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**Before the Presidential Commission on the
Supreme Court of the United States**

**“Access to Justice and Transparency in the
Operation of the Supreme Court”**

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Chairs Rodríguez and Bauer, and distinguished members of the Commission: Thank you for inviting me to testify today. I am the founder of Gupta Wessler, an appellate boutique that represents plaintiffs and public-interest clients. I am also a lecturer at Harvard Law School. I have appeared before trial courts nationwide, every federal circuit, several state supreme courts, and the U.S. Supreme Court—including once as a Court-appointed amicus curiae. In the past, I served as Senior Counsel at the Consumer Financial Protection Bureau and as a staff attorney at Public Citizen, where I coordinated that organization’s Supreme Court Assistance Project.

As an appellate practitioner who frequently represents consumers, workers, and communities affected by corporate or governmental wrongdoing, I am glad that this Commission is carefully considering the questions of equitable access to justice and transparency at the Supreme Court, and I am grateful for the opportunity to contribute my thoughts and experience on these critical issues. My testimony today will focus on the lack of diverse representation and transparency at the Supreme Court, along with the consequences that has for the Court, the legal profession, and the law. I will start by

identifying three major problems, each of which threatens to undermine the Court's legitimacy in the eyes of the public and its ability to deliver equal justice under law.

First, practice before the Court is dominated by a small group of repeat players that lacks demographic and experiential diversity. Increasingly, a small group of highly specialized, elite lawyers repeatedly argue Supreme Court cases. The vast majority of that group is white and male, and in large part drawn from former Supreme Court clerks—totally unrepresentative of the American people and even the legal profession at large. Even in the rare instances that the Justices have complete control over who will argue, in appointing amicus counsel, they have tended to choose from an insular and unrepresentative group: their own recent clerks. It should go without saying that increasing the diversity of the attorneys who argue before the Court requires no sacrifice whatsoever in the quality of their advocacy.

Second, this elite Supreme Court bar overwhelmingly consists of lawyers associated with large corporate law firms—corporate dominance that ends up shaping the contours of American law. This dominance not only means that expert lawyers' services are most available to the wealthiest clients, but also that they are prevented by business and ethics conflicts from representing many plaintiffs—for example, a customer who sues a bank for violating consumer-protection laws or a worker who sues an employer for wage-and-hour violations. This dynamic threatens the ability of ordinary Americans to access the level playing field that the American legal system promises. The phenomenon is of particular concern at the certiorari stage, where repeat players who know the ropes enjoy a distinct advantage. In this way, the imbalance in the Supreme Court bar has a profound

and consequential effect on the sort of cases that wind up getting heard by the highest court in the land. And, in turn, it ends up having a profound and consequential effect on the shape of American law.

Third, the imbalance in representation is heightened by the various aspects of the Supreme Court’s work that unnecessarily lack transparency. This is not a new observation, but it is, in my view, a worthy one for this Commission to consider carefully. Among many other examples, the secrecy of the Court’s certiorari process, and the unpredictability and lack of clear reason-giving endemic to its “shadow docket”, threaten public access to and trust in the Court’s work.

All of these problems are complicated, and their solutions will be as well. There is no magic bullet—no single piece of rulemaking, legislation, or reform that could possibly level the playing field. I’ve included below some recommendations that could serve as valuable first steps in strengthening access to justice and transparency at the Court.

First, diversify the bar. The Court should continue to expand and diversify the pool of appointed amici curiae beyond former Supreme Court law clerks to include a broader group of attorneys, with greater diversity in terms of race, gender, and professional experience, perhaps by using an advisory panel to offer recommendations for advocates. The Court should seek similar diversity in hiring law clerks, as should institutions and firms that hire attorneys who may appear before the Court—including the Office of the Solicitor General, state solicitors general, and elite appellate practices at big law firms.

Second, redress imbalances by encouraging the development of a specialized plaintiffs’ and public-interest appellate bar, including by increasing funding to dedicated

Supreme Court and appellate practices at organizations like Legal Aid and Public Defender offices; and

Third, increase accessibility to and transparency of the Court’s decisionmaking, especially in the certiorari process and the so-called “shadow docket.” There are a variety of options for reforms of this kind. They include publishing the Justices’ votes on petitions of certiorari and applications for stays; giving reasons for stays or injunctions that change the status quo; holding oral arguments on emergency stay applications; setting a default timetable and seeking full briefing for stay applications; providing a live broadcast of oral arguments; and releasing data on the demographic characteristics of Supreme Court law clerks and applicants to clerkship positions.

