

United States Senate

WASHINGTON, DC 20510

September 4, 2023

The Honorable John G. Roberts, Jr.
Chief Justice of the United States
Chairman, Judicial Conference of the United States
Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543

Dear Chief Justice/Chairman Roberts:

I write to lodge an ethics complaint regarding recent public comments by Supreme Court Justice Samuel Alito, which appear to violate several canons of judicial ethics, including standards the Supreme Court has long applied to itself.

I write to you in your capacity both as Chief Justice and as Chair of the Judicial Conference because, unlike every other federal court, the Supreme Court has no formal process for receiving or investigating such complaints, and asserted violations by justices of relevant requirements have sometimes been referred to the Judicial Conference and its committees. I include all justices in carbon copy because I am urging the Supreme Court to adopt a uniform process to address this complaint and others that may arise against any justice in the future.

The recent actions by Justice Alito present an opportunity to determine a mechanism for applying the Judicial Conduct and Disability Act to justices of the Supreme Court. Nothing prohibits the Court or the Judicial Conference from adopting procedures to address complaints of misconduct. The most basic modicum of any due process is fair fact-finding; second to that is independent decision-making.

Background

Some of the background facts here were related by members of the Senate Judiciary Committee who signed a letter to you dated August 3, 2023.¹ As that letter explains, the *Wall Street Journal* on July 28, 2023, published an interview with Justice Alito conducted by David Rivkin and James Taranto. Justice Alito's comments during that interview give rise this complaint.² The interview had the effect, and seemed intended, to bear both on legislation I authored and on investigations in which I participate.

During the interview, Justice Alito stated that “[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period.”³ Justice Alito's comments

¹ Letter from Sen. Richard J. Durbin et al., Senate Committee on the Judiciary, to Hon. John G. Roberts Jr., Chief Justice of the United States (Aug. 3, 2023).

² David B. Rivkin & James Taranto, Opinion, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July, 28, 2023), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7?st=4765zed61auy3j2&reflink=desktopwebshare_permalink.

³ *Id.*

appeared in connection to my Supreme Court Ethics, Recusal, and Transparency Act, which the Senate Judiciary Committee had advanced just one week before the publication of this interview.⁴ That bill would update judicial ethics laws to ensure the Supreme Court complies with ethical standards at least as demanding as in other branches of government.

Justice Alito's comments echoed legal arguments made to block information requests from the Senate Judiciary Committee and the Senate Finance Committee, on both of which I serve. Those arguments assert (in my view wrongly) that our constitutional separation of powers blocks any congressional action in this area, which in turn is asserted (also wrongly, in my view) to block any congressional investigation. Sound or unsound, it is their argument against our investigations, as reflected in the letter appended hereto. The subjects of these committee investigations are matters relating to dozens of unreported gifts donated to justices of the Supreme Court.

As the author of the bill at issue, and as the only Senator serving in the majority on both investigating committees, I bring this complaint.

Improper Opining on a Legal Issue that May Come Before the Court

On the Senate Judiciary Committee, we have heard in every recent confirmation hearing that it would be improper to express opinions on matters that might come before the Court. In this instance, Justice Alito expressed an opinion on a matter that could well come before the Court.

That conduct seems indisputably to violate the Code of Conduct for United States Judges. Canon 1 emphasizes a judge's obligation to "uphold the integrity and independence of the judiciary"; Canon 2(A) instructs judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"; and Canon 3(A)(6) provides that judges "should not make public comment on the merits of a matter pending or impending in any court." These canons help ensure "the integrity and independence of the judiciary" by requiring judges' conduct to be at all times consistent with the preservation of judicial impartiality and the appearance thereof.⁵

The Court's *Statement of Ethics Principles and Practices*, "to which all of the current members of the Supreme Court subscribe,"⁶ concurs. That document makes clear that, before speaking to the public, "a Justice should consider whether doing so would create an appearance of impropriety in the minds of reasonable members of the public. There is an appearance of impropriety when an unbiased and reasonable person who is aware of all relevant facts would doubt that the Justice could fairly discharge his or her duties."⁷ These same precepts are also enforced through the federal recusal statute, which requires all federal justices and judges to recuse themselves from any matter in which their impartiality could reasonably be questioned.⁸

⁴ *Id.*

⁵ Code of Conduct for U.S. Judges, Canon 1, Commentary.

⁶ Letter from John G. Roberts, Jr., Chief Justice of the United States, to Sen. Richard J. Durbin, Chairman, Senate Committee on the Judiciary (Apr. 25, 2023).

⁷ See *Statement on Ethics Principles and Practices* at 2:8-15, 2:19.

⁸ See 28 U.S.C. § 455(a), (b)(1).

