW YORK TIMES, (July 14, 2016) https://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html.

[37] *Id*.

[38] Robert Barnes, *Ginsburg Expresses 'Regret' For Remarks Criticizing Trump*, THE WASH. POST (July 14, 2016), https://www.washingtonpost.com/politics/ginsburg-expresses-regret-over-remarks-criticizing-trump/2016/07/14/f536. 87bc-49cc-11e6-bdb9-701687974517_story.html.

[39] Amy B. Wang, *Gorsuch Property Sale Renews Calls For Supreme Court Ethics Reform*, THE WASH. POST (April 25, 2023) https://www.washingtonpost.com/politics/2023/04/25/neil-gorsuch-property-sale-law-firm-ethics/.

Gorsuch's opinion is recorded, he sided with the firm's clients eight times and against the firm only four times.[40] The property, first listed in 2015, sold in 2017 — just nine days before Justice Gorsuch was confirmed to the Court. Justice Gorsuch did list income from Walden Group LLC on his financial disclosure forms the following year, but did not acknowledge the land sale, and in the column where he could list the identity of the buyer/purchaser of a private transaction, he left the box blank.[41] While the chief executive at the firm denies ever having met or interacted with the Justice, had the situation arisen in any other court of law, recusal would likely have been warranted. But because the decision is left up to Justice Gorsuch, and more to the point, is entirely unreviewable, his subjective determination is not only final, but effectively infallible. We can do better. SCERT paves the way for that improvement.

D. Justice Kagan

Justice Elena Kagan faced several conflicts between her earlier work as Solicitor General and her work on the Court. At her confirmation hearing, Kagan stated that as a general rule, if she had personally reviewed a draft pleading or participated in discussions to formulate the government's litigation position, she would recuse in a related case, even if she had not been the formal decision maker.[42] In direct questions regarding the Affordable Care Act, Justice Kagan assured that she did not express an opinion on the merits of the bill at any time as Solicitor General, though she did work in the Solicitor General's office while the bill was in Congress, a situation that would ordinarily warrant recusal.[43] Justice Kagan's answers reflect the portion of section 455 requiring disqualification "[w]here [the Justice] has served in governmental employment and in such capacity participated as counsel [or] adviser concerning the proceeding or expressed an opinion concerning the merits of the particular case or controversy."[44]

The most jarring aspects of Justice Kagan's lack of recusal in the Affordable Care Act litigation are illustrated by a series of emails exchanged between her and her colleagues in the Solicitor General's Office and with her former colleague from Harvard Law School, Laurence Tribe.[45] While the White House's official posture and Justice Kagan's direct, unequivocal oral response during her Senate confirmation hearing reflect a solicitor general who was entirely walled off from any participation on the litigation strategy in defense of the Affordable Care Act, the emails reveal a more nuanced reality.

Senior Counsel Brian Hauck in the Associate Attorney General's Office (hereinafter "the AAG's Office") e-mailed Kagan's then-deputy Neal Katyal stating:

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[40] *Id*.

[41] Heidi Przybyla, Law Firm Head Bought Gorsuch-Owned Property. POLITICO, (April 25, 2023) https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579.

[42] *Elena Kagan's Old Job as Solicitor General is Having an Effect on Her New One*, THE WASH. POST, published by CLEAVELAND.COM (Oct. 3, 2010, 10:38 PM), https://www.cleveland.com/nation/2010/10/elena_kagans_old_job_as_solici.html (citing Robert Barnes, *Recusals Could Force Newest Justice to Miss Many Cases*, WASH. POST, Oct. 4, 2010, at Al5).

[43] *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nominations*, THE WASH. POST (June 30, 2010), https://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY3.pdf.

[44] 28 U.S.C. §455.

[45] James Sample, *Supreme Court Recusal: From Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 145-150 (2013).