I. Diversity, Representation, and Transparency in Supreme Court Advocacy

A. The Diversity of the Supreme Court bar

It’s not difficult to imagine a time in the early nineteenth century when the private Supreme Court bar was open to very few. In the seminal time of *McCulloch v. Maryland* and *Gibbons v. Ogden*, roughly ten star litigators argued as many as three hundred cases before the Court.¹

But this “virtual monopoly” within the Supreme Court bar faded with the increasing ease of travel, and, by the twentieth century, many lawyers who appeared before the Court were first-time advocates.² The only advocates who appeared more regularly—namely John Davis, Thomas Thacher, Thurgood Marshall, Erwin Griswold, and Archibald Cox—cycled

¹ See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1489–92 (2008).

² *Id.*

in and out of the Solicitor General's Office, which left the private bar without ultra-specialized Supreme Court practitioners.³ As Justice William Rehnquist remarked in 1987, "[t]here is no such Supreme Court bar at the present time."⁴

The same can't be said today. In recent years, the revolving door between the Solicitor General's Office and a small number of elite, homogenous Supreme Court private practices has become the norm, and a handful of specialists have dominated arguments before the nation's high court. Today, roughly 70 lawyers are considered part of the elite Supreme Court bar, filing less than 1% of the petitions for certiorari before the Court but participating in nearly half the cases the Court selects.⁵

The demographics of these elite few are telling. From 2012 to 2018, women appearing before the Court constituted only 12 to 21% of advocates.⁶ In the 2019 term, 155 oral argument appearances were made before the Court, only twenty of which were made by women and only twenty-seven of which were made by advocates of color.⁷ In the entire 2019 term, only one woman of color appeared before the Court.⁸

These disparities in race and gender not only exist among Supreme Court advocates, but also permeate the Court and its coverage. Of the 115 Justices that have served on the Court, 93.9% have been white men, 4.3% have been women, and 2.6% have been people of

³ *Id.* at 1497.

⁴ *Id.* (quoting Tony Mauro, *Appealing Practice*, Legal Times, Oct. 9, 2007, at 14).

⁵ This testimony uses the phrase "Supreme Court bar" to refer to these elite repeat-advocates, rather than the 300,000 attorneys who have been nominally admitted to practice before the Court over its history.

⁶ Adam Feldman, *Final Stat Pack for October Term 2019 (updated)*, SCOTUSblog (Jul. 10, 2020, 7:36 PM), <https://perma.cc/3E2H-NTN8>.

⁷ Leah M. Litman, Melissa Murray & Katherine Shaw, *A Podcast of One's Own*, 28 Mich. J. Gender & L. 51, 58 (2021).

⁸ *Id.*

color.⁹ All seventeen Chief Justices have been white men. Despite the growing diversity of law schools, one study found that from 2005 to 2017, 85% of Supreme Court clerks were white, 4.1% were Black, and one third were women.¹⁰ Even in the media, all five of the top journalists dedicated to covering the Supreme Court are white men.¹¹

In other words, the entire ecosystem surrounding the Court looks a lot less like the American public than we might hope. For the development of the law, this limited diversity can make the Court “woefully inattentive to its impact on underrepresented groups.”¹² And on the most basic level, as this small and elite institution makes laws for a large and diverse country, many Americans do not see people like them regularly participate in the process.

B. Docket Capture

Homogeneity among Supreme Court advocates is by no means limited to race and gender. The small handful of elite appellate lawyers who argue most cases before the Supreme Court are not only overwhelmingly white and male—they also tend to represent the largest corporations in the world. Attorneys at corporate-defense firms are often conflicted out of representing plaintiffs, even if they would be inclined to do so otherwise.

This imbalance in the small group of advocates who have the ear of the Court has serious consequences for the Court’s agenda and the public’s perception that the Court gives each party before it an equal hearing. In turn, the stakes for the country are high: not

⁹ *Id.* at 53–54.

