BakerHostetler

Baker&Hostetler LLP

Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403

T 202.861.1500
F 202.861.1783
www.bakerlaw.com

David B. Rivkin, Jr.
direct dial: 202.861.1731
drivkin@bakerlaw.com

October 19, 2023

VIA ELECTRONIC MAIL

The Honorable Richard Durbin
Chairman
Senate Judiciary Committee
United States Senate
221 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Response to October 5, 2023, Letter to Leonard Leo

Dear Chairman Durbin:

We write on behalf of Leonard Leo in response to your letter of October 5, 2023, which, after a delay of approximately two and a half months, responded to our letter of July 25. In our July 25 letter, we raised various legal objections to the Committee's requests for information from Mr. Leo about his interactions with Supreme Court Justices. The October 5 Letter asserts that we "do not have a proper basis to withhold information from Congress." However, the letter is largely silent as to why our objections are supposedly unfounded, leaving us with only the Committee's *ipse dixit* that we are obligated to turn over the extensive and sensitive personal information it seeks.

We have put forward clear and detailed reasons why the Committee's inquiry is a form of political retaliation in violation of the First Amendment and the Equal Protection component of the Due Process Clause. But, for the most part, the October 5 Letter ignores these points, and, since our last correspondence, the Committee has only expanded the retaliatory campaign it is mounting against Mr. Leo. We also have explained at length why the Supreme Court ethics legislation the Committee has written would violate the separation of powers if enacted, and thus cannot legitimate the Committee's inquiry. But the October 5 Letter offers virtually nothing in the way of rebuttal, and the Committee continues to press forward with its unconstitutional bill. Across the board, the October 5 Letter tries to shield the Committee's inquiry from our

objections by simply acting as though they do not exist. Because we continue to believe that the Committee is not entitled to the personal information it seeks, and because the Committee has provided us with no arguments to the contrary, we respectfully decline to provide such information today.

<u>The October 5 Letter Fails to Address the Significant and Intensifying Retaliatory Acts in which the Committee Is Engaged</u>

In our July 25 Letter, we noted what is obvious to anyone who has been following the Committee's investigation. The Committee is engaged in a partisan project conducted only superficially in support of its efforts to write a bill that has already been written; that has no chance of ever becoming law; and that, if somehow enacted, would be peremptorily struck down as unconstitutional. The shallowness of the Committee's supposed legislative purpose clearly manifests the Committee's true aims. In actuality, the Committee is out to smear, impugn, and punish Mr. Leo, because the Committee Democrats do not like his political advocacy, and they want to shut it down. That much is clear from many public statements the Committee Democrats have made; the politically one-sided tack they have taken in charting their investigation; and the internal contradictions of their supposed legislative purpose.

Contrary to the October 5 Letter's bald assertion, these are not "frivolous" claims. The Letter's complete failure to answer our objections shows that the Committee has no answers to give. In our July 25 Letter, we quote a multiplicity of statements from Committee Democrats that plainly demonstrate deeply harbored animus toward Mr. Leo and his expressive activities. Nowhere in its October 5 response does the Committee even acknowledge these statements, let alone attempt to explain how the statements, taken together with the Committee's highly burdensome demands for information, are not a textbook example of First Amendment retaliation. Indeed, since our July 25 Letter, the Committee Democrats have intensified their rhetorical attacks on Mr. Leo's conservative views and constitutionally protected speech.

- On September 12, 2023, Chairman Durbin said that "[d]ark money continues to be a dire threat to American democracy and the integrity of the Supreme Court," and that "Leonard Leo and a gaggle of fawning billionaires" have worked to "form a calculated financial scheme, capitalize on the forthcoming Citizens United decision, and influence the Supreme Court at the expense of its reputation." Senator Richard Durbin, Durbin Statement On Calculated Dark Money Scheme Targeting The Supreme Court By Ginni Thomas, Leonard Leo, And Network Of Billionaires (Sept. 12, 2023). These statements were echoed on the Committee Democrats' official social media channels. Senate Judiciary Committee, Twitter (Sep. 11, 2023).

- On October 12, 2023, Senator Whitehouse said that "the ubiquitous fixer Leonard Leo" is part of a "filthy web of dark money, right-wing billionaires, compliant Supreme Court Justices." Senator Sheldon Whitehouse, Twitter (Oct. 12, 2023).

