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Testimony of

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"What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary"

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Mr. Chairman, Senator Kennedy, and members of this Subcommittee, thank you for the invitation to testify about the U.S. Supreme Court.

My name is Jonathan H. Adler and I am the inaugural Johan Verheij Memorial Professor of Law and Director of the Center for Business Law & Regulation at the Case Western Reserve University School of Law where, for the past twenty years, I have taught courses in and conducted research on constitutional, environmental, and administrative law, among other subjects.

The Supreme Court, and the Roberts Court in particular, has been a focus of my writing and research. I edited a book for Oxford University Press, *Business and the Roberts Court* (2016), and I have written extensively on the Court's composition, decisions, treatment of precedent, and decision-making in business-related and environmental law cases.[1] I have also written multiple academic and popular articles focusing on the jurisprudence of Chief Justice Roberts.[2] If any of this research would be of interest, I am happy to provide copies of relevant materials to members of the subcommittee.

My testimony today represents my personal opinions and not those of Case Western Reserve University, the School of Law, the Burke Center, or any other organization with which I am affiliated.

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[1] *See, e.g.*, *How Green Is the Roberts Court?* THE ENVIRONMENTAL FORUM (Nov/Dec 2020) (cover story); *Still In Search of the Pro-Business Court*, 67 CASE WEST. RES. L. REV. 681 (2017); *Business as Usual? The Roberts Court and Environmental Law*, *in* BUSINESS AND THE ROBERTS COURT (J. Adler ed. 2016); *Introduction: In Search of the Probusiness Court*, *in* BUSINESS AND THE ROBERTS COURT (J. Adler ed. 2016); *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009); *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983 (2008).

[2] *See, e.g.*, *This Is the Real John Roberts*, NEW YORK TIMES, July 7, 2020; *Conservative Minimalism and the Consumer Financial Protection Bureau*, U. CHI. L. REV. ONLINE (2020); *Anti-Disruption Statutory Construction*, 38 CARDOZO L. REV. 509 (2016); *Judicial Minimalism, the Mandate, and Mr. Roberts*, THE HEALTH CARE CASES: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS (N. Persily, G. Metzger, & T. Morrison, eds., 2013).

I would like to make three points. First, the decisions of the Supreme Court under Chief Justice Roberts are best explained, understood, and predicted as a consequence of the respective justices jurisprudential and doctrinal commitments, and not as a consequence of undue favoritism for or undue influence from any particular interest group, economic or otherwise. This is why business groups win some cases, and lose others. This is also why sometimes the conservative justices that have formed the Court's majority agree with each other in some cases, but not in others.

My second point is that many claims about the Roberts Court are inaccurate and unhelpful. Much public commentary on the Supreme Court fails to engage with the Court's actual jurisprudence, and instead seeks to apply reductionist labels to the Court's work. Commentators label the Roberts Court "activist" and accuse it of being an instrument of corporate interests. Such claims are misleading and overwrought, at best. Some such claims are simply false. By standard measures, the Roberts Court has been less "activist" than the Warren, Burger, or Rehnquist Courts.

My third point is that efforts by ideological and economic interests to influence federal courts are an inevitable consequence of turning over so many political and economic questions to the federal courts. The more that is at stake in the federal judiciary, the more various interests and factions will seek to ensure that their perspectives prevail. The only way this will change is to make the courts less central to the political and economic life of the nation.

Turning to my first point, it is distressingly common for those who disagree with the Supreme Court's decisions to question the motivations of the justices. Rather than address the substance of their decisions on the merits or, where applicable, seek reform of the relevant laws at issue in contested court decisions, the Supreme Court's critics prefer to demonize the justices and imply nefarious motivations.

One common charge made against the Roberts Court is that it is a tool of powerful corporate interests, an "instrument" of business, "captured" by dark money. The evidence for such charges is the Court's apparent solicitude for claims made by business groups. Business organizations, such as the Chamber of Commerce, have a strong track record before the Court, prevailing in a majority of cases in which amicus briefs are filed.

It is certainly true that the side favored by a majority of business groups prevails before the Supreme Court more often than not, but this hardly means the Court has embraced a 'pro-business" agenda or that any of the justices consciously seeks to advance a corporate agenda.