¹⁰ Tony Mauro, *Mostly White and Male: Diversity Still Lags Among SCOTUS Law Clerks*, Nat’l L.J. (Dec. 11, 2017, 4:00 AM), <https://perma.cc/6R52-VFJ9>.

¹¹ Litman, Murray & Shaw, *supra* note 7, at 59.

¹² *Id.* at 64–65. (“[J]ust as underrepresented voices on the Court can surface overlooked perspectives, as Justices Marshall, Thomas, and Sotomayor have done in their dissents, underrepresented voices *before* the Court can raise viewpoints that might otherwise go unstated in the rarefied air of One First Street.”).

just the rights of workers, consumers, and other plaintiffs, but also the credibility and legitimacy of the Court in the eyes of a public that already believes their government is overly aligned with the interests of large corporations.

The state of the elite bar today has been long in the making. Beginning in the 1980s, large corporate defense firms began cultivating specialized appellate practices, modeled after the Solicitor General's office, hiring and developing attorneys who would take on an increasingly large percentage of the Supreme Court's docket. This development coincided with the rise of well-funded, highly organized corporate political activity, often through groups like the Chamber of Commerce, whose litigation arm has become one of the most influential advocacy groups before the Supreme Court. As Justice Powell put it in his famous 1971 memo to the Chamber detailing the "broad attack" on the "American economic system," business interests could exploit a "neglected opportunity in the courts"—what he called "the most important instrument for social, economic and political change"—if they hired, "to appear as counsel amicus in the Supreme Court, lawyers of national standing and reputation."¹³

And that is what they have done. The influence of corporate America in the Supreme Court is borne out by the dominance of specialized "repeat players." As Professor Richard Lazarus has written,¹⁴ the 1980 term saw 5.8% of cases argued by attorneys who have presented at least five cases before the Supreme Court, or who were affiliated with law firms whose members had argued at least ten. By 2007, the percentage of Supreme Court

¹³ Memo from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chair of Educ. Comm'n, Chamber of Commerce at 1, 26, 27 (Aug. 23, 1971), *available at* <https://perma.cc/55BC-5N88>.

¹⁴ Richard J. Lazarus, *Docket Capture at the High Court*, 119 Yale L.J.F. 89 (2009).

cases argued by such “expert advocates” had passed 50%. For the past several years, it has hovered around 70%.¹⁵ Hiring one of these advocates is especially useful at the cert stage, and, since the 1980’s, the success of cert petitions filed by specialized private appellate practices has skyrocketed. In 1980, 5% of successful petitions (excluding the Solicitor General’s) were filed by repeat player advocates. By 2007, that rate had increased to more than 50%.¹⁶ Unsurprisingly, these advocates’ corporate clients benefit from their success. The past few decades are replete with examples of the Court granting review to corporate-friendly petitions that it would have likely passed over if not for an expert advocate’s name on the industry-side brief.

I’ll mention one example, taken from Professor Lazarus’s research: In the 1990s and 2000s, the Court granted five petitions submitted on behalf of one of two railroad companies, all concerning less-than-compelling, often downright obscure, legal issues—like interpretations of the Federal Employees Liability Act—sometimes without any circuit split or even lower court opinion.¹⁷ A likely explanation is that all five petitions came from Carter Phillips at Sidley Austin, a prototypical elite, expert Supreme Court advocate.¹⁸ All in all, Sidley had filed thirteen petitions in similar cases, meaning 38% were granted—a rate that Professor Lazarus rightly calls “astoundingly high.”¹⁹ And not only did the Supreme Court take up these cases, but the railroad industry won almost every time.²⁰ If not for the name on the cert petitions, they presumably would have been passed over. That

¹⁵ *Oral Argument – Advocates*, SCOTUSblog, <https://perma.cc/B8NK-2KFM> (last visited June 25, 2021).

¹⁶ Lazarus, *Advocacy Matters*, *supra* note 1, at 1516–21.

¹⁷ *Id.* at 1537–38.

¹⁸ *Id.* at 1538.

¹⁹ *Id.* at 1537.

²⁰ *Id.* at 1538. For other examples of this phenomenon, *see id.* at 1532–37.

they were picked out of thousands of competing petitions shows the connection between the Supreme Court bar's interests and the actions the Court actually takes.

