PACE UNIVERSITY | ELISABETH HAUB SCHOOL OF LAW

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DISTINGUISHED PROFESSOR OF LAW
[redacted]

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To: Joshua Dratel, Esq.
From: Bennett L. Gershman
Date: December 2, 2022
Re: Judicial Ethics Analysis Concerning Chief Justice John G. Roberts, Jr.

Introduction

I have been retained *pro bono* by Kendal B. Price to provide a judicial ethics analysis of allegations contained in Mr. Price's notarized affidavit dated December 2, 2022 ("Price Affidavit") concerning the Honorable John G. Roberts, Jr., Chief Justice of the United States, and his spouse Mrs. Jane Sullivan Roberts. I have no personal knowledge of the facts of this matter. For the purposes of my analysis I have assumed the allegations in the Price Affidavit are truthful and accurate.

This Memorandum sets out my opinions on whether Chief Justice John Roberts has complied with his legal and ethical obligations pursuant to 28 U.S.C.§ 455, the judicial recusal statute. In my opinion, Chief Justice Roberts has violated his obligations under 28 U.S.C. § 455(a) and (e) and further, that each of his annual financial disclosures between 2007-2021 is defective as a matter of law.

Professional Qualifications and Expertise

I was a government attorney for ten years. I served in the New York County District Attorney's Office from 1966-1972 and thereafter served in the New York State Special Prosecutor's Office from 1972-1976 created by the Governor of New York State to investigate and prosecute corruption by public and political officials. I served in this office as Chief of the Appeals Bureau and Chief of the Bronx County Anti-Corruption Bureau. During my prosecutorial career I investigated and tried hundreds of cases, including murder, rape, robbery, kidnapping, fraud, drugs, racketeering, and official and political corruption. As particularly relevant here, I have extensive experience

investigating and prosecuting judges, public officials, lawyers, business executives, and police officers.

After leaving prosecutorial work I became a law professor at Pace Law School, now renamed the Elisabeth Haub School of Law at Pace University. I am a tenured professor there. I recently was awarded a Distinguished Professorship. During my career I have taught courses in criminal law, criminal procedure, trial evidence, constitutional law, and professional ethics. I have written four books, 76 articles in law reviews and journals, and hundreds of book reviews, essays, and Op Ed articles. I have presented scholarly papers at numerous academic and professional conferences and symposia. According to a recent Bepress Legal Repository and Digital Commons@Pace, there have been over 200,000 total downloads of my articles during the period the database has existed. My books and articles have been cited at least 83 times by federal and state appellate courts, and at least 1,150 times in academic journals. My articles have been reprinted in college criminal justice textbooks [see, e.g., Stolzenberg et al., *Criminal Courts for the 21st Century* (1998); Mayes, et al., *Courts and Justice* (1995); Braswell, et al., *Justice Crime, and Ethics* (1991)] and have been translated and published in Chinese law reviews, see 116 Chengchi Law Review 293 (2010); 52 Tunghai University Law Review 195 2017).

My treatise, *Prosecutorial Misconduct* (2d ed., 2019-20, Thomson-Reuters, supplemented annually) is considered the most authoritative and influential treatise on the subject of prosecutorial conduct and ethics. My other treatise, *Criminal Trial Error and Misconduct* (3d ed. Lexis-Nexis, 2019, supplemented annually), examines the ethics of the criminal trial, and analyzes the conduct and ethics of the judge, prosecutor, defense lawyer, and jury. I am considered an expert on a prosecutor's legal and ethical duty to disclose to the defense exculpatory evidence. My book *Prosecution Stories* (Twelve Tables Press, 2018) describes the day-to-day experiences of prosecutors, including my own experiences, and how prosecutors should perform their function legally and ethically. The Ohio State Journal of Criminal Law devoted an entire issue in my honor in a Symposium in which twelve eminent legal ethicists contributed articles. See *Symposium*, Volume 16, Number 2 (Spring 2019). The articles by these scholars discuss controversial ethical issues in criminal law and the impact my scholarship has had on the U.S. criminal justice system. I am the author of the Constitutional Law casebook, *Modern Constitutional Law*. I received on February 17, 2021, the Sanford Levy Ethics Award from the Professional Ethics Committee of the New York State Bar

Association for my contributions to legal ethics. I was also presented on October 6, 2022, with the New York Law Journal's Life Achievement award.

I have provided numerous ethics opinions to lawyers in the form of reports, affidavits, and opinion letters. I have given these opinions in depositions, hearings, and other judicial proceedings. I have testified several times on government ethics before the U.S. Congress and the New York State legislature.