> Hi Neal – Tom wants me to put together a group to get thinking about how to defend against the inevitable challenges to the health care proposals that are pending, and hoped that OSG [Office of the Solicitor General] could participate. Could you figure out the right person or people for that? More the merrier. He is hoping to meet next week if we can."[46]

Katyal forwards the message to Kagan, saying that he is "happy to do this if you [Kagan] are ok with it."[47] Kagan's response, in full to Katyal, states, "You should do it."[48] Katyal then informed the AAG's Office that "Elena would definitely like OSG to be involved in this set of issues" and that "we will bring Elena in as needed."[49] Katyal copied Kagan on his advice to Associate Attorney General Thomas Perrelli that the DOJ "start assembling a response" to a draft complaint.[50] On March 21, 2010, Katyal e-mailed Kagan with his advice that she should attend a DOJ meeting with the White House's health-care policy team with Katyal stating, "I think you should go, no?" since this is "litigation of singular importance."[51] In emails with Tribe that may have received the most media attention, Justice Kagan wrote, "I hear they have the votes, Larry!! Simply amazing."— referring to the floor votes with respect to the health care bill's potential (but not yet actual) passage.[52]

Justice Kagan's email sequence — much like Justice Gorsuch's property sale — provides yet another instance where, had the judge involved served on a lower court, rather than the Supreme Court, the recusal outcome might have been different. Even if the end result had been the same, the process would serve as a source of some legitimacy.[53]

E. Justice Thomas

It was recently reported that Justice Thomas has, for over two decades, repeatedly accepted luxury trips from Republican donor Harlan Crow.[54] In addition to accepting hundreds of thousands of dollars' worth of vacations, including trips on private jets and superyachts, Justice Thomas has repeatedly failed to disclose these trips on his financial statements. That is not only

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[46] E-Mail from Brian Hauck, Senior Counsel, Assoc. Att'y Gen.'s Office, to Neal Katyal, former Deputy Solicitor Gen. (Jan. 8, 2010, 10:54 AM) (https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf).

[47] E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan, (Jan 8, 2010, 10:57 PM) (https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf).

[48] E-Mail from Elena Kagan, , to Neal Katyal, former Deputy Solicitor Gen. (Jan. 8, 2010, 11:01 AM) (https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf).

[49] E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan (May 17, 2010, 1:19 PM) (https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf).

[50] E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Thomas Perrelli, Assoc. Attorney General, and Elena Kegan (Mar. 18, 2010, 1:37 PM) (https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf).

[51] E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan (May 17, 2010, 1:19 PM) (https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf).

[52] Jake Tapper, *Then-Solicitor General Kagan on Health Care Bill Wrote 'I Hear They Have the Votes!! Simply Amazing,'* ABC NEWS BLOGS (Nov. 16, 2011, 11:32AM), https://abcnews.go.com/blogs/politics/2011/11/then-solicitor-general-kagan-on-health-care-bill-wrote-i-hear-they-have-the-votes-simply-amazing.

[53] Jonathan H. Adler, *Mukasey on the ObamaCare "Recusal Nonsense,"* VOLOKH CONSPIRACY (Dec. 5, 2011, 8:51 AM), https://volokh.com/2011/12/05/mukasey-on-the-obamacare-recusal-nonsense/.

[54] Joshua Kaplan, Justin Elliott, and Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 7, 2023, 5:00 AM) https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow.

unethical, but a violation of The Ethics in Government Act of 1978.[55] While that law excludes from its purview "personal hospitality," such as food or lodging, the personal hospitality exception does not include private jet transportation for social events and vacations.[56]

This recent discovery mirrors a similar scenario from 2011 in which Justice Thomas failed to disclose his wife's substantial income over a period of years, including income earned from an interest group she founded that was funded with half a million dollars from Harlan Crow — the repeated, outlier-level benefactor of Justice Thomas himself.[57]

Justice Thomas claims that he did not disclose the gifts or his wife's income because he assumed they amounted to standard hospitality between longtime friends and that there was a misunderstanding in the filing instructions, respectively.[58] However, the repetition of such glaring oversights, between the same actors, strains credulity. The lack of meaningful repercussions disincentivizes compliance, and the entire saga underscores the need for precisely the judicial ethics reforms that SCERT would provide.