Making public comments assessing the merits of a legal issue that could come before the Court undoubtedly creates the very appearance of impropriety these rules are meant to protect against. As Justice Kavanaugh pointed out, prejudging an issue in this manner is “inconsistent with judicial independence, rooted in Article III,” because “litigants who come before [the Court] have to know we have an open mind, that we do not have a closed mind.”⁹

Justice Alito and every other sitting member of the Supreme Court told the Senate Judiciary Committee during their confirmation hearings that it would be (in the words of Justice Alito) “improper” and a “disservice to the judicial process” for a Supreme Court nominee to comment on issues that might come before the Court.¹⁰ Justice Thomas said that such comments would at minimum “leave the impression that I prejudged this issue,” which would be “inappropriate for any judge who is worth his or her salt.”¹¹ Justice Kagan echoed those comments, telling the Committee it would be “inappropriate” for her to “give any indication of how she would rule in a case”—even “in a somewhat veiled manner.”¹² And Justice Kavanaugh explained that nominees “cannot discuss cases or issues that might come before them.” He continued: “As Justice Ginsburg said, no hints, no forecasts, no previews.”¹³

Justice Gorsuch made clear during his confirmation hearing that this rule applies to the precise topic on which Justice Alito opined to the *Wall Street Journal*:

Senator Blumenthal. Thank you. I also want to raise a question, talking about court procedure, relating to conflicts of interest and ethics. I think you were asked yesterday about the proposed ethics rules that have been applied to your court—

Judge Gorsuch. Yes.

Senator Blumenthal: [continuing]. To the appellate court, to the District Court, but not to the Supreme Court. Would you view such legislation as a violation of the separation of powers?

Judge Gorsuch. Senator, I am afraid I just have to respectfully decline to comment on that because I am afraid that could be a case or controversy, and you can see how it might be. I can understand Congress’ concern and interest in this area. I understand that. But I think the proper way to test that question is the prescribed process of legislation and litigation.¹⁴

⁹ *Confirmation Hrg. on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 115th Cong., at 123 (Sept. 5, 2018).

¹⁰ *Confirmation Hrg. on the Nomination of Hon. Samuel Alito to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 109th Cong., at 517, 554 (Jan. 11, 2006).

¹¹ *Confirmation Hrg. on the Nomination of Hon. Clarence Thomas to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 102d Cong., at 180 (Sept. 11, 1992); *Confirmation Hrg. on the Nomination of Hon. Clarence Thomas to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 102d Cong., at 173 (Sept. 10, 1992).

¹² *Confirmation Hrg. on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 111th Cong., at 80 (June 29, 2010).

¹³ *Kavanaugh Hrg.*, *supra* note 9, at 123.

¹⁴ *Confirmation Hrg. on the Nomination of Hon. Neil Gorsuch to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 115th Cong., at 334 (Mar. 22, 2017).

You, Justice Sotomayor, and Justice Barrett each expressly cited the canons of judicial ethics as the source of a nominee’s obligation to refuse to comment on such matters.¹⁵ There seems to be no question that Justice Alito is bound by, and that his opining violated, these principles.¹⁶

Improper Intrusion into a Specific Matter

These principles apply broadly to any opining, on any issue that might perhaps come before the Court. But here it was worse; it was not just general opining, it was opining in relation to a specific ongoing dispute. The quote at issue in the article—“No provision in the Constitution gives [Congress] the authority to regulate the Supreme Court”—directly follows a mention of my judicial ethics bill. Justice Alito’s decision to opine publicly on the constitutionality of that bill may well embolden legal challenges to the bill should it become law. Indeed, his comments encourage challenges to all manner of judicial ethics laws already on the books.

Justice Alito’s opining will also fuel obstruction of our Senate investigations into these matters. To inform its work on my bill and other judicial ethics legislation, and oversee the performance of the statutory Judicial Conference in this arena, the Senate Judiciary Committee is investigating multiple reports that Supreme Court justices have accepted and failed to disclose lavish gifts from billionaire benefactors.¹⁷ Separately, the Senate Finance Committee is investigating the federal tax considerations surrounding the billionaires’ undisclosed gifts to Supreme Court justices.¹⁸ Both committees’ inquiries have been stymied by individuals asserting that Congress has no constitutional authority to legislate in this area, hence no authority to investigate. Justice Alito’s public comments prop up these theories.¹⁹

As the author of the bill in question and as a participant in the related investigations, I feel acutely the targeting of this work by Justice Alito, and consider it more than just misguided or accidental general opining. It is directed to my work.

