

Presidential Commission on the Supreme Court of the United States

Testimony of Craig Becker

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Thank you for inviting me to testify before the Commission as you consider the important and difficult questions that have been posed to you by President Biden. The decisions of the Supreme Court are of enormous importance to working people and their unions.

I offer these thoughts as a lawyer who has represented labor organizations and working people for four decades and has also taught labor and employment law at Yale, Georgetown, the University of Chicago, and the University of California at Los Angeles law schools. The thoughts that follow are my own, as the time between the Commission's invitation and the submission of this testimony was too short to secure a formal and official statement from the governing bodies of the American Federation of Lab & Congress of Industrial Organizations (AFL-CIO).

I would like to make two related points in my short time with you today, both related to the credibility of the Court as an institution committed to the rule of law.

First, regrettably, I must inform you that the labor movement – its leaders, its lawyers, and its members – no longer believe labor organizations and working people seeking to act together to improve their wages, hours and working conditions can obtain a fair hearing before the Court. The situation is different in kind in the last several decades than at any time since Justices appointed by Republican presidents assumed their continuing majority on the Court half a century ago (a majority that has persisted throughout the four decades I have practiced labor law).

In consequential decision after consequential decision, the Court has ruled against the interests of working people and the labor movement. To cite just a few recent examples, *see Cedar Point v. Hassid*;¹ *Epic Systems v. Lewis*;² *Janus v. AFSCME Council 31*;³ *Harris v. Quinn*;⁴ and *Lechmere v. NLRB*.⁵

It cannot be that we are wrong in every labor case that comes before the Court. And if we are receiving a fair and unbiased hearing from the Justices, how can it be that the division among the Justices is identical each time we appear before the Court? I regret to say that only political predisposition can explain that pattern.

¹ 141 S.Ct. 2063 (2021).

² 138 S.Ct. 1612 (2018).

³ 138 S.Ct. 2448 (2018).

⁴ 573 U.S. 616 (2014).

⁵ 502 U.S. 527 (1992).

We are, of course, “all realists now,” in Columbia Law School Professor Walter Gellhorn’s famous formulation.⁶ One cannot be a labor lawyer in the early 21st century without being a realist, but the problem is more than predisposition rooted in party affiliation.

Famously, Chief Justice John Roberts pledged during his confirmation hearing, “I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”⁷ None of us is naive enough to believe that the Justices’ political perspectives do not affect their opinions, yet most of us still hope that there remains some line between judging and advocacy. But that line is now increasingly being crossed.

Let me give you one example.

Justice Alito began pitching for one side a decade ago in a little-known case called *Knox v. Service Employees International Union, Local 1000*.⁸ As presented by the parties, the case involved the application of well-settled law permitting unions selected by a majority of employees, and therefore having a legal duty to represent all employees, members and non-members, to spread the cost of that representation (but not of any political activities) across the entire group. More than 40 years ago, the Court upheld this practice in *Abood v. Detroit Board of Education*, with Justice Stewart writing for the majority.⁹ In later applying *Abood*, Justice Scalia explained, “Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them.”¹⁰ After *Abood* and until *Knox*, that principle of reimbursement for services rendered was not questioned. Rather, as Justice Kagan later observed, “over nearly four decades, we have cited *Abood* favorably numerous times and we have repeatedly affirmed and applied its core distinction between the costs of collective bargaining . . . and those of political activities.”¹¹

No party in *Knox*, not even the National Right to Work Legal Defense Foundation, which has been a virulent critic of public sector unions for a half-century and represented *Knox*, questioned *Abood*. But Justice Alito pointedly did. His opinion in *Knox*, ostensibly addressing the narrow question of whether the union had adequately informed non-members about how it was spending its funds, labeled the four-decade-old precedent “unusual” and even “extraordinary.”¹² And he was not alone, as four other Justices joined his opinion in full. In a separate concurring opinion, Justice Sotomayor concluded that Justice Alito’s opinion “breaks [the Court’s] own rules and, more importantly, disregards principles of judicial restraint” by addressing issues “well outside the scope of the questions presented and brief[ed].”¹³ Her concurrence made explicit that the

⁶ Beryl Harold Levy, Book Review, 109 U. Pa. L. Rev. 1045, 1047 (1961).