Justice Thomas's decision not to recuse from January 6th related matters deserves separate mention. The shock over Justice Thomas's decision to pass judgment on such matters has stemmed from the direct involvement of his spouse, Virginia (Ginni) Thomas, in perpetuating the "stolen election" conspiracy. Ms. Thomas not only publicly empathized with January 6th rioters, she urged Arizona legislators and the White House Chief of Staff to help overturn Biden's victory.[59] In November 2022, Justice Thomas voted to block a subpoena against the Arizona Republican Party chair for phone records that could have implicated Ms. Thomas.[60] Most notably, Justice Thomas was the lone dissenter in *Trump v. Thompson*, in which he argued in favor of Mr. Trump's bid to withhold presidential records from the January 6th committee.[61]

Contextually, the text messages Ms. Thomas sent — and the centrality of the person to whom she sent them during the contentious weeks following the 2020 election — could scarcely be more telling: Writing to the White House Chief of Staff, Mark Meadows, Ms. Thomas said,

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[55] *Id.*

[56] 5 U.S.C. §13104(a)(2) ("any food, lodging, or entertainment received as personal hospitality of an individual need not be reported"); §13104(a)(3) (requiring the disclosure of reimbursements that "includ[e] a travel itinerary, dates, and nature of expenses provided").

[57] *Id.*

[58] Zoe Tillman, *Justice Thomas Ethics Review Queried by US Court Leader in 2012*, BLOOMBERG LAW (May 5, 2023, 7:46 PM) https://news.bloomberglaw.com/us-law-week/justice-thomas-ethics-review-queried-by-us-court-leader-in-2012.

[59] Jonathan J. Cooper and Mark Sherman, *Ginni Thomas' emails deepen her involvement in 2020 election,* PBS (May 20, 2022, 7:22 PM) https://www.pbs.org/newshour/politics/ginni-thomas-emails-deepen-her-involvement-in-2020-election.

[60] *Ward v. Thompson*, 214 L. Ed. 2d 250, 143 S. Ct. 439 (2022). SCOTUSBLOG describes the Arizona matter at issue in *Ward* this way: "Thomas' wife, Ginni Thomas, lobbied Arizona lawmakers in November 2020 to set aside the victory by then-President-elect Joe Biden and choose a "clean slate of Electors." According to The Washington Post, which first reported on Thomas' efforts, Ginni Thomas sent emails to two members of the Arizona legislature through an online platform "designed to make it easy to send pre-written form emails to multiple elected officials." *See* Amy Howe, *Court allows Jan. 6 committee to obtain phone records of Arizona GOP chair*, SCOTUSBLOG (Nov. 14, 2022, 12:13pm). https://www.scotusblog.com/2022/11/court-allows-jan-6-committee-to-obtain-phone-records-of-arizona-gop-chair/.

[61] Trump v. Thompson, 142 S. Ct. 680, 211 L. Ed. 2d 579 (2022).

"Help This Great President stand firm, Mark!!! … You are the leader, with him, who is standing for America's constitutional governance at the precipice. The majority knows Biden and the Left is attempting the greatest Heist of our History."[62] Similarly, Ms. Thomas wrote to Mr. Meadows, "Sounds like Sidney and her team are getting inundated with evidence of fraud. Make a plan. Release the Kraken and save us from the left taking America down."[63]

Justice Thomas contends that he had no knowledge of his wife's involvement in the events culminating with the January 6th attacks. Even if one assumes that to be true, *prospectively* this will not remain a credible excuse in future cases regarding January 6th; the fact of Ms. Thomas's testimony about her involvement before the January 6th committee is common knowledge.[64] More to the point, however, *might it be reasonable* to question Justice Thomas's impartiality in adjudicating January 6th cases? *Might* it be better for him <u>not</u> to be the only person determining the answer to the prior question? *Res ipsa loquitur.*[65]