Affidavit of Kendal B. Price

Mr. Price is an attorney in good standing in Massachusetts. He was employed at Major, Lindsay & Africa (MLA), a prominent legal executive search firm, from 2011-2013. The firm promotes itself as "the premier legal executive search firm in the world." He was a Managing Director in the Partner Practice Group based in Boston, Massachusetts. He provided counseling and recruiting services to law firm partners, in-house counsel, government attorneys, specialized practice groups, and law firm management professionals.

One of Mr. Price's colleagues at MLA was Jane Sullivan Roberts, the spouse of Chief Justice John Roberts. Mrs. Roberts worked at MLA from 2007-2019. She is presently a legal recruiter at Macrae, which describes Mrs. Roberts as "one of Washington's most insightful and experienced legal recruiters, [who] advises high-profile law firm partners and groups on lateral moves, and senior government attorneys transitioning to the private sector."

According to Mr. Price, after Chief Justice Roberts was confirmed as the Chief Justice of the United States [September 25, 2005), "[Mrs. Roberts] restructured her career to benefit from his position." Mr. Price believes that at least part of Mrs. Roberts' remarkable success as a recruiter has come because of her spouse's position.

Mr. Price had very little contact with Mrs. Roberts, or any direct knowledge of her recruitment placements. However, in the summer of 2012, he was told by Jeffrey Lowe, an experienced recruiter and Managing Partner in MLA's Washington D.C. office that Mrs. Roberts was the highest earning recruiter in the entire company "by a wide margin." Mr. Price assumes that MLA may be the leading legal recruiter in the world, and that Mrs. Roberts may have been the highest-earning legal recruiter in the world. Mr. Price believes that a substantial portion of Mrs. Roberts' commissions have come from large American law firms with active Supreme Court practices.

According to Mr. Price, most legal recruiters spend years networking and building their practice. However, Mrs. Roberts achieved preeminent status as a legal recruiter in only her second full year at MLA. In that year, 2009, her total commissions exceeded $1 million dollars. It is apparently unheard for such an inexperienced recruiter to generate such huge commissions so early in his or her career. When Mr. Price asked Mr. Lowe his opinion on how it was possible for Mrs. Roberts to earn such huge commissions, Mr. Lowe made it clear that he did not wish to discuss the matter. Other MLA recruiters also were reluctant to discuss the remarkable success of Mrs. Roberts when Mr. Price asked about it.

Although Mr. Price has no evidence that any commissions earned by Mrs. Roberts influenced any particular judicial action or Supreme Court decision, he believes from his own experience that law firms making hires "do not feel comfortable with Mrs. Roberts' role." Senior hiring partners in law firms are acutely aware of the politics, optics, and unspoken norms that might cause them to feel pressure to hire outgoing government officials. From his own personal experience in seeking to place an outgoing senior government official in a prominent law firm, Mr. Price believes that "there is no question in my mind that firms with active Supreme Court practices would have felt intense political pressure to pay high salaries for candidates promoted by the spouse of the Chief Justice." Mr. Price also believes that these firms found the arrangement "distasteful" and "offensive."

The MLA commission structure typically depended on three factors: length of tenure at MLA, total fees that a recruiter brought to MLA, and the amount of base compensation. Mrs. Roberts' total commissions from 2007-2014 were over $10. 7 million dollars for placing 192 law firm partners and 21 other employees inside law firms, which Mr. Price believes is significantly more than any other MLA recruiter and perhaps more than any other legal recruiter in the world.

In 2013, Mr. Price learned that Mrs. Roberts was responsible for placing Kenneth Salazar, outgoing Secretary of the Interior in the administration of President Barack Obama in a partner position with Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale"). Mr. Price recalls learning of Mrs. Roberts' other placements of lawyers in large, national firms but does not remember the exact names of those firms. He recalls that they were prominent firms with significant government and/or appellate practices. As he states: "I cannot rule out that more than one law firm that paid commissions to Ms. Roberts argued cases at the Supreme Court."

Mr. Price learned in 2015 that Mrs. Roberts was earning as much as $3 million annually from law firms, a fair number of which he surmised were large, prestigious

firms likely to appear regularly before her husband, Chief Justice Roberts and the Supreme Court.

Mr. Price calculated that Mrs. Roberts must have been paid about $350,000 in an individual commission by WilmerHale for the placement of outgoing Interior Secretary Kenneth Salazar. One of Mr. Price's colleagues told him that he was especially impressed with Mrs. Roberts' Salazar placement because she had managed to negotiate not merely a huge salary for Mr. Salazar but also the opening, explicitly for Mr. Salazar, of an entire new WilmerHale office in Denver, Colorado.

Mr. Price noted that in her sworn arbitration testimony, Mrs. Roberts confirmed that a significant portion of her practice was placing in law firms as partners senior government attorneys, cabinet officials, former senators, and other senior lawyers. She stated that she kept her placements confidential, and that the firms kept her placements confidential too. She confirmed that she did not seek to benefit from publicity in the mass media with regard to her placements and the exposure of her work with MLA and in particular her placements. She stated that she did not think she had ever been mentioned in the media as placing senior government lawyers into law firms.