⁷ John Roberts, Jr., Opening Statement Before the Senate Judiciary Committee (Sept. 12, 2005) (transcript available at <https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf>).

⁸ 567 U.S. 298 (2012).

⁹ 431 U.S. 209 (1977).

¹⁰ *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 556 (1991) (Scalia, J. concurring in the judgment in part and dissenting in part).

¹¹ *Harris v. Quinn*, 573 U.S. 616, 669 (2014) (Kagan, J. dissenting).

¹² *Knox*, 567 U.S. at 313 quoting *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 184 (2007).

¹³ *Id.* at 323 (Sotomayor, J. concurring in judgment).

majority “strongly hints” that it was willing, even eager, to upend collective bargaining in the public sector by overturning *Abood*.¹⁴

On the final day of the term in June 2014, Justice Alito, citing his own dicta in *Knox* no fewer than 16 times, continued his assault on *Abood* while sharply limiting the application of the precedent. In *Harris v. Quinn*, another case involving the Service Employees International Union, a 5-4 majority of the Court reversed a unanimous decision of the Seventh Circuit Court of Appeals (authored by a judge appointed by President Reagan), holding that a union representing state-paid employees who care for disabled people in their homes cannot spread the cost of that representation across all such employees on the grounds that they are jointly-employed by the state and the customers they care for and, thus, the State does not control all the terms of their employment. Prior to *Knox*, the *Harris* plaintiffs had not questioned *Abood*, arguing only that its holding did not extend to the unique employment relationship at issue in *Harris*. However, when the case reached the Supreme Court, the Plaintiffs used the opening created by Justice Alito’s dicta, making the more radical argument that the *Abood* precedent should be overturned. Justice Alito’s opinion in *Harris* cast further doubt on *Abood*’s soundness without overturning the precedent – “taking potshots at *Abood*,” in the words of Justice Kagan’s dissent.¹⁵ “The *Abood* Court’s analysis is questionable on several grounds,” Justice Alito wrote, with four of the Court’s members again fully joining his opinion.¹⁶

Of course, Supreme Court Justices have views on controversial political questions, such as the role of unions in representing government workers. But fidelity to their oath requires holding those personal views in check in their votes, opinions, and questions during oral argument. Yet sprinkled throughout Justice Alito’s two opinions and in his questions during oral argument are clear expressions of his opposition to public sector unions. In his *Knox* opinion he referred ominously to “powerful public-sector unions” when the strength or weakness of the union was irrelevant to the legal issues at stake.¹⁷ During oral argument in *Harris*, he posed hypotheticals about a teachers’ union bargaining to preserve tenure and to prevent merit pay and about public employee pensions, which he asserted represented “a very big public policy issue.”¹⁸ He even suggested that the Illinois law at issue was the product of a corrupt bargain between the union and then-jailed Governor Rod Blagojevich, drawing a sharp response from Solicitor General Donald Verrilli who explained that “the issue before the Court is the constitutionality of the statute that was enacted . . . by a large bipartisan majority, and I don’t think it would be appropriate to look behind the legislature’s action to consider and try to evaluate its motives.”¹⁹

The upshot of Justice Alito’s unsubtle hints that he wanted to overturn *Abood* and weaken unions representing public employees was a race to the Supreme Court by opponents of worker representation seeking to squarely present the issue to the Court. In the first case to reach the Court, *Friedrichs v. California Teachers*, plaintiffs were so bold as to ask the court of appeals to rule against them “as quickly as is practicable so that Appellants may take their claims to the

¹⁴ *Id.* at 327 (Sotomayor, J. concurring in judgment).

¹⁵ *Harris*, 573 U.S. at 658 (Kagan, J. dissenting).

¹⁶ *Id.* at 617.

¹⁷ *Knox*, 567 U.S. at 303.

¹⁸ Transcript of Oral Argument, *Harris v. Quinn* (11-681), p. 44 (Jan. 21, 2014) (transcript available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/11-681_4f14.pdf).

¹⁹ *Id.* at p. 54.