These elite lawyers' "capture" of the Supreme Court docket, as Professor Lazarus has put it, has real consequences for workers, consumers, and other plaintiffs who have been hurt by corporations, as well as for criminal defendants. For one, judges and attorneys widely agree that hiring specialized appellate counsel—especially one particularly familiar with the Court—matters for a favorable outcome. In a 2004 survey of former Supreme Court clerks, 88% said they "len[t] additional consideration" to amicus briefs signed by an eminent repeat player.²¹ Empirical studies have linked attorney experience with case outcomes as well.²² A study by Professor Jeffrey Fisher, for example, found that a party represented in the Supreme Court is almost 20% more likely to win on the merits than one represented by a nonspecialist—and that the advantage at the certiorari stage is likely even larger.²³ A 2014 investigation found that over a decade, just 66 of the 17,000 attorneys who filed petitions at the Supreme Court accounted for 43% of the cases the Court took up, and 51 of those lawyers represented corporate interests.²⁴ An increase in cert petitions, combined with a shrinking merits docket, has made the involvement of repeat players in petitioning the Court especially valuable. As Professor Lazarus has put it: "[W]hile the number of cases has gone down, their involvement as counsel of record in the cases heard by the Court has simultaneously gone up . . . [T]hat the increase occurred notwithstanding

²¹ Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 54–56 (2004).

²² David S. Abrams and Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. Chi. L. Rev. 1145, 1145 (2007).

²³ Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 Stan. L. Rev. 137, 162 (2013).

²⁴ Joan Biskupic et al., *At America's Court of Last Resort, A Handful of Lawyers Now Dominates the Docket*, Reuters (Dec. 8, 2014, 10:30 AM), <https://perma.cc/9Q6B-CYUV>.

the decrease in the overall number of cases further magnifies the significance of the Supreme Court bar's resurgence."²⁵

The access that plaintiffs, criminal defendants, and other public-interest clients have to this specialized group of repeat players is severely limited. For one, corporate-defense firms routinely charge more than \$1,000 per hour for their services, and a single cert petition can cost a client hundreds of thousands of dollars. Even if attorneys at high-powered appellate practices have some inclination to take on plaintiff-side work, they often will not due to the fact that their firms represent the corporations, or at least the anti-plaintiff positions, on the other side of the case. The Chamber of Commerce and other influential industry groups—not to mention many of the largest corporations in the country themselves—have hired most of the firms with elite appellate practices, making it difficult or impossible for attorneys at those firms to represent contrary interests and positions. Some might reasonably suggest that the rise of excellent law school supreme court clinics mitigates this problem, but, unfortunately, that is not the case. Virtually all of those clinics are affiliated with the very same corporate-defense law firms that employ the expert Supreme Court advocates, making it difficult for the clinics to take a position against, for example, a major bank in a case concerning financial services regulation.

Meanwhile, the plaintiffs' bar comprises a far more decentralized and diverse set of much smaller, less well-connected firms, which tend to focus more on trial-level expertise than appellate specialization. Perhaps most obviously, plaintiffs' firms face difficult economics, spending far more time than their opponents on each client, relying on an

²⁵ Lazarus, *Advocacy Matters*, *supra* note 1, at 1515.

unstable flow of cases, and charging unpredictable and widely variable contingency fees. Compared to their corporate counterparts, plaintiffs' firms may have less access to top law graduates, who are drawn not just by the bigger paychecks and professional networks, but also by the best, if not exclusive, training grounds for appellate advocacy.

It is also worth briefly mentioning that the corporate tilt of the Supreme Court bar aligns with the backgrounds of the Justices themselves. Not since Thurgood Marshall has a Justice had significant experience representing indigent defendants, and no other member of the Court in recent history built a career on representing plaintiffs, in civil rights cases or otherwise. On the other hand, numerous Justices have themselves been members of the elite group of lawyers most trusted by the Court, and most likely to represent corporate defendants in their advocacy. At least in civil cases, the corporate defense bar's presence at the Supreme Court is unmatched in front of and behind the bench.

C. Lack of Transparency

The homogeneity and insularity of the elite Supreme Court bar gives large corporations outsized influence on the Court's inner workings and makes people feel excluded from one of the three branches of their government. This same problem is exacerbated by a litany of ways in which the Supreme Court is one of the least transparent institutions in American government.