¹⁵ See *Confirmation Hrg. on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the Sen. Comm. on the Judiciary*, 109th Cong., at 243 (Sept. 13, 2005) (citing Canon 3(A)(6) of the Code of Conduct for United States Judges); *Confirmation Hrg. on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 111th Cong., at 109 (July 14, 2009) (citing American Bar Association “rule on Code of Conduct”); *Barrett Confirmation Hearing, Day 2, Part 1*, C-SPAN Video, at 51:37–51:48 (Oct. 13, 2020) (citing “canons of judicial conduct”).

¹⁶ Indeed, another member of the Court has expressed how seriously federal judges and justices take these statements to the Judiciary Committee. See *Kavanaugh Hrg.*, *supra* note 9, at 123 (statement of Judge Kavanaugh) (“[B]elieve me, judges do feel bound by what they said to this Committee.”).

¹⁷ See, e.g., Letter from Sen. Richard J. Durbin, et al., Senate Committee on the Judiciary, to Harlan Crow (May 8, 2023), <https://www.judiciary.senate.gov/imo/media/doc/May%208,%202023%20letter%20to%20Harlan%20Crow16.pdf>.

¹⁸ See, e.g., Letter from Sen. Ron Wyden, Chairman, Senate Committee on Finance, to Harlan Crow (Apr. 24, 2023), <https://www.finance.senate.gov/imo/media/doc/Letter%20from%20Chairman%20Wyden%20to%20Harlan%20Crow%204.24.23.pdf>.

¹⁹ See, e.g., Letter from Harlan Crow to Sen. Ron Wyden, Chairman, Senate Committee on Finance (May 8, 2023), <https://s3.documentcloud.org/documents/23872250/harlan-crow-5-8-2023-letter-to-senate-finance.pdf>; Letter from Harlan Crow to Sen. Richard J. Durbin, Chairman, Senate Committee on the Judiciary (May 22, 2023), <https://s3.documentcloud.org/documents/23822173/harlan-crow-attorney-letter-to-senate-judiciary-committee.pdf>.

Improper Intrusion into a Specific Matter at the Behest of Counsel in that Matter

Compounding the issues above, Attorney David Rivkin was one of the interviewers in the *Wall Street Journal* piece, and also a lawyer in the above dispute. This dual role suggests that Justice Alito may have opined on this matter at the behest of Mr. Rivkin himself. Bad enough that a justice opines on some general matter that may come before the Court; worse when the opining brings his influence to bear in a specific ongoing legal dispute; worse still when the influence of a justice appears to have been summoned by counsel to a party in that dispute.

The timeline of the *Wall Street Journal* interview suggests that its release was coordinated with Mr. Rivkin's efforts to block our inquiry. Mr. Rivkin's interview with Justice Alito was reportedly conducted in "early July" 2023.²⁰ On July 11, Senate Judiciary Committee Chair Durbin and I sent a letter to Mr. Rivkin's client inquiring about undisclosed gifts and travel provided to justices.²¹ On July 20, the Senate Judiciary Committee voted to advance my judicial ethics bill mentioned above. (Notably, the Rivkin/Alito Congress-has-no-authority argument fared poorly in the committee that day, with no Republican rising to rebut the arguments against it.) On July 25, Mr. Rivkin by letter refused to provide the requested information on the purported ground that "any attempt by Congress to enact ethics standards for the Supreme Court would falter on constitutional objections."²² That response, appended hereto, was instantly published in *Fox News*.²³ Three days later, on July 28, the *Wall Street Journal* editorial page published the supportive opining from Justice Alito.²⁴

²⁰ Rivkin & Taranto, *supra* note 2.

²¹ Letter from Sens. Sheldon Whitehouse & Richard J. Durbin, Senate Committee on the Judiciary, to Leonard Leo (July 11, 2023).

²² Letter from David B. Rivkin, Jr. to Sens. Sheldon Whitehouse & Richard J. Durbin, Senate Committee on the Judiciary (July 25, 2023).

²³ Andrew Mark Miller, *Conservative activist rejects Senate Dem demand for help in Supreme Court probe: 'Political retaliation'*, FOX NEWS (July 25, 2023), <https://www.foxnews.com/politics/conservative-activist-rejects-senate-dem-demand-help-supreme-court-probe-political-retaliation>.