- On September 25, 2023, Senator Whitehouse claimed that "Leo orchestrates gifts and free travel from right-wing billionaires to FedSoc justices" in order to facilitate "right-wing

> billionaire[s'] 'care-and-feeding-of-FedSoc-justices." Senator Sheldon Whitehouse, Twitter (Sept. 25, 2023).

These new statements, along with the ones cited in our July 25 Letter and many others, remove any doubt, if there was any to begin with, that the Committee is targeting Mr. Leo out of hostility toward his political views and associations. The Committee cannot just ignore these statements, as it did in the October 5 Letter. Statements by government officials that "disparage" and evince "clear . . . hostility" toward a person's beliefs lead inescapably to the conclusion that the officials' actions are taken out of "animosity" toward a person's protected activities. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018). Thus, "expression[s] of opposition to . . . protected speech" demonstrate the animus necessary to establish a claim of First Amendment retaliation. *Boquist v. Courtney*, 32 F.4th 764, 777 (9th Cir. 2022). Here, the amount of vitriol directed at Mr. Leo by leading members of the Committee on account of his political activities makes uncontestable our conclusion that this inquiry is motivated by unlawful animus.

The Committee Democrats' statements are merely one of many indications that this inquiry is driven by a desire to harass and silence Mr. Leo. Another hallmark of unlawful First Amendment retaliation is an incongruity between what government officials say they are trying to accomplish and what they actually do. "Underinclusiveness in [government actions] may reveal that motives entirely inconsistent with the stated interest actually lie behind [the actions]." *Republican Party of Minnesota v. White*, 416 F.3d 738, 757 (8th Cir. 2005). That squarely describes the manner in which the Committee is conducting its inquiry.

The October 5 Letter states that the Committee seeks information from Mr. Leo in order to gain a "comprehensive understanding" of the supposed risk that "parties with matters before the Court [are] tak[ing] advantage of access to justices made possible by both disclosed and undisclosed transportation, lodging, and other gifts." As measured against that objective, the means that the Committee has deployed to acquire a "comprehensive understanding" of the influence peddling that they imagine is occurring at the Court clearly miss the mark.

If, as the October 5 Letter says, the supposed problem that concerns the Committee is improper "access to justices," then the Committee should be looking at the trips and events that are disclosed by the Justices (or at least publicly known) every bit as much as those that are not. Indeed, the October 5 Letter itself states that the Committee is interested in access "made possible by both *disclosed* and undisclosed" gifts and travel. (Emphasis added). In recent years, Justices Stephen Breyer, Ruth Bader Ginsburg, Ketanji Brown Jackson, Elena Kagan, and Sonia Sotomayor have disclosed hundreds of trips and events involving progressive legal and policy organizations, elite law schools, bar associations, and other legal membership groups. These institutions and organizations are almost exclusively governed and populated by the Left, and the attendees at their events are predominantly influential liberals. If the Committee were actually pursuing the inquiry it claims, these frequent trips and events would be of *at least* as much interest to the Committee as a fishing excursion Mr. Leo took with Justice Alito 15 years ago. In fact, there is every reason to believe that the countless private and social conversations that take place between Justices and legal or policy thought leaders and advocates at events sponsored by institutions such as the Aspen Institute, Planned Parenthood, Yale and Harvard Law Schools, the

American Bar Association, and the American Constitution Society are *more* consequential than instances of hospitality extended to the Justices by and amongst friends.

The Committee insists that it needs information about events, trips, and private hospitality extended to Justices Clarence Thomas and Samuel Alito, but, at the same time, shows absolutely no interest in Justice Ginsburg's visit to a Planned Parenthood event; or an invitation-only, privately funded event at the Library of Congress celebrating Justice Jackson's investiture; or Justice Sotomayor's visit to the American Constitution Society; or Justice Breyer's many trips to the Aspen Ideas Festival. The fact that attendance at those events was disclosed or publicly known says nothing about what occurred at those gatherings, why the Justices were invited to attend, who else attended the events, what interests those other attendees had in matters pending before the Court, or what subjects were raised with the Justices by those other attendees. The same is true of the numerous visits those same Justices have made to the most Left-of-center law schools and lawyers' membership groups in America, which are populated by many individuals with significant interests and participation in the work of the Court, and who certainly had access to the Justices during the Justices' visits.