F. Chief Justice Roberts

In his 2011 State of the Judiciary address, Chief Justice Roberts asserts that the Supreme Court is so fundamentally different from the lower federal courts that a code of conduct need not apply. Chief Justice Roberts claims that a Code of Conduct is unnecessary because "every Justice seeks to follow high ethical standards."[66] If this is true, however, one would think the Justices would actually welcome a Code of Conduct to ensure, in a clear and accessible manner, that they are acting ethically, as it would alleviate any issues of close calls or questionable ethical decisions. Chief Justice Roberts reminds us that there is no higher court to review a Justice's recusal decisions as the Supreme Court is the court of last resort and there is no replacement for a Supreme Court Justice. This "duty to sit" with all nine on the court does not, however, tell the full story. The current quorum is set at six Justices, allowing the Court to issue an opinion when up to three Justices are absent — something this Court (and almost every Court prior) has done.[67]

In his recent letter to Chairman Durbin, the Chief Justice declined the invitation to testify before the Senate Judiciary Committee, stating that "testimony before the Senate Judiciary

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[62] Bob Woodward and Robert Costa, *Virginia Thomas urged White House chief to pursue unrelenting efforts to overturn the 2020 election*, THE WASH. POST (March 24, 2022) https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/.

[63] *Id.*

[64] *Ginni Thomas Tells Jan 6 Committee She Regrets Texting with Meadows about 2020 Election,* CBS NEWS (Dec. 30, 2022, 3:01 PM) https://www.cbsnews.com/sanfrancisco/news/ginni-thomas-tells-jan-6-committee-she-regrets-texting-with-meadows-about-2020-election/.

[65] 28 U.S.C. §455 ("Any justice . . . of the United States shall disqualify himself in any proceeding in which his impartiality *might* reasonably be questioned" (emphasis added)).

[66] *See generally* CHIEF JUSTICE ROBERTS, 2011 YEAR END REPORT ON THE FEDERAL JUDICIARY 1(Dec. 31, 2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[67] It is an open question as to whether Congress and/or the Court could, or should, constitutionally authorize, for example, a randomly drawn circuit court judge to sit on a one-time basis, by designation in place of a recused Supreme Court Justice. If so, the "duty to sit" argument has even less force. Certainly, such a practice would be consistent with designation practices in the lower courts, and in many state supreme courts. It is also true, however, that the Supreme Court is constitutionally unique in respects that can reasonably be argued to counsel against such a practice. In any event, SCERT does not include such a provision, and the question, while interesting as a matter of theory, is not presented by the legislation before the Committee.

Committee by the Chief Justice is exceedingly rare."[68] He further implied that doing so would jeopardize judicial independence and the separation of powers. It is impossible to neglect that Chief Justice Roberts qualifies his statement with the words, "by a Chief Justice"; without them, his statement would be incorrect. Sitting Justices have testified before Congress in ninety-two hearings since 1960 in various matters regarding the judiciary.[69]

V. SCERT Is Consistent with Congressional Authority to Regulate Judicial Ethics

Four sources of constitutional interpretation — constitutional text, history, case law, and purpose — all support the constitutional power of Congress to enact SCERT.

A. Text

Article III, Section 1 of the Constitution states, "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."[70]

Article I, Section 8 states, in relevant part, "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . *all* . . . Powers vested by this Constitution in the Government of the United States, *or in any Department* or Officer thereof."[71] The Constitutional vests judicial power in the judicial branch, a "Department" of the United States.[72] Combined with Article III, the Necessary and Proper Clause establishes Congress's authority to carry the judicial power into execution.