According to Mr. Price, WilmerHale maintained a "highly active practice at the Supreme Court," serving as counsel of record on numerous petitions for certiorari, briefing, and arguing several merits cases each Term, and in many cases representing *amici curiae.* Mr. Price believes that the placement by Mrs. Roberts of lawyers in firms arguing before the Supreme Court might be perceived as unfair for parties and counsel opposing WilmerHale in the Supreme Court. As Mr. Price stated: "If I were litigating a case in federal court, would I want to know that the law firm opposing me had recently paid the judge's household over $300,000? If the judge didn't recuse himself, would I have them recused? To me, the answer to both questions were obviously yes."

Mr. Price was aware that the federal recusal statute requires Justices to inform themselves about their spouse's financial interests and treats a judicial spouse's financial interests as basically the same as a Justice's individual financial interests. Mr. Price was troubled that the Chief Justice had never disclosed the substantial payment to his household from WilmerHale, nor any of the other payments to his household by other law firms practicing before the Supreme Court, nor had ever recused himself from any case from which his household had received payments from law firms practicing before the Supreme Court. Mr. Price did not consult a specialist in judicial ethics because he was afraid that if he pressed the issue he would face retaliation.

Mr. Price believes that Mrs. Roberts has remained a prominent legal recruiter at her new company, Macrae, where he believes she earns between $1 million and $3 million per year, in substantial part by commissions from law firms practicing before the U.S. Supreme Court.

Mr. Price looked up the annual financial disclosure statements of Chief Justice Roberts. The statements always listed his spouse's income as "salary." To Mr. Price, this statement is misleading. Mrs. Roberts' compensation was commissions, "which most of us understand is quite different from 'salary.'"

Mr. Price queries whether if Mrs. Roberts' soliciting law firms for commission-based placements was entirely appropriate for the spouse of the Chief Justice, and the identities of the placements and law firms publicly would ordinarily be readily and gladly disclosed by most recruiters and their firms, "why all the secrecy?" "Why did Jane Roberts actively avoid any media coverage of her placements of high government officials? How come the Chief Justice did not disclose these payments, and even seemed to misrepresent them in his disclosures?"

Mr. Price acknowledges that he waited several years before coming forward with his disclosures. He states he was worried about the negative impact that his disclosure would have on his life, family, and career. He concludes that despite the risks, he believes it is time to share what he knows with other people and together build a judicial system that all Americans can trust.

Sources of Law & Federal Judicial Recusal Statute

Although three sources of law affect judicial recusals, only the last one, namely the federal recusal statute, codified at 28 U.S. Code § 455, applies here:

- **U.S. Constitution:** The Due Process Clause of the Constitution initially followed the common law, requiring recusals only in cases where the judicial official had "a direct, personal, substantial, pecuniary interest" in the case, see *Tumey v. Ohio*, 273 U. S. 510 (1927). In *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), the Court ruled the Due Process Clause further required recusals in matters involving high "probability of actual bias" by a judge. *Id.* Mr. Price does not allege either of these circumstances; Constitutional analysis therefore is inapposite. But the Constitution is not the only source of relevant law. The *Caperton* Court

confirmed that judicial "bias and prejudice" were matters also appropriately regulated by "statutes and judicial codes." *Id.*[1]

- **Codes of Conduct:** The Code of Conduct for United States Judges applies to "United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, ... magistrate judges," and some "special masters and commissioners."[2] But the Supreme Court has never applied the Code of Conduct to its own Justices. A 1993 Statement on Recusals,[3] adopted by a majority of individual Supreme Court Justices and later by Chief Justice Roberts,[4] does not concern the allegations presented here. The American Bar Association Model Code of Judicial Conduct is purely exhortatory, with no force of law.[5]

- **Judicial Recusal Statute:** Therefore, the only source of law relevant for my analysis is the federal judicial recusal statute, codified at 28 U.S. Code § 455, which explicitly applies to "any justice...of the United States."

I quote below the statutory provisions that are relevant to my opinion:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party.
>
> (4) He knows that … his spouse … has a financial interest in … a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.
>
> (5) He or his spouse

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[1] In a dissent challenging the majority's "probability of bias" Constitutional standard for recusals, Chief Justice Roberts argued that judicial recusals were best "regulated by 'common law, statute, or the professional standards of the bench and bar.'" *Caperton* at 891-92, Roberts, C.J. dissenting, quoting *Bracy v. Gramley*, 520 U. S. 899, 904 (1997).