Transparency is critical to the continued legitimacy of the Court. Americans will trust the Supreme Court to discharge its authority responsibly if it is viewed as representative, gives different parties and interests a fair hearing, and acts out of reasoned deliberation rather than partisanship or arbitrariness. But people are considerably less

likely to think that the Supreme Court works this way if its inner workings are totally inaccessible to the public. The sense that one of our nation's most important lawmaking institutions conducts its business behind closed doors can damage the Court's credibility, just as a lack of diversity and a pro-corporate tilt among the bar harms the public's perception of its representativeness. The problem is not just about transparency, either. To be frank, complexity and secrecy almost always benefit the most powerful, well-connected people in society. Much of Supreme Court practice is governed by unwritten rules that are unknown to almost everyone; mastering and taking advantage of them requires knowing—or hiring at great cost—the right people.

Take two examples of opportunities for much greater transparency: decisions to grant certiorari, and unsigned decisions that make up the so-called “shadow docket.”

Grants and denials of certiorari: Although many Supreme Court decisions themselves are highly scrutinized, the process for choosing just a handful of the thousands of cases submitted to the Court for review is shrouded in near-total secrecy. The choice of what goes on the Court's merits docket may be almost as important as the decisions themselves. It is becoming even more important as the number of petitions for certiorari increases and the Court's merits docket shrinks. The Court's selection of one case rather than another can shape the law in profound ways, yet the public knows almost nothing about that decision.

This secrecy is particularly troubling in light of the elite Supreme Court advocates' unique success in convincing the Court to grant petitions they write, usually on behalf of their corporate clients. We know that the process is tilted against plaintiffs and in favor of

corporate defendants (recall the example of the Court’s railroad cases), but we do not know exactly how, including how each Justice weighs in on these consequential decisions. Some argue that the opacity of this practice allows Justices the opportunity to consider petitions more candidly beyond the political spectacle.²⁶ Other commentators suggest the Court would find this public disclosure of decisions burdensome and difficult to justify without explanation.²⁷ But there is no reason to believe that revealing the final vote tallies on cert petitions would undermine the Court’s goals in these ways, and Justices would be free to file opinions explaining their votes.

The Shadow Docket: As Professors Will Baude—a member of this Commission—and Steve Vladeck—another panelist this afternoon—have explained,²⁸ the shadow docket consists of a variety of orders issued by a single Justice or the Court as a whole, that, unlike the “merits” docket, are generally accompanied by little or no reasoning, at most one round of briefing, and no explanation of which Justices voted and how. To make matters worse, their issuance is largely unpredictable and sometimes even happens in the middle of the night.

I will defer to Professor Vladeck’s discussion of the history and contours of this practice, but I want to comment briefly on how it fits into my larger story of the Court’s opacity and inaccessibility. I’m sure every member of this Commission could agree, at least

²⁶ See Lewis F. Powell, Jr., *What Really Goes on at the Supreme Court*, 66 A.B.A. J. 721, 722 (1980) (“Our decisions concern the liberty, property, and even the lives of litigants. There can be no posturing among us, and no thought of tomorrow’s headlines.”)

²⁷ See Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 Wash. U. L. Q. 389, 403–04 (2004).

²⁸ See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1 (2015); Stephen I. Vladeck, *The Supreme Court, 2018 Term — Essay: The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019).

at a general level, on some characteristics of a good judicial process: Measured, careful deliberation. Allowing interested parties to be heard. Giving reasons for a decision. Unfortunately, too many shadow docket decisions have none of these features, and, while some situations genuinely call for emergency action and the disposal of typical procedures, many do not.

In the worst cases, the Supreme Court has unnecessarily injected itself into fast-moving, extremely contentious issues of constitutional law. On the night before Thanksgiving last November, as COVID-19 case numbers headed toward their highest peak of the pandemic, the Court granted an application to enjoin New York’s restrictions on gathering indoors, on the basis that its application to places of worship violated the Free Exercise clause.²⁹ Although some Justices wrote concurrences and dissents, no one signed the Court’s four-page opinion. Not only was the case missing full oral argument, it was missing a live controversy: by the time of the decision, the regulations had already been revised to match the relief the plaintiffs sought.³⁰ Then, in April, another short, unsigned opinion invalidated a California COVID-19 restriction late on a Friday night.³¹ Despite the slapdash process that produced it, some experts said that decision “radically shifted” Free Exercise jurisprudence.³²

As the Chief Justice wrote in a similar case, “[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic

²⁹ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 29 (2020).