Supreme Court.”²⁰ In the trial court, the same plaintiffs had actually made a motion for judgment on the pleadings against themselves.²¹

The Court deadlocked 4-4 in *Friedrichs* after Justice Scalia’s death, which occurred between the argument and the issuance of the decision.²² But after the Senate refused to consider Merrick Garland’s nomination and confirmed Justice Gorsuch, the Court, predictably, overturned *Abood* by a 5-4 vote in *Janus v. American Federation of State, County and Municipal Employees, Council 31*.²³ In dissent, Justice Kagan wrote, “Today, the Court succeeds in its 6-year campaign to reverse *Abood*.”²⁴ Noting how the majority relied on Justice Alito’s persistent pitching in the earlier cases, Justice Kagan explained:

Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. . . . Relying on them is bootstrapping – and mocking *stare decisis*. Don’t like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as “special justifications” [for disregarding *stare decisis*].²⁵

The 5-4 decision could be understood as simply one more piece of evidence that the Justices do not simply “call balls and strikes.” But the question would never have come before the Court, nor would the judgment have been issued, had Justice Alito not actively solicited the case through pitches thrown in his prior opinions.

This form of judicial activism should be condemned by the Commission as highly corrosive of public confidence in the Court and inconsistent with the role of Supreme Court Justices.

My second point is related to my first. There is a growing perception among parties before the Court and – perhaps even more so – among parties wishing to be heard by the Court, that they must retain one of a small number of lawyers who are almost exclusively employed by corporate law firms, in order to receive a fair hearing from the Court. Here, I colloquially refer to this small group of lawyers as the “Supreme Court bar.”

That perception was strongly reinforced by an excellent piece of investigative reporting published by *Reuters*.²⁶ The reporters identified members of the “Supreme Court bar” by examining more than 10,300 petitions for a writ of *certiorari* filed by private attorneys between 2004 and 2012, identifying those lawyers who filed at least one petition each year and had at

²⁰ Reply Br. of Appellants at 5, *Friedrichs v. California Teachers Ass’n*, No. 13–57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014).

²¹ Plaintiffs’ Notice of Motion, Motion for Judgment on the Pleadings, and Memorandum of Points & Authorities in Support of Motion for Judgment on the Pleadings, *Friedrichs v. California Teachers Ass’n*, No. SACV 13–676–JLS, 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013).

²² *Friedrichs v. California Teachers Ass’n*, 136 S.Ct. 1084 (2016).

²³ 138 S.Ct. at 2460.

²⁴ *Janus*, 138 S.Ct. at 2487 (Kagan, J. dissenting).

²⁵ *Id.* at 2498 (Kagan, J. dissenting).

²⁶ Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber: A Small Group of Lawyers and Its Outsized Influence at the U.S. Supreme Court*, REUTERS (Dec. 8, 2014), <https://www.reuters.com/investigates/special-report/scotus/>. See also Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487, 1498-1500 (2008).

least three petitions granted during the period studied. The reporters identified 66 members of the bar.²⁷

Based on an analysis of Court data across the nine-year period, the reporters then found that 66 of the 17,000 lawyers who petitioned the Supreme Court succeeded at having their clients' appeals heard at a "remarkable rate." Their petitions were at least six times more likely to be accepted by the Court than were all others filed by private lawyers during that period. Although those lawyers account for far fewer than one percent of lawyers who filed petitions with the Court, they were involved in 43 percent of the cases the Court chose to hear from 2004 through 2012.²⁸

Just twelve firms were involved in one-third of the cases the Court decided to hear and 31 firms were involved in 44 percent of the cases.²⁹ The disproportionate success of this small group of lawyers in gaining a full hearing for their clients by the Court is increasingly troubling as the number of cases the Court chooses to hear continues to decrease, reaching all-time low last term, one followed closely by the term that has just ended.³⁰

At the argument stage, the *Reuters*' investigation found that "a group of eight lawyers, all men, accounted for almost 20 percent of all the arguments made before the court by attorneys in private practice during the past decade."³¹ The problem is also growing worse: "In the decade before, 30 attorneys accounted for that same share," according to *Reuters*.³²

Even more troubling, several Justices openly described how they relied on these lawyers as gate keepers and looked more favorably on petitions in cases in which these lawyers were involved. "They speak glowingly of the repeat performer," *Reuters* reported.³³ Former Justice Kennedy, for example, stated, "They basically are just a step ahead of us in identifying the cases that we'll take a look at."³⁴ Interviews with former clerks also "confirm the obvious: the clerks pay special attention to the petitions filed by prominent Supreme Court advocates."³⁵

Why is this a concern? For three reasons I will show.