²⁴ Separately, Mr. Rivkin is also counsel of record in a case the Supreme Court recently agreed to hear, *see Moore v. United States*, No. 22-800—a matter that presents distinct ethical issues, including possible conflicts of interest, that should also be addressed. Questions abound about the extent of private access Justice Alito has afforded Mr. Rivkin, who has appeared before the Court numerous times, particularly while Mr. Rivkin's petition for a writ of *certiorari* was pending in *Moore*. Mr. Rivkin's efforts in *Moore* have been publicly supported by the *Wall Street Journal* Editorial Board, which has approved three pieces written by or involving interviews with Justice Alito in four months—including a piece by Justice Alito "prebutting" reporting on the non-disclosed gifts that Leonard Leo arranged for Justice Alito to receive. *See* Editorial Bd., Opinion, *Is a U.S. Wealth Tax Constitutional?*, WALL ST. J. (June 14, 2023), <https://www.wsj.com/articles/wealth-tax-ninth-circuit-moore-v-u-s-charles-and-kathleen-moore-supreme-court-constitution-6cdfba92>; James Taranto & David B. Rivkin Jr., Opinion, *Justice Samuel Alito: 'This Made Us Targets of Assassination'*, WALL ST. J. (Apr. 28, 2023), <https://www.wsj.com/articles/justice-samuel-alito-this-made-us-targets-of-assassination-dobbs-leak-abortion-court-74624ef9>; Samuel A. Alito Jr., Opinion, *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda?mod=hp_opin_pos_3#cxrecs_s; Editorial Bd., Opinion, *A Wealth-Tax Watershed for the Supreme Court*, WALL ST. J. (June 27, 2023), <https://www.wsj.com/articles/supreme-court-moore-v-u-s-wealth-tax-patrick-bumatay-ninth-circuit-83610ed>.

Improper Intrusion into a Specific Matter Involving an Undisclosed Personal Relationship

On top of all this, the dispute upon which Justice Alito opined involves an individual with whom Justice Alito has a longstanding personal and political relationship. As my colleagues and I pointed out in our August 3 letter, “Mr. Rivkin is counsel for Leonard Leo with regard to [the Judiciary] Committee’s investigation into Mr. Leo’s actions to facilitate gifts of free transportation and lodging that Justice Alito accepted from Paul Singer and Robin Arkley II in 2008.”²⁵ Mr. Leo was Justice Alito’s companion on the luxurious Alaskan fishing trip in 2008 and facilitated the gifts to the justice of free transportation and lodging. Two years earlier, Mr. Leo’s political organization “had run an advertising campaign supporting Alito in his confirmation fight, and Leo was reportedly part of the team that prepared Alito for his Senate hearings.”²⁶

The timing of Justice Alito’s opining suggests that he intervened to give his friend and political ally support in his effort to block congressional inquiries. It appears that Justice Alito (a) opined (b) on a specific ongoing dispute (c) at the behest of counsel in that dispute (d) to the benefit of a personal friend and ally. Each is objectionable, and appears to violate, *inter alia*, Canon 2(B) of the Code of Conduct for United States Judges, which provides, “A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge.”

Improper Use of Judicial Office for Personal Benefit

The final unpleasant fact in this affair is that Justice Alito’s opining, apparently at the behest of his friend and ally’s lawyer, props up an argument being used to block inquiry into undisclosed gifts and travel received by Justice Alito. At the end, Justice Alito is the beneficiary of his own improper opining. This implicates Canon 2(B) strictures against improperly using one’s office to further a personal interest: a justice obstructing a congressional investigation that implicates his own conduct.

The Senate Judiciary Committee’s investigation encompasses reports that Justice Alito accepted but did not disclose gifts of travel and lodging valued in the tens of thousands of dollars. Further investigation may reveal additional information that Justice Alito would prefer not come to light. The facts as already reported suggest that Justice Alito likely violated the financial disclosure requirements of the Ethics in Government Act.²⁷ Perhaps Justice Alito should also have recused himself as required by the recusal statute in a 2014 case involving a company owned by Paul Singer, one of the billionaires who attended and paid for his Alaskan fishing vacation.²⁸ Justice Alito’s public suggestion that these laws are unconstitutional as applied to the Supreme Court, and that Congress lacks authority to amend them or investigate their implementation or enforcement, appears designed to impede Senate efforts to investigate these and other potential abuses.

²⁵ Letter from Sen. Richard J. Durbin et al., *supra* note 1.

²⁶ Justin Elliott, Joshua Kaplan, & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court>.

²⁷ See 5 U.S.C. §§ 13101, *et seq.*

²⁸ Elliott, Kaplan, & Mierjeski, *supra* note 26; see 28 U.S.C. § 455.

* * *

Conclusion

In the worst case facts may reveal, Justice Alito was involved in an organized campaign to block congressional action with regard to a matter in which he has a personal stake. Whether Justice Alito was unwittingly used to provide fodder for such interference, or intentionally participated, is a question whose answer requires additional facts. The heart of any due process is a fair determination of the facts. Uniquely in the whole of government, the Supreme Court has insulated its justices from any semblance of fair fact-finding. The obstructive campaign run by Mr. Rivkin and Mr. Leo, fueled by Justice Alito's opining, appears intended to prevent Congress from gathering precisely those facts.