³⁰ *Id.* at 75 (Roberts, C.J., dissenting).

³¹ *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

³² Brendan Pierson, *How COVID and Shadow Docket Exploded SCOTUS’ Scope of Religious Freedom*, Reuters (June 17, 2021, 4:33 PM), <https://reut.rs/3qr1pBu>.

and fact-intensive matter subject to reasonable disagreement.”³³ Whether or not it is appropriate for the Court to second-guess the elected branches in those circumstances, decisions like these should at least come with evidence of the Court’s deliberation and a full-throated explanation of its reasoning. And these “emergency” orders are certainly not the time for major changes in the constitutional law of religious liberty—a difficult, complicated, and controversial topic Americans have debated for hundreds of years. The Court has not made law that way in the past, and it certainly shouldn’t now.

The certiorari process and the shadow docket are not the only examples of the Supreme Court’s lack of transparency, but they are some of the most concerning. Below I’ll make a few recommendations that, if adopted, would make the Court more accessible to the public and, in turn, more likely to enjoy the trust and legitimacy that it needs and, at its best, deserves.

II. Opportunities for Reform

There are affirmative steps that Congress and the Court can take to begin to push back against the inequitable and insular playing field I have just outlined. The lack of representation in Supreme Court advocacy is an urgent problem that threatens the integrity of the Court and the procedural and substantive rights of litigants.

³³ *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

A. *Improving Diversity on Both Sides of the Bench*

While many of these inequities are the product of a complex and perpetuated system, the Supreme Court can play a greater role in expanding the diversity of the advocates it repeatedly hears from. One example is the Court's practice of appointing amici to argue issues otherwise unrepresented in the case. Approximately seventy times since 1926, and becoming a more frequent practice, the Court has invited an attorney to support an undefended judgement below,³⁴ to advance an argument unsupported by either party, or to argue against the Court's subject matter jurisdiction.³⁵ Unlike traditional amicus briefs filed with the Court, appointed amici are instructed to take a particular position and are always given an opportunity to present at oral argument.³⁶

Appointed amici often serve a critical role, especially when the Court has particular institutional interests in an issue that the parties do not address or contest, including issues concerning subject matter jurisdiction, supervisory authority of the courts, and judicial sentencing. For example, in *Sibelius*, appointed amici addressed the issue of whether the individual mandate was severable from the rest of the Affordable Care Act and whether the Anti-Injunction Act barred the Court from hearing challenges to the individual mandate, issues which neither real party was incentivized to argue.³⁷ In other words, the unique amici

³⁴ Examples include *Bob Jones University v. United States*, 456 U.S. 922 (1982) (appointing attorney William Coleman to defend the IRS' revocation of tax-exempt status when the DOJ declined to offer a defense); *Dickerson v. United States*, 530 U.S. 428, 441–42 (2000) (appointing attorney Paul Cassell to defend 18 U.S.C. § 5301 when the federal government agreed with the defendant that it was unconstitutional); *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (appointing amicus Vicki Jackson to argue that the Court lacked jurisdiction to rule on the case).

³⁵ See Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907, 909–10 (2011), Kate Shaw, *Friends of the Court*, 101 Cornell L. Rev. 1533, 1594–95 (2016) (listing the first 59 appointments).

³⁶ See Shaw, *supra* note 36, at 1535.

³⁷ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 542–43 (2012).

process has the potential to offer aspiring and diverse litigators an opportunity to gain experience and break into the elite and routine bar of lawyers before the Court, if the Court sought them out.

But the Court has failed to use its appointment power in this way. In fact, the record of amici appointed by the Court is even less diverse than the elite Supreme Court advocate's bar. Of the roughly 70 amicus advocates the Court has appointed, a mere seven have been women and only four have been people of color.