First, there is a growing public perception that the Supreme Court and its bar are a closed, elite club and that personal relationships may influence outcomes. As the *Reuters*' reporters stated, "the justices essentially have added a new criterion to whether the court takes an appeal – one that goes beyond the merits of a case and extends to the merits of the lawyer who is bringing it."³⁶

²⁷ Biskupic, *The Echo Chamber*.

²⁸ *Id.*

²⁹ *Id.*

³⁰ This same trend is documented in Lazarus, *Advocacy Matters*, at 1515-1517, 1526.

³¹ Biskupic, *The Echo Chamber*.

³² *Id.* Again, this same trend is documented in Lazarus, *Advocacy Matters*, at 1520.

³³ Biskupic, *The Echo Chamber*.

³⁴ *Id.*

³⁵ Lazarus, *Advocacy Matters*, at 1526.

³⁶ Biskupic, *The Echo Chamber*.

Second, the experience and knowledge those lawyers bring to the Court are narrow, as is the range of clients they agree to represent. Typically, that experience is limited to time in the Solicitor General's office, representing the United States, and in private firms, representing large corporations. Again, the *Reuters*' investigation found that of the 66 most successful lawyers, 51 worked for law firms that primarily represented corporate interests. In cases pitting the interests of customers, employees, or other individuals against those of companies, a leading attorney was three times more likely to file a petition for a corporation than for an individuals.³⁷

Reuters identified approximately 1,500 petitions filed during the nine years encompassed by its analysis in which the interests of corporations conflicted with those of employees, customers, or other individuals.³⁸ These appeals included employment discrimination claims, benefits disputes, and similar controversies. In those cases, members of the "Supreme Court bar" were three times more likely to petition the Court on behalf of the corporations, and the petitions filed by that bar's members were six times more likely to be granted than those filed by other attorneys.³⁹

The perception that the "Supreme Court bar" has a special relationship with the Justices, the belief that its members are at ease and more effective in argument before the Court, and – above all – the reality that they are indeed more successful in getting cases heard by the Court, have increasingly led parties who can afford the cost to retain such counsel in cases the parties want heard by the Court and in cases already before the Court on the merits.

Reuters' interviews of in-house corporate lawyers confirm this trend. Consider the statement of corporate counsel for both Aetna and CBS/Westinghouse, who hired outside counsel in multiple Supreme Court cases. "It's radically changed in the last 10 years," the attorney said. "Back then, you looked for a specialist in an area of the law. Now, you are not going to go with the specialist who won for you at the trial court in Pittsburgh. You want the guy who knows the justices and the justices know."⁴⁰

Yet the members of the "Supreme Court bar" typically cannot or will not represent parties with interests adverse to their corporate clients. Professor Richard Lazarus, a former Director of the Georgetown Supreme Court Institute, explained that there are "areas of law in which the vast majority of the private Supreme Court Bar regularly declines to serve as . . . counsel because of its concern that doing so will upset some of its most financially important business clients. For that reason, almost all of the practices refuse to provide such help to plaintiffs involved in employment discrimination" and similar matters.⁴¹ The *Reuters* story quoted one member of the bar acknowledging, "Working for corporate clients is the bread and butter of our practice. As a large national firm, we are generally conflicted from representing individuals and advocacy groups in litigation against corporations. They are typically suing our clients or prospective clients." "We do not take cases that could make negative law for our clients," said another

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Lazarus, *Advocacy Matters*, at 1560.

member of the bar.⁴² “The last thing we want to do,” said yet another, “is to make one of our long-standing clients unhappy with what we do.”⁴³