[2] https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges

[3] See *Statement of Recusal Policy*, the Supreme Court of the United States, November 1, 1993, available at https://www.politico.com/f/?id=00000183-8648-d513-a19b-9fdc5acd0000

[4] See *Roberts' Recusal Policy*, SCOTUSblog by Lyle Denniston, September 30, 2005, available at https://www.scotusblog.com/2005/09/roberts-recusal-policy/

[5] https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

When Impartiality of a Judge Might Reasonably be Questioned

The judicial recusal statute captures a crucial principle of judicial ethics: A judge must avoid not only *actual* conflicts of interest, but also any *perceived* conflicts of interest. No well-designed legal system should permit a judge to rule on a case in which he or she has a personal interest in a case or stands to benefit financially based on the outcome. But the judicial recusal statute goes even further: even in a case in which there is no actual conflict of interest, subsection (a) requires a judge to disqualify himself or herself

in a case in which the justice's "impartiality might reasonably be questioned."[6] This latter principle is a critical and long-standing ethical commitment that protects the credibility and independence of the judiciary. To be sure, public perceptions of a judge's partiality can undermine confidence in the courts. Moreover, disqualifying judges for outward manifestations of what might reasonably be perceived as bias avoids the need to make subjective judgment calls about what might actually be going on in a judge's heart and mind.[7]

Section 455(a) makes clear that judges should apply an objective standard in determining whether to disqualify themselves. Judges contemplating disqualification under § 455(a) should not ask whether they subjectively believe they are capable of impartially presiding over the case. Rather, the question the judge must ask is whether his or her impartiality might reasonably be questioned from the perspective of a reasonable person.

A "reasonable person" has been characterized as an "objective, disinterested observer" who is privy to full knowledge of the surrounding circumstances.[8] The reasonable observer should be "thoughtful" and "well-informed."[9] A reasonable person does not base a conclusion on groundless suspicion or speculation. This is because "the disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking."[10]

It is worth noting that the recusal statute identifies *perceived* conflicts of interest at the beginning of the statute, in subsection (a), before listing *actual* conflicts of interest in subsection (b). It is also worth noting that the statute mentions the financial interests of the judge's spouse four times, clearly indicating that the drafters were especially concerned that the financial interests of a judge's spouse might influence the judge's decision-making. Subsection (e) further distinguishes *perceived* and *actual* conflicts of

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[6]Notably, the statutory standard for recusals (namely, where a justice's "impartiality might reasonably be questioned") is quite different from, and far broader than, the Constitutional standard under the Due Process Clause. The Supreme Court has ruled that Due Process demands recusal only in narrower circumstances, namely when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009), quoting *Withrow v. Larkin*, 421 U. S. 35, 47 (1975).

[7] See Charles G. Geyh, *Judicial Disqualification: An Analysis of federal Law* (3rd ed. 2018), at

[8] United States v. Bayless, 201 F.3d 116, 126 (2d Cir. 2000).

[9] In re Mason, 916 F.2d 384, 386 (7th Cir. 1990); United States v. Jordan, 49 F.3d 152, 156 (5th Cir. 1995).

[10] In re Allied-Signal Inc., 891 F.2d 967, 970 (1st Cir. 1989)(Breyer, J.).

interest. A judge's *actual* conflict of interest cannot be cured by disclosure to the parties and a waiver; recusal is required in all circumstances under Subsection (b).

However, subsection (e) provides an important procedure for curing a *perceived* conflicts of interest that would normally require recusal under subsection (a), namely, "Full disclosure" of the apparent conflict followed by an explicit "waiver" of the apparent conflict by the parties to the case. Thus, whereas the statute makes clear that recusal is the primary remedy, an alternative procedure is provided if the judge makes a full disclosure of the perceived conflict and the party waives the conflict.

A Justice's ability to follow the law on recusal, disclosure and potential waiver is predicated on the requirement in subsection (c) that the Justice "make a reasonable effort to inform himself about the personal financial interests of his spouse," in this case Jane Sullivan Roberts.

The Price Affidavit contains no allegations regarding the Chief Justice's actual knowledge of his spouse's financial interests. As noted, Mr. Price alleges that he was not a close colleague with Mrs. Roberts at MLA and only learned of her activities from various sources: colleagues at his company, MLA corporate documents, and Mrs. Roberts' sworn deposition testimony. However, even from this distance, Mr. Price learned the following details about Mrs. Roberts' commission payments:

a. Mrs. Roberts' job consisted of placing senior government officials from the executive and legislative branches of government into partner positions at major U.S. law firms;

b. At least one of those law firms, namely WilmerHale, had an active and/or substantial practice before the Supreme Court;

c. The vast amount of Mrs. Roberts' income was in the form of commissions which were paid to her as a percentage of the recruited law firm partner's first year compensation;

d. At least one of those commission payments from law firms practicing before the Supreme Court – the Salazar commission - was quite substantial, exceeding a quarter of a million dollars.