If the Supreme Court, or a majority of the current justices, were in thrall to a corporate agenda, one would expect that business groups would most often prevail in the most significant and consequential cases before the Court. If a majority of justices truly placed the concerns of business ahead of their doctrinal or jurisprudential commitments, then this tendency would be *most* evident in those cases in which business interests had the most to

lose, if not the most to gain. Yet that is not at all what we have witnessed from the Roberts Court.

While business groups routinely prevail in cases asking the Supreme Court to corral a wayward appeals court decision or reject an innovative (if also unprecedented) litigation theory, they regularly lose when the law is against them, and often in some of the most consequential cases before the Court. If the Roberts Court were truly pro-business, one would have a hard time explaining decisions such as *EPA v. EME Homer City Generation* (upholding EPA's cross state air pollution rule), *County of Maui v. Hawai'i Wildlife Federation* (adopting an expansive interpretation of Clean Water Act jurisdiction), *Massachusetts v. EPA* (authorizing the EPA to regulate greenhouse gases under the Clean Air Act), *Chamber of Commerce v. Whiting* (rejecting a preemption challenge to Arizona's draconian penalties on business that hire unlawfully present aliens), or *Wyeth v. Levine* (rejecting preemption of state law claims against pharmaceutical manufacturers), among many others. From a business perspective, these are some of the Roberts Court's most important decisions, and they all went against the position advocated by the U.S. Chamber of Commerce and other business interests.

Preemption is a particularly useful area on which to focus as the preemption of variegated and costly state laws is one of the business community's top priorities, and yet it is an area in which it has been unable to enlist consistent support from the courts. Most recently, in *Virginia Uranium v. Warren*, a 6-3 Court held the Atomic Energy Act did not preempt state regulation of uranium mining on private lands. No opinion for the Court commanded a majority. There were three opinions of three justices each. Justice Gorsuch's opinion, joined by Justices Kavanaugh and Thomas, expressed a profound skepticism of the sorts of broad preemption arguments favored by business interests. Preemption, Justice Gorsuch explained, should be based upon what the legislature did, not some broader legislative purpose. Thus, without anything in the AEA preempting a state's traditional authority to regulate private land use within its borders, Virginia's prohibition of uranium mining could not be preempted, *even if* Virginia legislators sought to address risks otherwise regulated by the Nuclear Regulatory Commission. Only the Chief Justice, Justices Alito and Breyer dissented.

What *Virginia Uranium* helps illustrate is that the individual justices are driven by their own jurisprudential philosophies and doctrinal commitments, not a desire to help or hinder particular interest groups. The justices did not divide along traditional ideological lines and some of the Court's most liberal and most conservative justices found themselves in agreement on the result, if not on underlying rationale. Business may prefer aggressive federal preemption of state regulation (and a robust Dormant Commerce Clause), but some of the Court's originalist conservatives—Justices Gorsuch, Thomas and Kavanaugh—do not. What is doing the work in this case is their view of federalism, and the relationship between the federal and state governments, not what is good or bad for business. Whether or not one agrees with these justices on these points, it is readily apparent that they are applying the law as they believe is appropriate, not catering to any particular interest group or serving any corporate masters.

By the numbers, business groups may prevail more often than not, but this is only part of the story. When it comes to Supreme Court decisions, quality is more important than quantity. Among other things, quantitative assessments fail to account for the substance of the decisions, and do not differentiate between ordinary cases and those with major ramifications. Nor do such analyses typically account for whether a given case marks a departure from prior precedent or paves new ground, nor do they consider the broader context in which a case occurs.

Failure to account for the content of the decisions and doctrinal baseline results in misleading analyses. This is readily illustrated by looking at the Court's decisions concerning climate change, an issue which I know is of particular interest to the Chairman (as it should be). In *Massachusetts v. EPA*, the Court decided 5-4 that states could sue the federal government for failing to take action to curb global warming, and that the Clean Air Act authorized the Environmental Protection Agency to regulate greenhouse gases as "air pollutants" under the Clean Air Act. In *American Electric Power v. Connecticut*, the Court decided 8-0 that (due to the *Massachusetts* decision) the Clean Air Act displaced nuisance actions against greenhouse gas emitters under the federal common law of interstate nuisance. Finally, in *Utility Air Regulatory Group v. EPA*, the Court largely affirmed the EPA's authority to regulate greenhouse gas emissions from large emitters, subject to some limitations, splitting 7-2 and 5-4 on different issues.