One stark illustration of these dynamics is the recent Federal Arbitration Act (FAA) decision in *Epic Systems Corp. v. Lewis*.⁴⁴ *Epic* holds that workers can be compelled as a condition of employment not only to agree to arbitrate all workplace disputes but to do so solely as individuals without resort to any form of class action or even simple joinder. As *The New York Times* documented, the expansive use of the FAA and its aggressive construction to prevent access to the courts by consumers and workers were products of arguments advanced by a number of corporate law firms and lawyers, including Chief Justice Roberts when he was in private practice.⁴⁵ In one of the three cases that were consolidated for argument before the *Epic* decision, I served as co-counsel for a clerk who had worked in a gas station in Alabama and was forced to sign an arbitration agreement as a condition of continued employment. The agreement purported to prevent her not only from going to court when she was not paid according to the federal Fair Labor Standards Act, but also from joining her claims with others who had been similarly wronged. The National Labor Relations Board held that the agreement violated her right to take concerted action for mutual aid and protection under the National Labor Relations Act (following a decision issued while I was a Member of the Board).⁴⁶ The United States Court of Appeals for the Fifth Circuit disagreed, holding that the NLRA did not clearly enough countermand the command the Court had earlier found in the FAA that arbitration agreements should be enforced as written.⁴⁷

After a split developed among the circuits, the Supreme Court granted review in the three cases.⁴⁸ By the time the cases were briefed and argued, all of the corporate employers were represented by members of the “Supreme Court bar,” including the dean of the bar, Paul Clement, who argued the case for the employers, and Neal Katyal, who now heads the Supreme Court practice in the firm where Chief Justice Roberts used to work.⁴⁹ None of the workers were represented by members of the “Supreme Court bar.”⁵⁰ In a 5-4 decision, the Court ruled in favor of the corporate employers.⁵¹

As the *Reuters*’ reporters concluded from their study of the growing influence of the “Supreme Court bar,” the results are “a decided advantage for corporate America, and a growing insularity

⁴² Biskupic, *The Echo Chamber*.

⁴³ *Id.*

⁴⁴ 138 S. Ct. 1612 (2018).

⁴⁵ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere: Stacking the Deck of Justice*, THE NEW YORK TIMES, (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

⁴⁶ *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014) (relying on *D.R. Horton, Inc.*, 357 NLRB 2277 (2012)).

⁴⁷ *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

⁴⁸ *Id.*, cert. granted, 137 S.Ct. 809 (2017) (No. 16-307); *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016), cert. granted, 137 S.Ct. 809 (2017) (No. 16-300); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), cert. granted, 137 S.Ct. 809 (2017) (No. 16-285).

⁴⁹ See Briefs for Petitioner Epic Systems Corporation, Petitioner Ernst & Young LLP, and Respondent Murphy Oil USA, Inc., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300, & 16-307).

⁵⁰ However, Lewis was represented by a professor from the University of Virginia Law School’s Supreme Court clinic.

⁵¹ *Epic Sys. Corp.*, 138 S.Ct. at 1612.

at the court.”⁵² Professor Lazarus finds, “What the private Supreme Court Bar has accomplished over the past decade is to persuade the Court to enter into areas of law of interest to the regulated community to correct what business perceives as problematic legal doctrine.”⁵³ Business interests, Lazarus notes, have obtained “a Supreme Court docket and rulings on the merits more responsive to their economic interests” as a result of their growing capture of the “Supreme Court bar.”⁵⁴

Third, the “Supreme Court bar” not only lacks professional diversity, it also lacks other crucial types of diversity. *Reuters* reported that of the 66 members of the bar it identified, 63 were white and only eight were women. Eight lawyers, all men, accounted for 20 percent of the argument by private counsel during the decade studied by *Reuters*.⁵⁵ Professor Lazarus also underscores “the lack of women and racial minorities present in [this] prestigious area of legal practice.”⁵⁶

I can illustrate the impact of this concerning trend on the argument of labor cases before the Court.

For decades, important labor cases were argued by labor lawyers. Many of the leading labor lawyers of the generation that retired a decade or two ago argued multiple cases before the Supreme Court. One of my predecessors as General Counsel of the AFL-CIO, Laurence Gold, routinely appeared before the Court, as did Michael Gottesman, who now teaches at Georgetown Law School, but was formerly a partner in a labor law firm in Washington, D.C.⁵⁷ But in the last few years, union General Counsels have felt compelled to go outside the labor bar when critical cases reached the Supreme Court.