From the foregoing, it is clear that Mrs. Roberts' business relationships with lawyers and law firms, notably WilmerHale, has been far from indirect or non-consequential. As the Price Affidavit demonstrates, Mrs. Roberts' relationships with law firms and law firm clients has involved neither occasional nor isolated transactions but have been substantial, ongoing, and rewarded by huge commissions. It is also reasonable to assume that she has had close personal connections with the lawyers and law firms for whom she recruited, and the new lawyers she brought into the firms. It is also reasonable to believe that Mrs. Roberts' remarkable success as a law firm recruiter may have been influenced by the position held by the Chief Justice.[11]

It is also reasonable to assume that if Mr. Price – having little contact with Mrs. Roberts - was aware of matters relating to her financial compensation from extremely lucrative commissions, then her spouse, the Chief Justice of the Supreme Court, would very likely know about these matters. It is simply unreasonable to believe that the Chief Justice would be ignorant of how much his household's income had been supplemented annually by his wife's recruitment work when this additional income was measured in millions of dollars.

This is not to say that the Chief Justice reasonably should have known every detail of his spouse's legal placements and the amounts of her commissions. For example, it might not be reasonable for the Chief Justice to know the names of every specific recruit, or every specific law firm, or the specific amounts of his wife's commission payments.

But some provisions in § 455 indicate that there are specific matters about which the Chief Justice Roberts should reasonably be aware of or make an effort to learn, and with respect to which he should seek or have sought clarification. For example, subsection (a) specifically refers to "any proceeding where [the judge's] impartiality might reasonably be questioned." This reference suggests that after the Chief Justice learned that some of his spouse's commission income derived, at least in part, from law firms practicing

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[11] Although not binding guidance with respect to the judicial recusal statute, nevertheless Cf. *Committee on Codes of Conduct Advisory Opinion No. 107*: Disqualification Based on Spouse's Business Relationships (June, 2009), available at https://www.politico.com/f/?id=00000183-86e4-d513-a19b-9ff475e50000
("judges should consider recusal whenever they become aware of circumstances suggesting that the hiring of the spouse or the spouse's business may have been influenced by the judge's position"). See also id. (important factors for recusal include "degree of involvement of the spouse or the spouse's business;" whether spouse performed "high-level executive recruitments;" whether spouse had "substantial and ongoing relationship with the same company [Wilmer-Hale];" and whether the spouse's business relationships were ongoing and the amount of commissions paid by spouse's client).

before his Court, it would be unreasonable for Chief Justice Roberts not to inquire specifically about the commission payments by those particular law firms.[12]

The Price Affidavit cites 213 law firm placements by Mrs. Roberts between 2007-2014. Mrs. Roberts presumably has made many more placements since 2015. The Chief Justice should have informed himself about which, if any, of those hundreds of other lawyer placements involved law firms practicing before his Court.

Mrs. Roberts, MLA, WilmerHale, and the Supreme Court

If the Chief Justice had reasonably informed himself of the personal financial interests of his spouse, as required under subsection (c), then he would certainly be aware that his spouse received a six-figure commission payment from Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale") in mid-2013. According to the Price Affidavit, Mrs. Roberts was paid $353,625.00 in 2013 for her role in placing Kenneth Salazar, outgoing U.S. Secretary of the Interior, into a partner position at WilmerHale. Mr. Salazar started working in the firm on June 10, 2013.[13] Moreover, Mrs. Roberts reportedly arranged for WilmerHale to open a new office in Denver, Colorado to accommodate Mr. Salazar's request. (In August 2021, after eight years at WilmerHale, Mr. Salazar left the firm and became the U.S. Ambassador to Mexico.[14]). Reports of Mr. Salazar's placement were noted by the media.

As the Price Affidavit notes, WilmerHale is a globally-recognized American law firm with a very active practice in the Supreme Court. According to ScotusBlog, between 2013-2017, WilmerHale argued 27 cases before the Supreme Court, more cases than any other law firm.[15]

Between 2012 and 2022, WilmerHale has briefed approximately 139 certiorari petitions before the Supreme Court, filed approximately 61 briefs opposing certiorari,

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[12] It is theoretically possible that the Chief Justice might have some agreement or arrangement, whether formal or informal, to deliberately limit his knowledge of his spouse's law firm commission payments. On the one hand, such arrangement might make it harder for him to be influenced, even unconsciously, in cases before his Court. But at least with regard to payments from law firms that actively practice in his Court, any such arrangement to limit the Chief Justice's knowledge would constitute a violation of 28 U.S.Code § 455 (c), requiring him to reasonably inform himself of his spouse's financial interests.