Beyond events and trips, there are other activities of the Democrat-nominated Justices to which the Committee has turned a blind eye, despite significant media coverage of those activities. For example, there has been considerable press attention given to the "RBG" documentary in which Justice Ginsburg participated that was released right before the 2018 midterm elections—a far more recent and significant event than a 2008 fishing trip. Participant Media, which purchased the distribution rights for the documentary, was founded by billionaire Jeffrey Skoll "to bring you the most politically charged movies of the year." Scott Tobias, *Participant Media Wants to Bring You the Most Politically Charged Movies of the Year*, GQ (Sept. 17, 2015). Further, Mr. Skoll is a known political activist. His philanthropic enterprises have given more than $27 million to Arabella Advisers' Leftwing dark money network. On these facts, Mr. Skoll's political activism clearly raises questions about his unparalleled access to and collaboration with a sitting Justice that would be of interest to the Committee if it were actually engaged in the legislative work it claims.

Another item that would, by any fair assessment, be of interest to the Committee if it cared about supposed influence peddling at the Court is Justice Ginsburg's receipt of a $1 million prize awarded by the Berggruen Institute. This is, by far, the largest gift that any Justice has disclosed over the past two decades. The announcement of the award states that Justice Ginsburg would direct the $1 million "to charitable or non-profit organizations that she designates." Rachel Bauch, *Annual Berggruen Prize for Philosophy & Culture Awarded to U.S. Supreme Court Justice Ruth Bader Ginsburg for Her Work in Pioneering Gender Equality and Strengthening the Rule of Law*, Berggruen Institute (Oct. 23, 2019). Since Justice Ginsburg's death, the Institute has stated that the list of recipients, "per her wishes, is not for publication." Andrew Kerr, *Ruth Bader Ginsburg's Mysterious $1 Million Prize*, The Washington Free Beacon (July 19, 2023). Despite the award's obvious relevance to the Committee's purported concerns, the Committee has made no inquiries into what interests the Institute, its benefactor, or those on its prize selection committee might have that are related to the work of the Supreme Court, or whether any of the prize money went to groups with business before the Court. *See* Appendix, *Representative Examples of Disclosed Events* for further examples and discussion. The Committee has instead decided to focus

exclusively on the private social interactions of Republican-appointed Justices with personal friends who happen to be conservatives.

In sum, the investigation in which the Committee is engaged is so "woefully underinclusive as to render belief in [its] [stated] purpose a challenge to the credulous." *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002). The chasm between what the Committee says it is doing and what it is actually doing is immense. Indeed, even in its own letter, the Committee cannot keep its story straight. The October 5 Letter's meager response to our previous recitation of instances where Democrat-nominated Justices could possibly have been exposed to improper influence peddling—and why those instances clearly implicate the Committee's supposed concerns—is that "the Committee's investigation focuses on the problem of undisclosed conduct." But, as already noted, the very next page of the letter states that the primary issue on which the Committee has trained its attention is untoward "access to justices made possible by both *disclosed* and undisclosed transportation, lodging, and other gifts." (Emphasis added). So which is it? The truth is that it is neither. Whether disclosed or undisclosed, what the Committee clearly cares most about is obtaining information that it believes will help it punish and embarrass people like Mr. Leo with whom Committee Democrats have political disagreements. Because the Committee's "proffered explanation is unworthy of credence," it "demonstrate[s] pretext," which can only lead to an inference of retaliatory motive. *Alston v. Town of Brookline*, 997 F.3d 23, 46 (1st Cir. 2021).

Another internal contradiction that characterizes the Committee's inquiry is that the objective in support of which the inquiry is supposedly being pursued has already been effected. The Committee says that it wishes to solve an ethics problem at the Supreme Court, and Committee Democrats have described S. 359, the Supreme Court Ethics, Recusal, and Transparency ("SCERT") Act of 2023, as the "comprehensive" solution to that problem. Senator Sheldon Whitehouse, Remarks at Executive Meeting of Senate Judiciary Committee (July 20, 2023). But the SCERT Act has already been reported out of Committee. *See* Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 117th Cong. (as reported by S. Comm. on the Judiciary, Sept. 5, 2023). Logically, that means the Committee must have concluded that it already had enough information to make an informed legislative decision about what kinds of ethics reforms are needed. Despite this, the Committee's investigation carries on, and a renewed request for information has been lodged months after the Committee voted to report the bill out of committee. The sequencing of bill writing, bill consideration, and bill reporting followed by purported factual investigation is odd, to put it charitably.