McCulloch v. Maryland recognized the broad scope of the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."[73] SCERT fits neatly within the *McCulloch* framework: First, establishing an ethical judiciary is a legitimate end.[74] Second, as Professor Amanda Frost details extensively in her May 2, 2023, submission to the Committee, this end is within the scope of Article III,[75] and "Article III 'leaves Congress in charge of many of the details'

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[68] Jordan Rubin, *John Roberts Calls Dick Durbin's Bluff, Declines Ethics Testimony Invite*, MSNBC (April 26, 2023) https://www.msnbc.com/deadline-white-house/deadline-legal-blog/john-roberts-senate-judiciary-committee-durbin-rcna81471.

[69] Robert Barnes and Ann Marimow, "*Supreme Court Justices discussed, but did not agree on, code of conduct*," THE WASH. POST, Feb. 9, 2023.

[70] U.S. CONST. art III, §1.

[71] U.S. CONST. art I, §8 (emphasis added).

[72] At the time of the framing, the judicial branch was commonly referred to as a "Department." *E.g.* THE FEDERALIST NO. 78 (Alexander Hamilton), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/fed78.asp (last visited June 11, 2023) ("WE PROCEED now to an examination of the judiciary department of the proposed government"); Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is").

[73] McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

[74] Offutt v. United States, 348 U.S. 11, 14 (1954) (prohibiting judges from deciding contempt charges entangled with their personal feelings because "justice must satisfy the appearance of justice").

[75] Amanda Frost, *Supreme Court Ethics Reform* 11-13 (testimony to 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.

necessary to implement federal judicial power."[76] Third, the SCERT provisions — establishing ethics and disclosure rules for all judicial officers along with a process to enforce them — are means plainly adapted to the end of implementing an ethical federal judiciary. Finally, none of those provisions are prohibited by the Constitution.[77]

Textual analysis of the Constitution thus reveals that Congress has the authority to enact SCERT under the Necessary and Proper Clause in conjunction with the Vesting Clause of Article III.

B. History

Historical analysis also supports Congress's authority to make laws that carry the judicial power into execution, including laws that regulate the Supreme Court. The First Congress, whose members included sixteen Framers,[78] enacted the Judiciary Act of 1789 which established the Supreme Court and lower courts by filling in the details left out of Article III.[79] Ever since, Congress has exercised this same authority to control the Supreme Court's size,[80] quorum,[81] location,[82] term,[83] salary,[84] staff,[85] and ethics (e.g., by mandating an oath of office[86]). Consider, purely hypothetically and by way of illustration, that Congress could constitutionally expand the Court from nine justices to nineteen. Comparatively, regulating justices' ethical conduct, especially in a manner that defers to the Court as to many of the details, is but a modest measure that strengthens the Court.

Similarly, by way of a less dramatic example, there is no constitutional doubt as to the validity of the ethics legislation passed in the 20th Century: In 1948, Congress enacted the first version of 28 U.S.C. §455, which established a recusal standard that applied to "any Justice or

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[76] *Id.* at 11 (citing JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT OF THE UNITED STATES 2 (Oxford University Press, 2009).

[77] None of the SCERT provisions limit the tenure of judicial officers, U.S. CONST. art III, § 1, reduce the salary of judicial officers, *id.*, or expand the judiciary's jurisdiction beyond the limits of Article III, Section 2, *id.* §2; Marbury v. Madison, 5 U.S. 137, 175 (1803).

[78] Senators William Samuel Johnson and Roger Sherman of Connecticut, Senators Richard Basset and George Read of Delaware, Senator William Few and Representative Abraham Baldwin of Georgia, Representative Daniel Carroll of Maryland, Senator John Langdon and Representative Nicholas Gilman of New Hampshire, Senator William Paterson of New Jersey, Senator Rufus King of New York (represented Massachusetts in the Constitutional Convention), Representative Hugh Williamson of North Carolina, Senator Robert Morris and Representative George Clymer of Pennsylvania, Senator Pierce Butler of South Carolina, and Representative (and later President) James Madison Jr. of Virginia. U.S. CONST. SIGNATURES; *The First Federal Congress*, FIRST FEDERAL CONGRESS PROJECT, https://www2.gwu.edu/~ffcp/exhibit/p1/members/ (last visited June 11, 2023).