As you have repeatedly emphasized, the Supreme Court should not be helpless when it comes to policing its own members' ethical obligations. But it is necessarily helpless if there is no process of fair fact-finding, nor independent decision-making. I request that you as Chief Justice, or through the Judicial Conference, take whatever steps are necessary to investigate this affair and provide the public with prompt and trustworthy answers.

Sincerely,



SHELDON WHITEHOUSE

Chairman

Senate Judiciary Subcommittee on

Federal Courts, Oversight, Agency Action, and

Federal Rights

Enclosure

cc: The Honorable Samuel A. Alito, Jr., Associate Justice, Supreme Court of the United States
The Honorable Clarence Thomas, Associate Justice, Supreme Court of the United States
The Honorable Sonia Sotomayor, Associate Justice, Supreme Court of the United States
The Honorable Elena Kagan, Associate Justice, Supreme Court of the United States
The Honorable Neil M. Gorsuch, Associate Justice, Supreme Court of the United States
The Honorable Brett Kavanaugh, Associate Justice, Supreme Court of the United States
The Honorable Amy Coney Barrett, Associate Justice, Supreme Court of the United States
The Honorable Ketanji Brown Jackson, Associate Justice, Supreme Court of the United States
The Honorable Roslynn R. Mauskopf, Secretary, Judicial Conference of the United States

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July 25, 2023

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VIA ELECTRONIC MAIL

The Honorable Richard Durbin
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The Honorable Sheldon Whitehouse
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Subcommittee on Federal Courts, Oversight, Agency
Action, and Federal Rights
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221 Dirksen Senate Office Building
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Re: Response to July 11, 2023 Letter to Leonard Leo

Dear Chairman Durbin and Senator Whitehouse:

We write on behalf of Leonard Leo in response to your letter of July 11, 2023, which requested information concerning Mr. Leo's interactions with Supreme Court Justices. We understand this inquiry is part of an investigation certain members of the Senate Judiciary Committee have undertaken regarding ethics standards and the Supreme Court. While we respect the Committee's oversight role, after reviewing your July 11 Letter, the nature of this investigation, and the circumstances surrounding your interest in Mr. Leo, we believe that your inquiry exceeds the limits placed by the Constitution on the Committee's investigative authority.

Your investigation of Mr. Leo infringes two provisions of the Bill of Rights. By selectively targeting Mr. Leo for investigation on a politically charged basis, while ignoring other potential sources of information on the asserted topic of interest who are similarly situated to Mr. Leo but have different political views that are more consistent with those of the Committee majority, your inquiry appears to be political retaliation against a private citizen in violation of the First Amendment. For similar reasons, your inquiry cannot be reconciled with the Equal Protection component of the Due Process Clause of the Fifth Amendment. And regardless of its other constitutional infirmities, it appears that your investigation lacks a valid legislative purpose, because the legislation the Committee is considering would be unconstitutional if enacted.

The Committee's Inquiry Raises Serious First Amendment Concerns

Bedrock constitutional principles dictate that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In the guise of conducting an investigation concerning Supreme Court ethics, the Committee appears to be targeting Mr. Leo because of disagreement with his political activities and viewpoints on issues pertaining to our federal judiciary. An investigation so squarely at odds with the First Amendment cannot be maintained.

Mr. Leo is entitled by the First Amendment to engage in public advocacy, associate with others who share his views, and express opinions on important matters of public concern. “[T]he freedom to think and speak is among our inalienable human rights.” *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2311 (2023). Indeed, expressive activity of this kind is afforded the greatest protection possible. *See Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the ‘highest rung of the hierarchy [sic] of First Amendment values,’ and is entitled to special protection.” (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982))). Yet Mr. Leo has, for years, been the subject of vicious attacks by members of Congress, specifically including members of the Committee majority, because of how he chooses to exercise his rights. In reference to Mr. Leo’s public advocacy work, for example, Senator Whitehouse has called Mr. Leo the “little spider that you find at the center of the dark money web.” Senator Sheldon Whitehouse, Remarks on the Floor of the United State Senate (Sept. 13, 2022). Similar remarks from Senator Whitehouse and others are too numerous to recount.

This campaign of innuendo and character assassination has now moved beyond angry speeches and disparaging soundbites. In the July 11 Letter, Committee Democrats have now wielded the investigative powers of Congress to harass Mr. Leo for exercising his First Amendment rights. That transforms what has to this point been a nuisance occasioned by intemperate rhetoric into a constitutional transgression.

“[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech.” *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quotation omitted). Thus, an official is prohibited from “tak[ing] adverse action against someone based on” that person’s expressive activity. *Id.* This bar against retaliatory action applies to Congress as much when it acts in its investigative capacity as when it legislates. *See Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (“[T]he provisions of the First Amendment . . . of course reach and limit congressional investigations.”).