From a business perspective, the three climate cases are best scored as a win (*American Electric*), a loss (*Massachusetts*) and a tie (*UARG*), with the "pro-business" positions attracting a slight majority of the available votes in these cases. Thus, as a quantitative matter, it appears that business has fought climate regulation to a draw in the Supreme Court. And if one adds in the Supreme Court's 5-4 decision to stay the Obama Administration's Clean Power Plan, business interests would seem to have a winning record on climate change in the Supreme Court. In reality, business interest have lost more than they have gained.

Massachusetts is potentially the most consequential business-related case of the past two decades. For starters, the decision made it easier for states and interest groups to sue the federal government for failing to regulate business activity. More significantly, in holding that greenhouse gases are "air pollutants" subject to regulation under the Clean Air Act, the Court triggered the most dramatic expansion of federal environmental regulation since enactment of the 1990 Clean Air Act Amendments. The *Massachusetts* decision laid the ground work for *all* federal regulation of greenhouse gases under the Clean Air Act.

By comparison, the *American Electric Power* and *UARG* opinions were relatively small potatoes. In *AEP* the Court unanimously reaffirmed long-standing precedent on the statutory displacement of federal common law actions for insterstate nuisance, and relied upon the *Massachusetts* holding that the Clean Air Act reaches greenhouse gases in reaching its result.

UARG was more significant, but it likewise reaffirmed the *Massachusetts* holding. Stripped of the particulars, *UARG* merely trimmed EPA's greenhouse gas regulation around the edges, limiting only its most expansive application. *UARG* prevented the EPA from asserting

regulatory authority over smaller stationary source greenhouse gas emitters, but left the vast bulk of the EPA's greenhouse gas regulations in place.

The net result of the Court's climate decisions to date is a dramatic expansion of federal environmental regulation over motor vehicles, utilities, and industrial sources. By any measure, the resulting regulatory environment is vastly less business-friendly than before the cases were decided. Yet under a quantitative assessment, business interests seem to be holding steady, if not actually making gains. In these cases, business interests have received a majority of the available votes, but lost legal ground. In this way, a quantitative assessment of the effect of the Court's climate decisions on business grossly misrepresents what has actually occurred.

It is common to point to the favorable win-loss record of the Chamber of Commerce to suggest that the Roberts Court has a soft spot for business. The Chamber regularly files *amicus* briefs in cases of major importance to the business community, but it does not file in every such case, and that is important. The Chamber's decision to file may be based upon a case's importance, but it might also be based upon the likelihood of victory. The higher the Chamber's success rate, the more valuable the Chamber's efforts may appear to its members and donors. Thus the Chamber has an incentive to file briefs even when there is little question that the side favored by business groups will prevail, as well as an incentive not to submit briefs in cases that are clearly lose causes. In this regard it may be notable that the Chamber has declined to file in some significant cases in which the side favored by business interests lost, such as *Kasten v. Saint-Gobain Performance Plastics Corp*. (concerning the Fair Labor Standards Act) and *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority* (concerning the application of the Dormant Commerce Clause to solid waste flow control policies).

It is also important to remember that business interests often lie on both sides of a case. Most antitrust cases, for example, pit one corporation against another, as do many other business law cases. Even cases in which one might think the business interest is abundantly clear may pit different business groups against each other. The lead plaintiff in the constitutional challenge to the Patient Protection and Affordable Care Act was the National Federation of Independent Business (NFIB). Yet many business groups, including hospitals and insurance companies, benefitted from the statutory provisions NFIB sought to challenge. Several individuals sued their former employers for discrimination in *Bostock v. Clayton County*, and yet numerous businesses, CEOs and business organizations filed amicus briefs on behalf of the employees and against the business employers.

While most of my testimony has focused on the question of whether the Roberts Court has been acting as an instrument of business interests, I think it is also important to address claims that the Court's Republican-appointed justices vote as a block and that the Roberts Court has been a "conservative activist" court.