Another oddity of the timing of the Committee's inquiry is that the renewed request for information comes more than two months after our last correspondence with the Committee. If the ethics issues on which the Committee purports to be fixated did in fact present "a dire threat to American democracy," a greater sense of urgency would be expected. Senator Richard Durbin, Press Release: Durbin Statement On Calculated Dark Money Scheme Targeting The Supreme Court By Ginni Thomas, Leonard Leo, And Network Of Billionaires (Sept. 12, 2023). Again, the contradiction between the Committee's words and actions is stark.

The Committee's inquiry is defined by internal inconsistencies, over the top accusations of misconduct, and a myopic focus on one side of the political aisle that likely has more to do with soliciting donations for reelection campaigns than securing information that might assist in the discharge of the Committee's lawmaking responsibilities. From top to bottom, the inquiry is a

political operation that is being advanced under the guise of a congressional investigation. Because of the "implausibilities, inconsistencies, incoherencies, [and] contradictions in [the Committee's] proffered legitimate reasons" for its inquiry, the inference that Mr. Leo is being targeted because of his expressive activities is unshakeable, and the October 5 Letter does not even try to rebut it. *Alston*, 997 F.3d at 46.[1]

<u>The Committee Continues to Act Without a Valid Legislative Purpose</u>

Critically, the Senate does not "possess[] the general power of making inquiry into the private affairs of the citizen." *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880). That limitation on the Senate's investigative powers is especially important where the inquiry into private matters is made simply "to expose for the sake of exposure," to harass and humiliate. *Watkins v. United States*, 354 U.S. 178, 200 (1957). Where the "predominant result" of a congressional investigation "can only be an invasion of the private rights of individuals," the investigation cannot proceed for lack of a legislative purpose. *Id*.

Here, the unnecessary disclosure of details about Mr. Leo's private life is not just the predominant intended result of the Committee's inquiry, it is likely the only result. Any information Mr. Leo might share with the Committee could not possibly aid in the drafting of a bill that has already been reported out of Committee. Nor can the Committee plausibly claim that information from Mr. Leo is needed to help write other ethics bills. The SCERT Act was—in Committee Democrats' own telling—their "comprehensive" solution to the imagined ethics crisis at the Supreme Court, which makes this ongoing investigation an afterthought disjoined from any actual legislative work. *See Watkins*, 354 U.S. at 187 ("No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.").

Instead, as we have stressed, the Committee's inquiry actually appears to be undertaken for the unfortunate and improper purposes of scoring partisan points against a detested political opponent and vilifying him in the court of public opinion. *See Watkins*, 354 U.S. at 187 ("Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."). Dredging up content for inflammatory Tweets and fundraising appeals that are circulated far and wide outside the Senate chamber is not a valid legislative purpose. *Cf. Doe v. McMillan*, 412 U.S. 306, 314–15 (1973) ("[R]epublishing a libel . . . is not an essential part of the legislative process."). Similarly, the Committee's attempt to manufacture the appearance of wrongdoing on the part of Mr. Leo in connection with an alleged "financial scheme" to "influence the Supreme Court," and to set itself up as judge and jury of that supposed wrongdoing, is not a valid legislative purpose; it is an attempted congressional prosecution. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020) ("Congress may not use subpoenas to 'try' someone 'before [a] committee for . . . wrongdoing.'" (quoting *McGrain v. Daugherty*, 273 U.S. 135, 179 (1927) (alteration in original)).

Further, even if the SCERT Act were still pending in Committee, our position would be the same. The Committee cannot derive a valid legislative purpose from lawmaking activities that can

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[1] For similar reasons, our view that the Committee's actions also constitute an Equal Protection violation has only hardened in the intervening months since we last wrote the Committee. As with the points raised in our July 25 Letter concerning First Amendment retaliation, the October 5 Letter neglects to address or respond to our Equal Protection concerns.

only culminate in the enactment of an unconstitutional law. "[T]he power to investigate . . . does [not] extend to an area in which Congress is forbidden to legislate." *Quinn v. United States*, 349 U.S. 155, 161 (1955). In virtually every one of its provisions, the SCERT Act transgresses the bounds placed on Congress by the Constitution. If enacted, it would be a dead letter in the courts, and therefore cannot supply the Committee with the legislative purpose it needs to move forward with its inquiry.