[79] Judiciary Act of 1789, 1 Stat. 73, AVALON PROJECT, https://avalon.law.yale.edu/18th_century/judiciary_act. asp (last visited June 11, 2023).

[80] *Id.* §1 (current version at 28 U.S.C. §1).

[81] *Id.* (current version at 28 U.S.C. §1).

[82] *Id.* (current version at 28 U.S.C. §2).

[83] *Id.* (current version at 28 U.S.C. §2).

[84] Compensation Act of 1789, 1st Cong., sess. 1, ch. 18, §1, LIBRARY OF CONGRESS, https://tile.loc.gov/ storage-services/service/ll/llsl/llsl-c1/llsl-c1.pdf (last visited June 11, 2023) (enacted one day before the Judiciary Act of 1789) (current version at 28 U.S.C. §5).

[85] Judiciary Act of 1789, *supra* note 79, §7 (current version at 28 U.S.C. §671-77).

[86] *Id.* §8 (current version at 28 U.S.C. §453).

judge."[87] In the Ethics in Government Act of 1978, Congress required various government officers, including the Chief Justice and Associate Justices,[88] to file an annual report[89] disclosing, inter alia, their non-governmental income,[90] gifts,[91] and reimbursements.[92] Finally, in the Ethics Reform Act of 1989, Congress prohibited various government officers, including "officer[s] . . . of the . . . judicial branch[]," from accepting gifts by individuals affected by the officer's public functions.[93]

In light of the historical precedent of Supreme Court regulation, Congress possesses the constitutional authority to further regulate the Court with SCERT. The new disclosure requirements fall in line with the standards set in 1978,[94] just as the new recusal rules fall in line with the standards set in 1948.[95] With the new enforcement process, SCERT fills in the details necessary to establish an ethical judiciary. The accepted use of Congress's greater power to regulate the Supreme Court's size,[96] quorum,[97] and even jurisdiction,[98] imply Congress's lesser power to regulate the process of recusal.

C. Case Law

Despite the textual and historical support of Congress's authority to regulate the Supreme Court, opponents of legislation akin to SCERT contend that separation of powers concerns preclude such measures. Case law, however, reinforces the legitimacy of measures that, without jeopardizing the core functions of co-equal branches, facilitate meaningful checks and balances.

As the Court itself notes, "we have never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.'"[99] Rather, as the Court held in the Congress-to-Executive Branch context, "in determining whether [an] Act violates the separation-of-powers principle the proper inquiry requires analysis of the extent to which the Act prevents the [separate branch] from accomplishing its constitutionally assigned functions."[100] The Court has developed a three-part test to determine whether a congressional act violates this separation of powers principle.

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[87] Act of June 25, 1948, ch. 646, §455, 62 Stat. 869, 908 (1948) (current version at 28 U.S.C. §455).

[88] Ethics in Government Act of 1978, Pub. L. No. 95-521, §308(9), 92 Stat. 1824, 1861 (1978) (current version at 5 U.S.C. §13101(10)).

[89] *Id.* §301(c) (current version at 5 U.S.C. § 13103(d)).

[90] *Id.* §302(a)(1)(A)-(B) (current version at 5 U.S.C. § 13104(1)(A)-(B)).

[91] *Id.* §302(a)(2)(A)-(B) (current version at 5 U.S.C. § 13104(2)(A)).

[92] *Id.* §302(a)(2)(C) (current version at 5 U.S.C. § 13104(2)(B)).

[93] Ethics Reform Act of 1989, Pub. L. No. 101-194, sec. 303, § 7353(a), 103 Stat. 1716, 1742 (1989) (current version at 5 U.S.C. §7353(a)).

[94] Ethics in Government Act of 1978 §302(a)(1)-(2) (current version at 5 U.S.C. §13104(1)-(2)).