A 2019 report authored by the Subcommittee Chairman and published by the American Constitution Society notes that between the Court's 2005-2006 term (when John Roberts

became Chief Justice) and the 2017-2018 term, there were 212 5-4 decisions, of which 78 were "partisan" decisions "in which the Roberts Five provided all five votes in the majority. These numbers are remarkable, but not for the reasons this report suggests.

During this period the Court heard nearly 1,000 cases. These cases represent a tiny fraction of those heard (let alone filed) in federal court during this time. The vast majority of these cases were heard by the Court because of a circuit split or other division in lower court authority. In other words, these cases were, by and large, those in which learned, intelligent, and conscientious lower court judges could not reach agreement as to the proper result. They are difficult cases on which reasonable and thoughtful jurists can—and almost always did—disagree. And yet these cases split the Supreme Court 5-4 less than 25 percent of the time. That is truly remarkable, as is the fact that the Supreme Court is unanimous in large share of the cases it hears.

Also remarkable is that, although we have had a Court on which there are five conservative justices and four liberal justices, fewer than half of the 5-4 splits focused on in the 2019 report divided the Court along these precise "partisan" lines. In other words, in a majority of the Court's 5-4 decisions, at least one of the "Roberts Five" departed from the conservative bloc to produce a majority. Moreover, 78 of 212 represents only 36 percent of the Court's 5-4 cases over this time period, and less than ten percent of the Court's total cases during this time. Given that Republican presidents tend to appoint justices with conservative judicial philosophies and Democratic presidents tend to appoint justices with progressive judicial philosophies, the remarkable thing is not that the number of cases with seemingly partisan alignments is so high. Rather, the remarkable thing is that it is so low.

The reality is that justices appointed by Presidents of the same party—or even the same President—do not vote in lockstep or operate as a unified block. Former President Trump appointed both Justices Neil Gorsuch and Brett Kavanaugh, and yet in their first term together on the Court they fully agreed in only 56 percent of cases. Justice Kavanaugh found himself in full agreement with Justice Stephen Breyer more often than with Justice Gorsuch. This is not the result one would expect if one believed the justices were captured or controlled by nefarious interests or and were not making their own individual judgments about how to decide each case before them.

Another concern raised about the Roberts Court is that the Court's conservative majority has been unduly "activist" as is remaking the law rapidly and radically. This claim, too, is not supported by what we have seen in Roberts Court to date.

Charges of judicial activism are commonplace, and the "activist" label is itself quite slippery. To many, an "Activist" court is simply a court that does not rule the way that they would prefer. Used in this way, it is a content-free epithet. A more substantive way to define "judicial activism" is by a court's propensity to declare legislative acts unconstitutional or to overturn prior precedent. By these measures, however, the Roberts Court has been anything but "activist." To the contrary, by these measures the Roberts Court has been the least

"activist" Court in the post-war period—less "activist" than the Warren Court, the Burger Court, and the Rehnquist Court.

Professor Keith Whittington of Princeton University surveyed the history of Supreme Court invalidation of federal laws in his book *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (2019). As the data Professor Whittington compiled shows, the Supreme Court invalidates fewer federal statutes per term than did the Warren, Burger, or Rehnquist Courts. Here (from Table 7-1, p. 238 of *Repugnant Laws*) is the number of cases per year invalidating federal statutes under each of the last four Chief Justices.

Warren Court	2.57
Burger Court	3.17
Rehnquist Court	3.63
Roberts Court	2.08

One may conclude that the Roberts Court declares too many federal statutes unconstitutional, or too few. One may believe that the Roberts Court focuses on the wrong statutes or the wrong sorts of constitutional infirmities in making its decisions. But what this data shows is that one cannot argue that the Roberts Court has been more aggressive in rejecting the work of Congress than were its predecessors.

An examination of the rate at which the Roberts Court has overturned the Court's prior precedents leads to a similar conclusion. Consulting data compiled the Government Printing Office, one finds that the Roberts Court has averaged overturning fewer than two prior precedents per term. The Rehnquist Court, however, averaged between two and three cases overturned per term, and the Warren and Burger Court each overruled an average of more than four cases per term. If one looks instead to the number of cases overruling prior precedents, one finds a similar, if slightly smaller disparity between the restrained behavior of the Roberts Court and the more aggressive or "activist" behavior of its predecessors. And if one rejects the GPO's methodology for counting cases, a 2010 *New York Times* report found a similar pattern.