To take just one especially egregious example, the SCERT Act would force a Justice to recuse from cases where the Justice "knows that a party to the proceeding or an affiliate of a party to the proceeding made any lobbying contact . . . or spent substantial funds in support of the nomination, confirmation, or appointment of the justice or judge," or where the Justice "their spouse, their minor child, or a privately held entity owned by any such person received income, a gift, or reimbursement" "from a party to the proceeding or an affiliate of a party to the proceeding." S. 359 § 4. In addition, the bill would allow inferior court judges to investigate complaints made against a Justice who failed to recuse in a given case and take disciplinary action if they conclude a violation occurred. *Id.* § 2(a).

These provisions, if they were to ever become law, would be blatant usurpations by Congress of the judicial power. *See Loving v. United States*, 517 U.S. 748, 757 (1996) ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another."). Recusal decisions, like other judicial determinations, are made in the context of a case or controversy pending before the Court and have historically been left to the discretion of the individual Justices. *See* Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 Wis. L. Rev. 1181, 1195 (2011). Time and again, courts have described recusal decisions as a core "judicial function." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 882 (2009). That historical practice carries "significant weight" when charting the lines that separate the respective powers of the coordinate branches of government. *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014). In consequence, it is not within Congress's power to direct or regulate how recusal decisions are made. *See United States v. Brown*, 381 U.S. 437, 442 (1965) ("[T]he separation of powers" prohibits the "legislative exercise of the judicial function.").

Moreover, the notion that Congress could set up inferior court judges as overseers of Supreme Court Justices' conduct turns on its head the structure of the judicial branch ordained by Article III of the Constitution. *See* U.S. Const. art. III, § 1. Article III does not create "a batch of unconnected courts, but a judicial *department*, composed of 'inferior Courts' and 'one supreme Court,'" which serves as "the final word of the department as a whole" and is not answerable to the courts below it. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995). By inverting this structure, the SCERT Act would "impermissibly threaten[] the institutional integrity of the Judicial Branch." *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)). It would be the equivalent of Congress empowering subordinate executive branch officers to second-guess the President's actions and reprimand him where they disagreed with his conduct. Such an arrangement would plainly "compromise the integrity of the system of separated powers and the role of the Judiciary in that system." *Stern v. Marshall*, 564 U.S. 462, 503 (2011).

As with the rest of its response to our legitimate concerns, the October 5 Letter makes only a half-hearted gesture at grappling with the grave separation of powers issues that the Committee's actions implicate. The Letter gives as its rebuttal the solitary citation of *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), for the proposition that our position reflects an "archaic view of the separation of powers as requiring three air-tight departments of government." The disconnect between that blithe assertion and the seriousness of our objections is striking. In *Nixon*, the Court cautioned that the separation of powers is breached where Congress's actions create "undu[e] disrupti[on]" in the workings of another branch that prevents the other branch "from accomplishing its constitutionally assigned functions." *Id.* at 445. Just because the powers of the federal government are not siloed in three "air-tight" departments does not mean that Congress can insert itself into any and all functions that are assigned to the judicial branch. The SCERT Act would intrude directly on core judicial functions, and therefore exceeds Congress's constitutional authority.

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Speaking in another context, then-Attorney General Robert Jackson said that the "greatest danger of abuse" of the government's investigative power comes when government officials "pick[] the man" "whom [they] dislike[] or desire[] to embarrass" and "then search[] the law books, or put[] investigators to work, to pin some offense on him." Robert H. Jackson, Address to the Second Annual Conference of United States Attorneys (April 1, 1940). The Committee Democrats have already made up their minds about Mr. Leo. In Committee Democrats' imagining, Mr. Leo is a "right-wing" "fixer" who sits atop a conspiracy to capture the Supreme Court and poses a "dire threat to American democracy," and they appear determined to use the Committee's investigative tools in an attempt to uncover evidence to substantiate those noxious beliefs, or at least to impose immense and costly burdens on Mr. Leo in order to punish him for his disfavored views. It is not our responsibility to aid in that partisan effort, and we choose not to do so today.

Sincerely,

David B. Rivkin, Jr.

David B. Rivkin, Jr.
Attorney for Leonard A. Leo