[95] Act of June 25, 1948 §455 (current version at 28 U.S.C. §455).

[96] Judiciary Act of 1789, *supra* note 88, §1 (current version at 28 U.S.C. §1).

[97] *Id.* (current version at 28 U.S.C. §1).

[98] U.S. CONST., art. III, sec. 2 (defining the Supreme Court's appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make"); *Ex parte McCardle*, 74 U.S. 506 (1868).

[99] Morrison v. Olson, 487 U.S. 654, 693-94 (1988) (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

[100] United States v. Nixon, 418 U.S. 683, 707 (1974)).

The first element is whether Congress is attempting to increase its own powers at the expense of another branch.[101] SCERT does not shift control over recusal decisions to Congress. The control over disqualification remains in the judiciary; SCERT simply shifts the decision-making power to Justices who are not involved in the potential conflict. Congress's prospective role, were SCERT adopted, would be, "limited to receiving reports or other information and oversight . . . functions that we have recognized generally as being incidental to the legislative function of Congress."[102]

The second element is whether the Act causes the usurpation of another branch's proper functions.[103] The proper, core function of the judicial branch is deciding cases or controversies and doing so with decisional independence.[104] SCERT does not usurp judicial functions; it rather furthers the legitimacy, and the appearance of legitimacy, of the Court carrying out those core functions.

The final element is whether the Act impermissibly undermines or disrupts another branch by preventing it "from accomplishing its constitutionally assigned functions."[105] Under SCERT, the Justices of the Supreme Court retain the power to determine their own code of conduct and enforce it. Far from imposing highly specific, granular judicial ethics regulations on the Court, SCERT leaves many of the details to the Court itself. *Marbury*'s maxim that the Supreme Court has the power to say "what the law is" is well-established.[106] But that does not extend to the Court effectively declaring itself, unlike Congress or the Executive, to be *above* the law, and able to choose, entirely voluntarily, and without review, when it wishes to comply and when it does not.[107]

D. Purpose

Finally, SCERT is consistent with the broader functional aims of the Constitution. In creating the Constitution, the Framers recognized a humbling truth about human nature and, ultimately, about good government:

> If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[108]

In other words, men and women with the best intentions are nonetheless prone to mistake their own interest for justice. True justice arises only when the men and women of the government operate within a system, greater than any one individual, that checks their self-interested biases.

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[101] 487 U.S. at 694.

[102] *Id.*

[103] *Id.* at 695.

[104] U.S. Cons. art III, § 2.

[105] *Morrison*, 487 U.S. at 695 (quoting Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977)).

[106] Marbury v. Madison, 5. U.S. 137, 177 (1803).

[107] *Id.* at 163 ("The Government of the United States has been emphatically termed a government of laws, and not of men").

[108] THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/fed51.asp (last visited June 11, 2023).

This is the rationale behind the judiciary's greatest power, that of judicial review. Because the men and women of Congress and the Executive branch are not angels, the men and women of the judiciary have the duty to review the acts of those branches to ensure their acts conform to the Constitution.[109] But this rationale runs in both directions. Even the best humans, be they in Congress or on the Court, are imperfect (and especially so when unilaterally judging their own cases). That is not an indictment, but rather, a reflection of the human condition. The Framers acknowledge as much in their embrace of inter-branch oversight. SCERT reflects the checks and balances, rules, and systematized procedures of good governance.

VI. Conclusion

The appearance of impropriety extant in the Supreme Court's refusal to clean up its own house with regard to judicial ethics norms increases the need for legislative reforms. This conclusion is amply supported by the Constitution, statutes, precedent, scholarship, and foundational principles aimed at promoting confidence in the courts. The Supreme Court Ethics, Recusal, and Transparency Act of 2023 is an important, and much-needed, step in the right direction.

[109] *Marbury*, 5. U.S. at 176-77 (recognizing that the constitutional limits on congressional power mandate judicial review that enables the government to control itself).