As a consequence, labor cases are argued by lawyers without extensive experience representing working people or their unions; without extensive experience with labor law; and without a deep commitment to the right of workers to representation. In such cases, the Court hears argument from lawyers proficient with doctrinal analysis and accustomed to appearing before the Justices, but not from lawyers deeply knowledgeable about the doctrine’s implications for workers. As former Court of Appeals Judge Michael Luttig, himself a former Supreme Court clerk, explained

⁵² Biskupic, *The Echo Chamber*.

⁵³ Lazarus, *Advocacy Matters*, at 1532.

⁵⁴ *Id.*

⁵⁵ Biskupic, *The Echo Chamber*.

⁵⁶ Lazarus, *Advocacy Matters*, at 1554 n. 282. See also Austin Carsh, *Riddled with Exclusivity: The Homogeneity of the Supreme Court Bar in the Roberts Court*, in *OPEN JUDICIAL POLITICS* (Rorie S. Solberg et al. eds., 2020), available at <https://open.oregonstate.edu/open-judicial-politics/chapter/riddled-with-exclusivity-the-homogeneity-of-the-supreme-court-bar-in-the-roberts-court/>.

⁵⁷ See Lazarus, *Advocacy Matters*, at 1497 n. 49. Of course, this change is also due in part to the declining number of labor cases on the Court’s docket. A similar story can be told about legal services lawyers representing poor people. Between 1966 and 1974, there were 119 Supreme Court cases brought by legal services attorneys and those attorneys secured victory in 62 percent of those cases, which was second only to the record of the Solicitor General. See Alan Houseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, CENTER FOR LAW & SOCIAL POLICY (2018), https://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf; SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICE PROGRAM AND SUPREME COURT DECISION MAKING* 101 (1990).

to the *Reuters*' reporters, the Court and its bar have grown "detached and isolated from the real world, ultimately at the price of the health and proper development of the law."⁵⁸

This also means that young talented lawyers contemplating a career as a labor lawyer (or in other non-corporate fields) may no longer believe that it is possible that if they work hard, gather expertise, and hone their skills, they can argue in the Supreme Court alongside other outstanding lawyers. That marker of success in the profession is increasingly reserved to lawyers in corporate law firms.

Here, I have a possible solution to offer, at least at the *cert.* petition stage.

Petitions should be stripped of any information identifying counsel, similar to the procedures of double-blind, peer-review of submissions to academic journals, blind grading of law school exams, and blind auditions for symphony orchestras.

The procedures for non-blind selection of articles by student-edited law reviews illustrate the potential for bias in *cert.* petition review. The editors who read submissions almost always know the identity of the authors, their law school affiliations, and their publication history.⁵⁹ Moreover, many of the law students who select articles to publish in prestigious law reviews then go on to secure clerkships on the Court, assisting the Justices with selecting cases to hear on the merits. Often, they are recommended to Justices by some of the very same professors whose articles they published; many also later seek employment with members of the "Supreme Court bar."⁶⁰ Review of *cert.* petitions operates similarly. Supreme Court justices and clerks know the identity of the petitioners' counsel. Notably, research indicates that non-blind review of journal submissions leads to "prestige bias" that disadvantages younger scholars, makes it harder for women and non-U.S. scholars to publish, and undermines the perceived fairness of the review and selection process among authors.⁶¹ Non-blind review may also reduce readers' confidence in a journal's reliability.⁶²

Paralleling the *Reuters*' analysis of the "Supreme Court bar," a study analyzing more than 4,500 articles submitted to the "top 50" U.S. law school journals found "letterhead bias," *i.e.*, an author's institutional affiliation influenced the journals' publication decisions.⁶³ More "highly-ranked" journals tended to publish the work of authors affiliated with more "highly ranked" institutions and those with a publication history in more "highly-ranked" journals, regardless of submitted articles' content.⁶⁴ Editors relied on authors' credentials to determine which articles to

⁵⁸ Biskupic, *The Echo Chamber*.

⁵⁹ *Id.* at 270.

⁶⁰ See Biskupic, *The Echo Chamber*. See, e.g., Jordan S. Rubin, *Jones Day Adds Nine U.S. Supreme Court Clerks from 2019-20 Term*, BLOOMBERG LAW (Apr. 1, 2021), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XBQ4TLLC000000?bna_news_filter=us-law-week#jcite.

⁶¹ Jonathan Gingerich, *A Call for Blind Reviews: Student Edited Law Reviews and Bias*, 59 J. LEGAL EDUC. 269, 269-70 (2009).