The Committee’s investigation into Mr. Leo’s relationship with Justice Alito quite clearly constitutes an adverse action for purposes of the First Amendment. The burden created by a congressional inquiry is significant. *See Watkins v. U.S.*, 354 U.S. 178, 197 (1957) (“The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference.”). It can chill expressive

activity and infringe on First Amendment rights. *See, e.g., Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001) (“Any form of official retaliation for exercising one’s freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.”); *see also United States v. Hansen*, 143 S. Ct. 1932, 1963 (2023) (Jackson, J., dissenting) (noting that an investigative letter sent by members of Congress “can plainly chill speech, even though it is not a prosecution (and, for that matter, even if a formal investigation never materializes).”).

It seems clear that this targeted inquiry is motivated primarily, if not entirely, by a dislike for Mr. Leo’s expressive activities. Retaliatory motive can be shown in at least two ways: (1) where the “evidence of the motive and the [adverse action] [are] sufficient for a circumstantial demonstration that the one caused the other,” *Hartman v. Moore*, 547 U.S. 250, 260 (2006); or (2) where “otherwise similarly situated individuals not engaged in the same sort of protected speech” were not subjected to the same adverse action, *Nieves*, 139 S. Ct. at 1727. Both circumstances are present here.

As noted, Mr. Leo and the groups with which he is affiliated have been subjected to a barrage of disparaging remarks because of their views on judicial nominations and other judicial matters. Sen. Whitehouse has attacked “creepy right-wing billionaires who stay out of the limelight and let others, namely Leonard Leo and his crew, operate their” supposed “far-right scheme to capture and control our Supreme Court.” Senator Sheldon Whitehouse, Remarks on the Floor of the United State Senate (July 12, 2023). Senator Durbin has similarly decried “Leonard Leo and the Federalist Society” for their “joint effort [with] very conservative groups, special interest, dark money groups, and the Republican party” to shape “what will be the future of the court.” Senator Richard Durbin, Interview with the Washington Post (July 13, 2023). And perhaps most tellingly, the present investigation was announced with a statement titled “Whitehouse, Durbin Ask Leonard Leo and Right-Wing Billionaires for Full Accounting of Gifts to Supreme Court Justices.” Sens. Richard Durbin and Sheldon Whitehouse, Press Statement (July 12, 2023).

These explicitly political attacks, and others like them, made over the course of many years and reaching a crescendo in the days immediately following the transmission of the letter to Mr. Leo, provide an ample basis for concluding that the July 11 Letter is animated by animus toward “conservative” “Right-Wing” views and organizations, rather than a purely genuine concern about Supreme Court ethics. *See Lyberger v. Snider*, 42 F.4th 807, 813 (7th Cir. 2022) (explaining that statements from officials who took adverse action can demonstrate retaliatory motive). The circumstances of the Committee’s investigation show that “retaliatory animus actually caused” the adverse action taken against Mr. Leo. *Nieves*, 139 S. Ct. at 1723.

This conclusion is confirmed by the targeted and one-sided nature of the investigation. Despite professing interest in potential ethics violations and influence-peddling at the Supreme Court, the Committee has focused its inquiries on individuals who have relationships with Justices appointed by Republican Presidents. Reported instances of Democrat-appointed Justices

accepting personal hospitality or other items of value from private individuals have been ignored. Here are some examples:

- In 2019, Justice Ruth Bader Ginsburg was given a \$1 million award by the Berggruen Institute, an organization founded by billionaire investor Nicolas Berggruen. *See* Andrew Kerr, *Ruth Bader Ginsburg's Mysterious \$1 Million Prize*, Washington Free Beacon (July 19, 2023). Justice Ginsburg used the money to make donations to various charitable causes of her choosing, most of which remain unknown. *See id.*
- Between 2004 and 2016, Justice Stephen Breyer took at least 225 trips that were paid for by private individuals, including a 2013 trip to a private compound in Nantucket with billionaire David Rubenstein, who has a history of donating to liberal causes. *See* Marty Schladen, *U.S. Supreme Court justices take lavish gifts — then raise the bar for bribery prosecutions*, Ohio Capital Journal (April 26, 2023).
- On September 30, 2022, the Library of Congress hosted an expensive investiture celebration for Justice Ketanji Brown Jackson that was funded by undisclosed donors. *See* Houston Keene, *Library of Congress explains why it hosted Jackson investiture but not for Gorsuch, Kavanaugh, Barrett*, Fox News (Sept. 30, 2022).
- On two occasions, Justice Sonia Sotomayor failed to recuse herself from cases involving her publisher, Penguin Random House, which had paid her \$3.6 million for the right to publish her books. *See* Victor Nava, *Justice Sonia Sotomayor didn't recuse herself from cases involving publisher that paid her \$3M: report*, N.Y. Post (May 4, 2023).
- Justice Sonia Sotomayor used taxpayer-funded Supreme Court personnel to promote sales of her books, from which she earned millions of dollars, including at least \$400,000 in royalties. *See* Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's staff prodded colleges and libraries to buy her books*, Associated Press (July 11, 2023).
- Throughout her tenure on the Supreme Court, Justice Ruth Bader Ginsburg maintained a close relationship with the pro-abortion group National Organization for Women (“NOW”), which frequently had business before the Court. *See* Richard A. Serrano & David G. Savage, *Ginsburg Has Ties to Activist Group*, Los Angeles Times (Mar. 11, 2004). Among other things, Justice Ginsburg helped the organization fundraise by donating an autographed copy of one of her decisions, and contributed to its lecture series, even as she participated in cases in which NOW filed amicus briefs. *See id.*; Katelynn Richardson, *Here Are the Times Liberal Justices had Political Engagements that Were Largely Ignored by Democrats*, Daily Caller (May 5, 2023).