Figure 1 – Photographs representing 63 of the Court’s 70 amici appointments since 1926

Further, appointed amici are increasingly drawn from a hyper-elite and insular group of lawyers, and experience as a Supreme Court law clerk is a near prerequisite.³⁸ Under the Court's standard practice, the Circuit Justice responsible for the Circuit from which a case arose will appoint one of that Justice's recent clerks—a lawyer, in other words, with whom the Justice has a personal relationship.

These statistics and insular practices reveal the need for the Court to expand its pool of amicus advocates, including professors with specialized backgrounds and diverse members of appellate bars in circuit courts. In this vein, the Court should also make its decisions about when and whom to appoint as amici counsel more transparent and go beyond the Justices' personal relationships. By treating these appointments more openly, the Court would demonstrate to the public the value of the amicus appointment process. The Court might additionally consider creating an advisory panel—diverse both in demographic characteristics and in subject-matter expertise—who could recommend advocates to the Supreme Court to appoint when appropriate. Such a group might be well-positioned to choose from a broader set of options than the Court does currently. Although amicus appointments account for a limited number of arguments in any Term, expanding the voices heard before the Court is in keeping with the Court's role as an institution that should reflect the diversity of the bar as a whole.

In turn, the Court can work toward hiring a more diverse pool of clerks, keeping in mind that Supreme Court clerkships are often access points to join the ranks of elite appellate advocates. Other sources of elite appellate practitioners, like law firms and the

³⁸ See Shaw, *supra* note 36, at 1553–56. For a visual representation, see Alan Mygatt-Tauber (@AMTAppeals), Twitter (Jun 15, 2021 6:43 PM) <https://perma.cc/36JT-Y9AG>.

Office of the Solicitor General, can likewise take steps to hire broadly. They can be aided by organizations like the Appellate Project, which organizes mentorship, internship, and clinic programs that open access to appellate careers, based on the view that “our highest courts should reflect our communities.”³⁹

B. Mitigating Corporate Skew in the Supreme Court bar

The pro-corporate tilt in the Supreme Court bar is a result of long-running and deep-seated inequities in the legal profession and in society at large. There is no easy solution, and mismatches in resources between plaintiffs and corporations might necessarily produce some mismatches in advocacy. But the success of a specialized Supreme Court bar in corporate law firms suggest that a specialized appellate bar for plaintiffs could emerge as well, to the benefit of workers, consumers, and a fairer legal system for all.⁴⁰

Some steps in this direction might be taken by plaintiffs’ appellate advocates themselves—for example, by creating systems to better coordinate with each other, perhaps like the Chamber of Commerce does for pro-corporate litigation. A more centralized network of plaintiffs’ and public-interest appellate lawyers could, for example, help litigators around the country avoid doomed appeals that might create bad law. Currently, some nonprofit legal centers, like Public Citizen or the National Employment Lawyers Association, play a role in overseeing appeals and training plaintiff-side appellate lawyers, but none have the resources of corporate practices.

³⁹ The Appellate Project, <https://perma.cc/6A4G-HTRR>.

⁴⁰ For a lengthier explanation of this point, see generally Deepak Gupta, *Leveling the Playing Field on Appeal: The Case for a Plaintiff-Side Appellate Bar*, 54 Duq. L. Rev. 383 (2016).

Given this landscape, the government, starting with this Commission and this White House, can and should encourage the development of specialized public-interest and plaintiffs’ lawyers—first and foremost by advocating for increased funding to organizations that do this appellate work. To start, Legal Aid organizations around the country provide invaluable services to low-income people in the areas of housing, employment, immigration, criminal justice, public benefits, and more. A few Legal Aid offices—but only a few—have developed small appellate practices. Similarly, some public defender offices have small appellate divisions. More funding for these offices would strengthen the legal representation of low-income and other marginalized people in general—a worthy goal in its own right—but it could also facilitate the development of a larger, more experienced public-interest appellate bar. Just as corporate law firms and the Solicitor General’s office do for most prominent appellate lawyers now, better-funded Legal Aid and Public Defender offices could create the kinds of opportunities for training, specialization, and, eventually, repeat advocacy for career public-interest lawyers.⁴¹

C. Increasing Transparency and Trust

One of the simplest, and in some sense the easiest, ways the Court can make itself more open to and trusted by the public is by becoming more transparent. In fact, the Court should be commended for already having taken some important steps toward accessibility.