⁶² *Id.* at 270-71.

⁶³ Stephen Thomson, *Letterhead Bias and the Demographics of Elite Journal Publications*, 33 HARV. J. LAW & TECH. 203, 203, 206 (2019). See also Leah M. Christensen and Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with All the Power – Student Editors*, 59 S.C. L. REV. 175, 180 (2007).

⁶⁴ Thomson, *Letterhead Bias*, at 217.

publish.⁶⁵ These “top-tier” law journals also had higher rates of publication of articles written by professors at their own schools, which raises serious questions about the integrity and credibility of the selection process.⁶⁶ And, like the Justices who spoke frankly to the *Reuters*’ reporters, editors from “higher-ranked” law journals indicate that they are influenced by the law school where an author teaches.⁶⁷

In contrast to law reviews, journals in most other disciplines employ a fairer system for evaluation of submissions – double-blind review.⁶⁸ Double-blind review masks the reviewer’s and the author’s identity from each other.⁶⁹ For example, in the social sciences, unlike in law, most academic journals use double-blind peer review.⁷⁰ Double-blind review allows submissions to be judged based on their content, not the author’s name, gender, race, ethnicity, institution, or publication history.⁷¹ A survey of academics from around the world commissioned by the Publishing Research Consortium revealed that 71 percent of 3,040 respondents believed that double-blind reviewing was more objective and fair, removing potential bias based on the author’s institution, race, and nationality, as well as the reviewer’s personal opinion about the author.⁷²

A study conducted in 2017 similarly found that reviewers of computer science submissions where the author’s identity was known were significantly more likely than reviewers under double-blind procedures to provide a positive review and to recommend acceptance of papers written by famous authors at “top” universities and “top” companies.⁷³ In such cases, reviewers used information about authors and institutions to make judgments on the submissions, which meant that works of equivalent merit were scored differently.⁷⁴

Similarly, I doubt that anyone would dispute the fact that blind grading of law school exams minimizes bias. In addition to bias rooted in familiarity, affection, race, ethnicity, and gender, Professor Vikram David Amar, Dean of the University of Illinois College of Law, describes an “expectation effect.” Once a professor has received good work from a student, that professor is more inclined to view latter work more favorably, even though the latter work may be sub-par.⁷⁵

⁶⁵ *Id.* at 212.

⁶⁶ *Id.* at 260.

⁶⁷ Christensen, *Navigating the Law Review Article Selection Process*, at 188.

⁶⁸ Nancy McCormack, *Peer Review and Legal Publishing: What Law Librarians Need to Know About Open, Single-Blind, and Double-Blind Reviewing*, 101 L. LIBR. J. 59, 63 (2009).

⁶⁹ *Id.*

⁷⁰ Eloisa Martin, *How Double-Blind Peer Review Works and What It Takes to be a Good Referee*, 64 CURRENT SOC. 691, 691 (2016).

⁷¹ E.S. Darling, *Use of Double-Blind Peer Review to Increase Author Diversity*, 29 CONSERVATION BIOLOGY 297, 297 (2015).

⁷² Zosia Kmietowicz, *Double Blind Peer Reviews Are Fairer and More Objective, Say Academics*, 36 BMJ 241, 241 (2008).

⁷³ Andrew Tomkins, Min Zhang, & William D. Heavlin, *Reviewer Bias in Single- Versus Double-Blind Peer Review*, 114 PNAS 12708, 12708 (2017).

⁷⁴ *Id.* at 12712.

⁷⁵ Vikram David Amar, *Why 'Blind' Grading Makes Good Sense, and Should Be Used More Extensively Outside of the Context of Law School Exams*, VERDICT (Jan. 17, 2014), verdict.justia.com/2014/01/17/blind-grading-makes-good-sense-used-extensively-outside-context-law-school-exams. Similar biases have been demonstrated in experimental studies of grading of undergraduate students. See, e.g., John M. Malouff et. al, *Preventing Halo Bias in Grading the Work of University Students*, 1 COGENT PSYCHOL. 1 (2014). In fact, numerous studies from around

Professor Daniel Keating at Washington University School of Law explains, “[M]ost of us professors would not trust ourselves, despite our best intentions, to be completely objective if we knew the identity of the person whose exam we were assessing. . . . Anonymous grading assures that our subconscious biases will play no part in the score that we give.”⁷⁶ It is hardly inconceivable that Supreme Court Justices may be subject to such unconscious forms of bias, no less so than are law school professors with similar professional training.

