STATEMENT OF THOMAS H. DUPREE JR.

Before the United States Senate Judiciary Committee

Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights

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Thank you for inviting me to testify today and to share my thoughts on the Twenty-First Century Courts Act of 2022.

I am a partner at Gibson, Dunn & Crutcher and co-chair the firm's Appellate and Constitutional Law Practice group. The views I share today are my own. I served as Principal Deputy Assistant Attorney General under President George W. Bush. Between my work at the Justice Department and at Gibson Dunn, I have argued more than 100 appeals, and have argued in all thirteen of the federal circuit courts of appeals, as well as before the United States Supreme Court.

Today I would like to focus on two sections of the bill before the Committee: Section 2—the provision ordering the Supreme Court to issue a Code of Conduct governing the Justices themselves; and Section 5—the provision that would impose new disclosure requirements on amicus briefs filed in the Supreme Court or the courts of appeals.

Let me start with Section 2. This is an extraordinary mandate that infringes on the separation of powers—a bedrock and inviolable principle that underpins our constitutional democracy. Our founders well understood the importance of separating the legislative branch from the judicial branch. As the Supreme Court has explained, "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." [*Plaut v. Spendthrift Farm*, Inc., 514 U.S. 211, 219 (1995)] The lesson of this shared experience is reflected in the words of James Madison, who wrote in Federalist 47 that "the preservation of liberty requires that the three great departments of power should be separate and distinct."

Ordering the Justices to adopt a Code of Conduct within 180 days offends the separation of powers. So does threatening the Justices by providing that a Code of Conduct will be forced upon them if, in the bill's ominous words, "the Supreme Court of the United States fails to comply" with the congressional mandate. The bill intrudes upon the core function of a coordinate and co-equal branch of government. It is the Supreme Court, not the Congress, that has the prerogative under our constitutional structure to decide whether to adopt a Code of Conduct governing the Justices themselves. As Chief Justice Roberts has written, courts "require ample institutional independence" and "[t]he Judiciary's power to

manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government."

Adopting some of the recusal provisions included in this bill would open the door to a tidal wave of disqualification motions in virtually every important case. Round One in all the big-ticket constitutional cases would be litigation over which Justices are eligible to decide the case, and which Justices must be disqualified. It is hard to imagine anything more corrosive to public faith in the Supreme Court than what would become routine volleys of motions alleging that various Justices are ethically compromised and must recuse because they accepted a meal from someone distantly connected to a case. As Justice Scalia once wrote in denying a request that he recuse, "While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor . . . ." [*Cheney v. U.S. Dist. Ct*., 541 U.S. 913, 928 (2004) (Scalia, J., in chambers)]

Let me now turn to Section 5. The bill would impose a host of disclosure requirements on those who file amicus briefs in the Supreme Court or a court of

appeals. In cases where the amicus is a business or an organization, the amicus would need to disclose the identity of anyone who contributed 3% or more of the organization's annual revenue or above a certain cash threshold. Section 5 would also place limits on an amicus's ability to provide travel for a judge to come give a speech. The bill requires the Comptroller General to conduct an annual audit to ensure compliance with these rules, and provides that amici who run afoul of these prohibitions shall be fined up to $200,000.

The purpose of an amicus brief—literally a friend-of-the-court brief—is to assist the judges. A good amicus brief does not simply echo the parties' briefs but provides a different perspective, often one derived from the amicus's own experience. In some cases, an amicus brief will fully align with the positions of one of the parties, but in other cases, an amicus brief will stake out a middle ground or urge an outcome that neither of the parties have proposed.

The disclosure requirements set forth in Section 5 are unnecessary. The Supreme Court and the federal courts of appeals already have disclosure requirements that govern amicus briefs. If the Justices and judges on the Supreme Court and the federal courts of appeals believe that additional information would help them evaluate the arguments presented in an amicus brief, it is their prerogative to require that information.

These disclosure requirements would result in far fewer amicus briefs being filed. That in turn would result in the courts receiving far less information, and hearing from far fewer voices, when they decide cases.

The disclosure requirements will chill and penalize constitutionally protected conduct. By requiring amici to disclose people who contribute to their organization, the bill would put a steep price on the exercise of First Amendment rights, including the right to free speech, the right to assemble, and the right to petition the government. The bill tells those who want their voice to be heard in our federal courts, "You may speak—but only if you turn over your contributor list."

Allow me to close by saying that the two provisions of the bill I have discussed today—the Code of Conduct mandate and the amicus-disclosure requirements—seem to be animated by a dark and distorted perception of our judicial branch—a perception that is fundamentally at odds with what I have seen in more than 20 years of practice in the Supreme Court and the courts of appeals. In my experience, speaking as someone who has argued in front of hundreds of federal judges throughout the country, our federal bench is populated by men and women of the highest integrity. Even when I disagree with the outcome in a particular case, I have never doubted for a moment that these are judges who are

striving to do their absolute God-given best to faithfully interpret the laws and the Constitution of our great nation.

Thank you very much. I welcome your questions.