⁴¹ Some have suggested mitigating the disadvantages that criminal defendants face at the Court by going even further, such as by creating an Office of the Defender General, *see* Daniel Epps & William Ortman, *The Defender General*, 168 U. Pa. L. Rev. 1469 (2020), or a committee of expert defense attorneys to appoint *amicus curiae* who would argue against the state in criminal cases, *see* Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 Minn. L. Rev. 1985, 1989 (2016).

For one, the Supreme Court's online docket system is easy to use, and in my view should serve as an illustration of how every court around the country could make documents more accessible to the public. The Supreme Court's transition to phone arguments, broadcast live, was another laudable step toward making oral arguments less closed-off from the public at large, even if it was foisted upon the Court by the pandemic.

Other transparency reforms the Court may wish to consider include:

- **Publishing Justices' votes on petitions for certiorari and applications for stays.** Although many Supreme Court decisions themselves are highly scrutinized, the process for choosing just a handful of the thousands of cases submitted to the Court for review is shrouded in near-total secrecy. This process of deciding whether or not to grant a writ of certiorari and place it on the Court's merits docket may be almost as important as the Court's decisions themselves. And it is becoming even more important as the number of cert petitions increase and the Court's merits docket shrinks. The Court's selection of one case rather than another can shape the law in profound ways, yet the public knows almost nothing about that decision. This secrecy is particularly troubling in light of the elite Supreme Court advocates' unique success in convincing the Court to grant petitions they write, usually on behalf of their corporate clients.

To shed some light on this key stage of decisionmaking that affects hundreds of millions of people, the Court could consider Professor Fisher's suggestion that it publish the vote tallies, and how each Justice voted, on cert petitions.⁴² It might also

⁴² Jeffrey L. Fisher, *The Supreme Court's Secret Power*, N.Y. Times (Sept. 24, 2015), <https://perma.cc/HAH7-3YMS>.

consider doing so for applications for stays, another notoriously opaque, but important, set of decisions the Court makes. This practice would do nothing to increase the workload of the Justices or their clerks. Justices would not be required to explain their votes, though they may be more inclined to do so—a helpful and healthy outcome for the bar and the public at large.

- **Giving explanations for changing the status quo.** Reason-giving is a core feature of the American legal system, and it is essential for public trust in the Court’s fair and considered approach to judicial reasoning and decisionmaking. Regardless of the kind of order at issue, and even in cases of genuine emergency, the Court should consider publishing an explanation for its decision when it rules on a stay or injunction in such a way that alters the status quo ordered by the lower court.

- **When feasible, holding oral arguments on emergency stay applications.** There are undoubtedly some instances where a true emergency does not leave time for arguments, but the Court should consider a practice of holding them whenever possible. That the Court successfully held oral arguments on merits cases over the phone during the pandemic shows this can be done even in time-sensitive situations.

- **Maintaining a default timetable and, where possible, a full briefing for applications for stay.** A more predictable timetable and deadlines for briefs and decisions, which currently vary and likely catch many by surprise would

solidify both the reality and the perception that the Court is deliberating carefully about the important issues raised by stay applications.

- **Compiling and releasing statistics on the demographic characteristics of law clerks and clerkship applicants.** The Court has never released this information, and all insights on the matter come from a number of unofficial studies. These studies show that the Court’s clerks still skew heavily white and male, even as law schools diversify. Given concerns about the diversity of Supreme Court clerks, some of whom go on to become expert Supreme Court advocates themselves, publishing data on this group would give the public a chance to track progress toward forming a staff that is representative of the nation.

- **Broadcasting oral arguments on live video.** The Supreme Courts of Canada and the U.K. broadcast arguments online, as do some courts of appeals. The Supreme Court itself switched to live audio during the pandemic. Adopting this practice permanently, with video, would greatly contribute to the public’s understanding of, and confidence in, the institution.

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Thank you again for the opportunity to testify today. I look forward to your questions, and I remain available to speak with you as you continue your important work in the coming months.⁴³

⁴³ I would like to thank Cara Meyer and Sam Weinstock, both summer associates at Gupta Wessler, for their research and assistance in preparing this testimony, and Abigail Cipparone, a legal assistant at Gupta Wessler, for her editorial assistance.