None of these incidents has resulted in inquiries from the Committee. Yet, Committee Democrats have not meaningfully distinguished these examples from the supposed ethics lapses committed by Republican-appointed Justices that are the focus of the Committee’s investigation. Moreover, for all of Committee Democrats’ statements disparaging Mr. Leo for his First Amendment-protected advocacy pertaining to the law and the judiciary, they have evinced no interest in investigating the largest “dark money” network in American politics, that associated with the Democratic Party-aligned Arabella Advisors. *See* Emma Green, *Democrats Have Made Their Peace With Dark Money*, *The Atlantic* (Nov. 2021). Nor have they pursued the new Democratic Party-aligned coalition of “dark money” groups established specifically to “mold the [Supreme Court’s] future.” Adam Edelman, *Dem-aligned groups launch campaign to keep Supreme Court front of mind in 2024*, *NBC News* (June 12, 2023). To the contrary, Sen. Whitehouse—who has repeatedly attacked Mr. Leo for his advocacy—“praised the new campaign as a tool that could help combat” his policy opponents’ advocacy. *Id.*

Where, as here, the scrutiny of an investigation is aimed at only one side of the political spectrum, it is a fair inference that politics is the motivating factor. *See O’Brien v. Welty*, 818 F.3d 920, 935 (9th Cir. 2016) (holding that university’s decision to block a student with a “conservative point of view” “from posting about certain issues” on a school forum “while at the same time allowing posts expressing left-leaning viewpoints to remain” supported inference of First Amendment retaliation).

The Committee’s failure to make any inquiries into similar incidents involving Democrat-appointed Justices is all the more troubling when juxtaposed against the focus of the Committee’s questions to Mr. Leo. The July 11 Letter was apparently spurred by a report about a single fishing trip that Mr. Leo took with Justice Alito *over fifteen years ago*. Even assuming that trip is somehow relevant to present concerns about Supreme Court ethics, the connection is highly attenuated, focused on “an object remote” from purported “legitimate concerns” about ethics standards. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993). The notion that a fishing trip a decade and a half ago is more pertinent to the Committee’s current work than a \$1 million award given to a Justice less than four years ago is not plausible and bolsters the conclusion that the Committee’s inquiries are motivated by its distaste for Mr. Leo’s political views. *Cf. Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 802 (2011) (“Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”).

The Committee’s Inquiry Violates Equal Protection

The Equal Protection component of the Due Process Clause of the Fifth Amendment prohibits government actions that are “based on ‘an . . . arbitrary classification.’” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). That protection extends to individuals who are not part of a protected class, *see Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), such as where unfavorable government action is taken because of “malicious or bad faith intent to injure” a particular person, *Cobb v. Pozzi*,

363 F.3d 89, 110 (2d Cir. 2004); *see also Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 849 (10th Cir. 2005) (finding equal protection violation where differential treatment of “class of one” was undertaken “out of sheer malice”). And like the First Amendment, the protections of the Fifth Amendment fully apply in the context of a congressional investigation. *See Quinn v. United States*, 349 U.S. 155 (1955).