[13] *Ken Salazar, Former Interior Secretary and US Senator, Joins WilmerHale*, June 6, 2013, https://www.wilmerhale.com/en/insights/news/ken-salazar-former-interior-secretary-and-us-senator-joins-wilmerhale.

[14] https://www.usaid.gov/mexico/news/arrival-ambassador-kenneth-salazar

[15] See https://www.scotusblog.com/2018/09/empirical-scotus-supreme-court-all-stars-2013-2017/, last accessed on September 5, 2022.

argued approximately 39 merits cases before the Supreme Court, and represented amici *curiae* in approximately 159 cases. Several WilmerHale clients and matters stand out:

1.Monsanto

WilmerHale represents Monsanto, the global agri-business giant. Just since WilmerHale paid over $350,000 to the Chief Justice's household in 2013, Monsanto has had 5 petitions for (or oppositions to) certiorari before the Supreme Court.

2.Dutra Group

In 2018, five years after Ms. Roberts received the Salazar commission, WilmerHale's client Dutra Group sought certiorari for a circuit court ruling that the company was liable for punitive damages in the injury of Christopher Batterton, a sailor on one of Dutra Group's vessels. *Dutra Group v. Batterton*:

December 7, 2018 — certiorari granted.[16]

March 25, 2019 — Oral argument.[17]

June 24, 2019 — decision published.[18]

Because the Chief Justice was in the majority, and voted in favor of WilmerHale's client, Supreme Court rules state that he would have assigned the opinion to Justice Alito. The Chief Justice joined Justice Alito's opinion holding that Dutra Group did not owe punitive damages to the injured sailor.

Recusal Based on Financial Interest of a Party to the Litigation

Because WilmerHale is the only law firm mentioned by name in the Price Affidavit, my analysis is limited to that particular firm.[19]

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[16] https://www.supremecourt.gov/orders/courtorders/120718zr_f2q3.pdf

[17] https://www.supremecourt.gov/oral_arguments/audio/2018/18-266 transcript at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-266_5536.pdf

[18] https://www.supremecourt.gov/opinions/18pdf/18-266_m6io.pdf

[19] There is no suggestion that Chief Justice Roberts has an actual conflict of interest, such as a "personal bias or prejudice" [see 28 U.S.C. §455(b)(1)], nor is there any evidence that recusal is required because a spouse has an "interest that could be

Subsection (b)(4) of § 455 requires recusal if a Justice's spouse "has a financial interest in...a party to the proceeding." The "party" to a proceeding is normally understood as the client, the legal person with standing under Article III to bring the case. WilmerHale is the law firm representing the "party." Under the most natural reading of "party," WilmerHale is not a "party"; therefore, Ms. Roberts' interest in a business relationship with the firm would seem to be beyond the plain terms of the statute.

But while WilmerHale is not a party, WilmerHale and other law firms practicing before the Supreme Court certainly have much to gain or lose depending on a firm's ability to obtain certiori for clients so that the Court will hear their cases, and of course the paramount interest in how the Court rules. Indeed, law firm fees are often directly tied to the results of litigation. Over the long term, a law firm's reputation is likely tied to winning cases in the Supreme Court.

If WilmerHale was considered a "party" to the litigation for purposes of Subsection (b)(4), Ms. Roberts had a "financial interest" in WilmerHale.[20] Without WilmerHale as a financially solvent, going concern, she would not have received over $350,000 in commissions from the firm. The Price Affidavit alleges that Mrs. Roberts was instrumental in negotiating the opening of a new WilmerHale office for Mr. Salazar in Denver, Colorado. This leaves open a possibility that Mrs. Roberts may have played an operational business role with WilmerHale at one point, and/or had an ongoing business relationship with WilmerHale. She placed at least one and possibly multiple senior lawyers at the firm; she received substantial commission payments from the firm in one or more years; and she was even instrumental in determining which offices the firm opened. Accordingly, it is not unreasonable that Mrs. Roberts might be said to have been an "active participant in the affairs" of WilmerHale under § 455 (d)(4).

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substantially affected by the outcome of the proceeding." Id., (b)(5). To be sure, Chief Justice Roberts' spouse apparently had repeated and ongoing business relationships with the law firms before the Court, and those relationships arguably constitute an "interest." But the possibility that Mrs. Roberts' interest in those ongoing relationships might be affected by the outcome of any proceeding is remote. It is extremely doubtful that any ruling by the Supreme Court could drive those law firms out of business, thereby drying up her commissions.

[20] Subsection (D)(4) providers a more specific definition of "financial interest," specifically it means "an ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other participant in the affairs of the party." There is no suggestion in the Price affidavit that Ms. Roberts ever had an equity interest in WilmerHale, or served as director or advisor to the firm.