The bottom line is that despite the frequency with which the "activist" accusation is made, under Chief Justice Roberts, the Supreme Court has invalidated federal laws and overturned prior court precedents at a significantly lower rate than did the Warren, Burger, or Rehnquist Courts. Moreover, not all of the Roberts Court's decisions overturning federal laws or overturning precedents have moved the law in a more conservative direction, as decisions like *Windsor v. United States* (declaring the federal Defense of Marriage Act to be unconstitutional) and *Obergefell v. Hodges* (overturning *Baker v. Nelson*) make clear. Past performance is no guarantee of future results, and the Roberts Court's minimalist tendencies could certainly change in the years ahead, but insofar as this subcommittee is concerned about judicial activism, the Roberts Court should not be its focus.

None of this is to say that political and economic interest groups do not seek to influence the Court. Of course they do. The Court's decisions are important, and people care greatly about the how the Court's decisions come out. This hearing is testament to that.

The simple reality is that the incentive to try to influence the composition, ideology and work of the Court is roughly proportional to the amount the Court does. As the range of issues touched by the Court and constitutionalized has expanded over the past century, so too has the value of influencing judicial decisions. This, in turn, has increased the inventive to try and influence the Court's behavior, whether through amicus briefs, nominations, or political pressure. Thus, it should be no surprise that Presidential candidates campaign on promises to nominate a particular type of judge or justice, and that Senators both interrogate nominees before confirmation and inveigh against decisions they do not like afterwards. If judicial decisions, instead of votes in Congress, are going to resolve the key questions of the day, then that is where political and economic interests will focus their resources and attention.

These pressures inevitably build as more and more questions become fodder for litigation and are brought into the federal courts. This is particularly so when the Court decides to resolve issues on Constitutional grounds, thereby removing questions from the realm of political resolution. Yet if this is the concern, it seems quite odd to train one's sights on the Roberts Court. As already noted, the Roberts Court to date has invalidated federal laws on constitutional grounds at a far lower rate than its post-war predecessors. In other words, the Roberts Court has done less to supplant the political branches and seize issues for the judiciary than did the Warren, Burger or Rehnquist Courts. Combined with the Court's smaller caseload. Those concerned about judicial overreach may need to focus their attention elsewhere.

The only way to lower the incentive to influence the federal judiciary is to lower the stakes. The more questions Congress can resolve itself, the less pressure there will be on the courts to resolve those same questions. The less Congress leaves to the courts, the less people will care about who is nominating or confirming individual judges. Congress could facilitate this process by resolving more issues within the legislative process, such as by taking more care in drafting statutes, regularly reauthorizing federal programs, and restoring the traditional legislative processes, as well as by avoiding partisan attacks on judicial integrity and independence. Interest groups would not feel the need to invest so heavily in confirmation battles if the confirmation process returned to a focus on judicial qualifications.

The Court could also do more to increase confidence in its work by taking additional steps to increase transparency. Live streaming audio because of Covid-19 was a very positive step, not least because it has allowed more of the public to hear what the Court does. Instead of relying upon sensationalized accounts on talk radio or cable news, people can listen to the arguments themselves and hear the justices wrestle with complicated issues.

I would urge the Court to continue the practice of live-streaming audio of all oral arguments. I would further encourage the justices to increase their voluntary disclosures and divest themselves of conflict-producing investments, as well as to issue explanations for all recusal

decisions. The justices could also make a greater effort to resolve cases in the regular order, as opposed to on the "shadow docket," and provide actual arguments and opinions when resolving high-profile questions. The American people should be able to read and hear for themselves why the Court does what it does. As much as possible, this work should occur in the sunshine. I support reform efforts along these lines, although I would caution Congress to be respectful of separation of powers before seeking to dictate to another coordinate branch how it must act.

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Thank you again for the opportunity to present my views on this important subject, Mr. Chairman. I hope that my perspective has been helpful to you, and I am happy to answer any questions members of the Subcommittee may have.