An unlawful, discriminatory exercise of government power occurs where a person is “intentionally treated differently from others similarly situated and . . . there is no rational basis for the difference in treatment.” *Olech*, 528 U.S. at 564. For reasons already given, those conditions are met here. Mr. Leo is clearly being treated differently from similarly-situated individuals who also have close personal relationships with Supreme Court Justices or who have travelled privately with a Justice. Whereas Mr. Leo is now the subject of a congressional inquiry, the many individuals and organizations who have facilitated travel for Democrat-appointed Justices, or exchanged gifts or personal hospitality with those Justices, are apparently immune from the Committee’s attention. These are clearly individuals and organizations “who engaged in similar conduct” to Mr. Leo. *United States v. Blackley*, 986 F. Supp. 616, 618 (D.D.C. 1997) (emphasis omitted). Yet their treatment by the Committee is vastly different from its treatment of Mr. Leo.

The Committee’s focus on Mr. Leo has sometimes been explained with reference to “dark money” and “phony front groups” that are supposedly out to “capture” the Supreme Court. Senator Sheldon Whitehouse, Remarks on the Floor of the United State Senate (Sept. 13, 2022). But no member of the Committee’s Majority has expressed similar concern about liberal organizations like Arabella Advisors that fully merit the “dark money” label, and that use their clout to advocate for judicial reforms favored by progressives. *See Emma Green, The Massive Progressive Dark-Money Group You’ve Never Heard Of*, *The Atlantic* (Nov. 2, 2021); Editorial Board, *The Stifle Speech Act of 2022*, *Wall Street Journal* (Sept. 22, 2022). Again, the politically based difference in treatment is unmistakable and telling.

Further, as we have already described at length, Committee Democrats have an extensive record of vilifying Mr. Leo for his lawful public advocacy, attacking him in the harshest possible partisan terms. It is hard to conclude that the disparate treatment to which Mr. Leo is being subjected is the result of anything other than “sheer vindictiveness” motivated by politics. *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). It therefore violates Equal Protection.

The Committee Lacks a Valid Legislative Purpose

Congress cannot conduct an investigation in connection with legislation that it cannot constitutionally enact. *See United States v. Rumely*, 345 U.S. 41, 45 (1953). Thus, a bill that, if enacted, would be unconstitutional cannot supply the Committee with a valid legislative purpose for its investigation. *See Quinn*, 349 U.S. 155, 161. That is true of the *Supreme Court Ethics, Recusal, and Transparency Act of 2023* (“Ethics Bill”), which the Committee, on purely partisan

lines, ordered reported on July 20, 2023. The Committee’s inquiry is therefore impermissible for reasons independent of the infringement of Mr. Leo’s constitutional rights.

The Ethics Bill would, among other things, establish a process by which private individuals could file complaints against Supreme Court Justices, and would empower lower court judges to rule on those complaints. *See* S. 359, 118th Cong. (2023). That arrangement offends basic separation of powers principles in at least two ways. First, it would elevate lower court judges to the position of overseers of the Supreme Court, turning upside down the hierarchy of the judicial branch mandated by the Constitution. *See* U.S. Const. art. III, § 1. Second, the bill’s complaint process would work as an engine for generating continuous harassment of Supreme Court Justices, who could be deluged with frivolous ethics complaints that would distract them from their constitutional duties. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) (explaining that separation of powers principles are implicated where Congress harasses a coordinate branch in the performance of its duties).

More generally, any attempt by Congress to enact ethics standards for the Supreme Court would falter on constitutional objections. There is no enumerated power in Article I of the Constitution that authorizes Congress to regulate the inner workings of the Supreme Court. *See* U.S. Const. art. I. Ethics standards imposed by Congress on the Supreme Court would therefore necessarily be unconstitutional. *See New York v. United States*, 505 U.S. 144, 177 (1992) (holding congressional action unlawful where it “[i]es] outside Congress’ enumerated powers”). Likewise, regardless of their particulars, any ethics standards Congress may enact would raise separation of powers concerns of sufficient magnitude to render them invalid. *See Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (holding that each branch of government must be “entirely free from the control or coercive influence, direct or indirect” of the other branches). The fact that Congress has already enacted laws that purport to impose ethics standards on the Justices does not change this conclusion. The legality of those laws has never been tested in court. And as Chief Justice Roberts has made clear, the Supreme Court has never acquiesced to Congress’s assertion of authority over the Court’s ethics standards, and Congress of course cannot expand its own power under the Constitution by passing an unconstitutional statute.

* * *

The Senate’s investigative authority should, as a matter of both law and prudence, be exercised consistent with the freedoms guaranteed to every American by the Bill of Rights. Turning the Senate into a “platform of irresponsible sensationalism” where an individual’s “right to hold unpopular beliefs” and “right of independent thought” are disregarded is a course that we know from past experience can serve no good end. Senator Margaret Chase Smith, Declaration of Conscience (June 1, 1950). We will not be part of that journey.

July 25, 2023
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Sincerely,

A handwritten signature in blue ink, appearing to read "David B. Rivkin, Jr." with a stylized flourish at the end.

David B. Rivkin, Jr.
Partner