Finally, blind auditions now employed by many orchestras further evidence the potential benefits of masking the identity of petitioners’ counsel. Symphony orchestras, until recently, consisted of musicians who were hand-picked by the music director.⁷⁷ Although almost all members still had to audition, most of the contenders were male students of a select number of teachers.⁷⁸ Notably, until 1970, less than five percent of the musicians in the top five U.S. orchestras were women.⁷⁹ Thereafter, most major U.S. orchestras changed their audition policies, more widely advertising openings and restructuring auditions to reduce favoritism and bias.⁸⁰ Many U.S. orchestras now use screens to hide auditioning musicians from view, so that the judges’ biases – conscious and unconscious – cannot influence hiring decisions.⁸¹ In blind auditions, judges are only given a number to identify the individual.⁸² Some orchestras also use a carpet to muffle the sound of footsteps that may reveal the gender or size of the musician.⁸³

A study from 2000 found that use of screens increases the probability that woman will be advanced and hired.⁸⁴ Female advancement from preliminary rounds rose by 50 percent.⁸⁵ Between 1997 and 2013, the number of musicians in top orchestras remained stable, but the proportion of women hired increased with the implementation of blind auditions.⁸⁶ Research suggests that the switch to blind auditions explains about a third of the increase in the hiring of women.⁸⁷

the world confirm not only expectation bias, but racial, ethnic, national origin and other forms of insidious bias in non-blind grading. *See, e.g.*, John Malouff & Einar Thorsteinsson, *Bias in Grading: A Meta-Analysis of Experimental Research Findings*, 60 AUSTL. J. EDUC. 245, 252 (2016); David M. Quinn, *Experimental Evidence on Teachers’ Racial Bias in Student Evaluation: The Role of Grading Scales*, 42 EDUC. EVALUATION & POLY ANALYSIS 375 (2020); Maresa Spriesma, *Discrimination in Grading: Experimental Evidence from Primary School Teachers*, 45 EMPIR. ECON. 523 (2013); Bjorn Tyrefors Hinnerich et. al, *Discrimination Against Students with Foreign Backgrounds: Evidence from Grading in Swedish Public High Schools*, 23 EDUC. ECON. 660 (2015).

⁷⁶ Daniel Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L. Q. 171, 173 (1998). *See also* John Malouff, *Bias in Grading*, 56 COLLEGE TEACHING 191 (2008).

⁷⁷ Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 715 (2000).

⁷⁸ *Id.* at 715-16.

⁷⁹ Curt Rice, *How Blind Auditions Help Orchestras to Eliminate Gender Bias*, THE GUARDIAN (Oct. 14, 2013), <https://www.theguardian.com/women-in-leadership/2013/oct/14/blind-auditions-orchestras-gender-bias>.

⁸⁰ Goldin, *Orchestrating Impartiality*, at 716.

⁸¹ Jeremy Reynolds, *Equality or Equity: Orchestral Auditions Should Be More ‘Blind,’ Not Less*, PITTSBURGH POST-GAZETTE (July 26, 2020), <https://www.post-gazette.com/news/insight/2020/07/26/Orchestra-blind-audition-New-York-Times-diversity-argue/stories/202007240112>.

⁸² Goldin, *Orchestrating Impartiality*, at 722.

⁸³ *Id.*

⁸⁴ *Id.* at 715.

⁸⁵ *Id.* at 738.; Rice, *How Blind Auditions Help Orchestras to Eliminate Gender Bias*.

⁸⁶ Goldin, *Orchestrating Impartiality*, at 722.

⁸⁷ *Id.*

By implementing blind review of petitions for *certiorari*, the Supreme Court could reduce bias and favoritism at this increasingly critical stage of the adjudication process. That would help mitigate inequities in access to justice stemming from the position occupied by the “Supreme Court bar.” Even if the Court does not adopt this approach, individual Justices could do so to ensure their own impartiality and avoid the appearance of bias.

Thank you for the opportunity to testify before you today.