Recusal, or Full Disclosure and Waiver, is Required Under Subsection (a).

Analysis under 28 U.S.C. §455 (a) of the Chief Justice's conduct is straightforward. As noted above, subsection (a) requires a Justice's recusal "in any proceeding in which his impartiality might reasonably be questioned." However, subsection (e) provides a method for curing a perceived conflict of interest under subsection (a), namely, by the Chief Justice providing "full disclosure on the record of the basis for disqualification," followed by "waiver" from the affected parties.

In my opinion, a reasonable person would want to know that the law firm on the other side of a legal dispute had recently paid the judge's household over $350,000. Such a payment might cause a reasonable person to question the judge's impartiality.[21] The fact that a reasonable person might question a judge's impartiality does not mean that the judge would necessarily be biased. Indeed, it is entirely possible that the judge could ultimately remain impartial in the case. But, as noted above, subsection (a) is not concerned with whether a judge is *actually* biased. Rather, subsection (a) requires recusal (or disclosure and waiver) if a reasonable person "might"[22] question the judge's impartiality—in large part, to protect the public's trust in the integrity of the judiciary.

At least with respect to the 27 merits cases argued in the Supreme Court by WilmerHale between 2013 and 2017,[23] the judicial recusal statute [28 U.S. Code § 455(a)] required Chief Justice Roberts to recuse himself. The Chief Justice could have avoided recusal only by invoking the procedures of subsection (e), namely, "full disclosure" by the Justice and "waiver" by the litigants of the possible conflict. In my opinion, the failure by the Chief Justice to recuse himself, or seek disclosure and waiver, constitute multiple violations of the recusal statute.

To be sure, the recusal statute itself provides no specific remedy for any justice, judge or magistrate judge who violates its requirements. When lower court judges violate 28 U.S. Code § 455, they could conceivably be ordered by a higher court to recuse themselves (e.g., by one of the Circuit Courts of Appeal, or the Supreme Court itself). But for violations of 28 U.S. Code § 455 by a Justice of the Supreme Court, the

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[21] It is perhaps possible to imagine an unsophisticated litigant who was unconcerned by large monetary payments to the judge's household by the other side. But no competent and reasonable lawyer, upon learning that the opposing firm had recently paid the judge's household over $350,000, would fail to question whether the judge might be impartial, and potentially explore bringing a motion for recusal, depending on the lawyer's tactical analysis of the situation.

[22] Note further that the statute does not demand recusal (or disclosure and waiver) if a reasonable person would necessarily question a judge's impartiality. It sets a much higher standard for judges, requiring recusal (or disclosure and waiver) if a reasonable person "might" question their impartiality.

[23] See https://www.scotusblog.com/2018/09/empirical-scotus-supreme-court-all-stars-2013-2017/, last accessed on September 5, 2022.

only remedy available under the Constitution appears to be impeachment by the U.S. House of Representatives, and conviction by the Senate.[24] Regardless of whether Congress pursues any type of remedy against the Chief Justice, and for all cases going forward, the Chief Justice should either recuse himself from cases in which counsel has made substantial payments to his household or "fully disclose" such payments to counsel and seek a waiver by the litigants.

Chief Justice Robert's Annual Financial Disclosures

Since the enactment of the Ethics in Government Act of 1978, every judicial officer of the United States has been required to file annual financial disclosures.[25] The Chief Justice's spouse began her career as a legal recruiter in 2007; all the Chief Justice's annual disclosure statements since 2007 are enclosed as exhibits to this memorandum.

Since 2007, the Chief Justice has described his spouse's income in exactly the same way, as "salary." For ease of reference, here are the relevant excerpts from his filing from 2013, the year his spouse received a commission payment exceeding $350,000 from WilmerHale:

[24] The very unlikelihood of impeachment of a Justice suggests that the Supreme Court itself should more aggressively self-enforce potential conflicts.
[25] 5 U.S.C. app.§§ 101-111.

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Rev. 1/2014

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2013

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (last name, first, middle initial)	2. Court or Organization	3. Date of Report
Roberts, John G.	Supreme Court of the U.S.	05/15/2014
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
Chief Justice	☐ Nomination Date ☐ Initial ☑ Annual ☐ Final 5b. ☐ Amended Report	01/01/2013 to 12/31/2013

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE
1. 2013	Major, Lindsey & Africa, LLC -- Attorney Search Consultants -- Salary

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature: s/ John G. Roberts

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILLFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

The Chief Justice's other disclosures from 2007—2021 are virtually identical, always describing his spouse's income as "salary." However, the vast majority of Mrs. Roberts' compensation – and arguably the exclusive basis for her income – apparently came from commissions, not salary, paid to her as a percentage of the gross first-year compensation for new partners and other lawyers she placed at law firms. Most people

intuitively understand that "salary" and "commissions" are significantly different forms of compensation. Definitions provided by the Merriam-Webster online dictionary reinforce this familiar understanding:

> **Commission**[26] (7): a fee paid to an agent or employee for transacting a piece of business or performing a service
>
> *especially*: a percentage of the money received from a total paid to the agent responsible for the business
>
> [example] He gets a commission for each car he sells. …
>
> **on commission:** with commission serving as partial or full pay for work done
>
> [example] an artist working *on commission*
>
> **Salary**:[27] fixed compensation paid regularly for services

The U.S. Department of Labor regulations draw the same commonsense distinction. "Salary" is defined at 29 C.F.R. § 541.602:

> Salary basis. (a) General rule. An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

Conversely, 29 U.S.C. §207(i) explains that:

> In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services…

Further, 29 U.S.C. §779.416(c) states that:

> A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek

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[26] See https://www.merriam-webster.com/dictionary/commission, last accessed on September 5, 2022.

[27] See https://www.merriam-webster.com/dictionary/salary, last accessed on September 5, 2022.

Characterizing Mrs. Roberts' commissions as "salary" is not merely factually incorrect; it is incorrect as a matter of law. If Major, Lindsey & Africa had characterized Mrs. Roberts' compensation as "salary" to the Department of Labor, the U.S. judicial system would have affirmed that she was paid commissions, not salary. (The U.S. Department of Labor has gone to great lengths to distinguish between "commission" and "salary" precisely because some actors, by mischaracterizing the true form of a person's compensation, for whatever reason might seek to obscure the actual basis for the compensation.)

The Chief Justice's state of mind when he completed his financial disclosures is unknown. His defective filings could have been made willfully or accidentally. Neither the Price affidavit, nor the Chief Justice's annual financial disclosures, provide any evidence about the Chief Justice's subjective state of mind when he completed the disclosures and certified that "all information pertaining to my spouse is accurate, true, and complete to the best of my knowledge and belief."

It is my opinion, having studied and taught Constitutional Law for many years, and often commented about Supreme Court Justices, that Chief Justice Roberts is a sophisticated jurist, and arguably a master of the English language. It is therefore inconceivable to me that he would consistently, year after year, confuse the meanings of the terms "salary" and "commissions." As noted, the legal distinction between these terms is clear, undisputed, and legally material.

If the Chief Justice's inaccurate financial disclosures were inadvertent, presumably he should file corrected and amended disclosures. If the Attorney General determines that the Chief Justice behaved unlawfully by "knowingly and willfully" falsifying or "fail[ing] to ... report any information that" he was "required to report" in the financial disclosures, then the Department of Justice could seek to fine the Chief Justice up to $50,000, or imprison him up to one year.[28] Presumably, the first step for making such determination would simply be for Department of Justice investigators to interview the Chief Justice to determine the circumstances of his filings and assess his credibility.

The allegations in the Price affidavit suggest that it is plausible that the Chief Justice's spouse may have leveraged the "prestige of judicial office" (ABA Model Code of Judicial

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[28] See 5a U.S. Code § 104. Inaccurate financial disclosure statements, if deliberately made, can result in prosecution. Senator Ted Stevens of Alaska was convicted in 2008 of seven felony counts in connection with charges that he knowingly failed to list on Senate disclosure forms the receipt of some $250,000 in gifts and services used to renovate his home in Girdwood, Alaska. See https://www.nytimes.com/2008/10/28/washington/28stevens.html

Ethics, Rule 1.3) to meaningfully supplement their household income. Moreover, the failure of the Chief Justice in his annual financial disclosure statements from 2007 — 2021 to accurately describe the source of his spouse's annual income may have been done to conceal the millions of dollars she contributed to their household income. This mutually beneficial conduct was far from trivial, technical, or harmless. It directly threatens the public's trust and confidence in the federal judiciary at the highest level.

Conclusion

The allegations in the Price Affidavit are serious. They suggest that it is plausible that the Chief Justice's spouse may have leveraged the "prestige of judicial office" to meaningfully raise their household income. That concern, together with the failure of the Chief Justice to recuse himself in cases where his spouse received compensation from law firms arguing cases before the Court, or at least advise the parties of his spouse's financial arrangements with law firms arguing before the Court, threaten the public's trust in the federal judiciary, and the Supreme Court itself. In my opinion, the Honorable John G. Roberts, Chief Justice of the United States, repeatedly violated his obligations under 28 U.S. Code § 455(a) and (e). Further, his annual financial disclosures between 2007-2021 are defective as a matter of law.

Exhibits Enclosed

- Relevant excerpts, Chief Justice Roberts' annual financial disclosures, 2007-2021
- WilmerHale, Supreme Court cases 2012-2022