December 7, 2022

The Honorable Jerry Nadler, Chair
The Honorable Jim Jordan, Ranking Member
Judiciary Committee, U.S. House of Representatives
2141 Rayburn House Office Building
Washington, D.C. 20515

RE: House Judiciary Committee Hearing, "Undue Influence: Operation Higher Court and Politicking at SCOTUS," December 8, 2022

Dear Chairman Nadler, Ranking Member Jordan, and Distinguished Members of the Committee:

With great concern for the integrity of the Supreme Court and our fundamental freedoms, I offer the following statement ahead of the Committee's upcoming hearing, "Undue Influence: Operation Higher Court and Politicking at SCOTUS." My name is Katy Joseph and I serve as the director of policy and advocacy for Interfaith Alliance Foundation, a national nonpartisan organization that champions an inclusive vision of religious freedom, promotes policies that protect freedom of belief for people of all faiths and none, and works to ensure that all Americans receive equal treatment under the law.

In addition to directing our legislative advocacy program, I have the pleasure of coordinating our federal amicus practice. Interfaith Alliance regularly participates in strategic "friend of the court" briefs that spotlight federal cases impacting the boundary between religion and government. In an average year, Interfaith Alliance appears in this capacity in four to six U.S. Courts of Appeal and before the U.S. Supreme Court. Recent examples include multifaith briefs affirming the right to religious accommodations for Sikh members of the Marine Corps,[i] damages for clergy subjected to tear gas by the Trump Administration outside St. John's Church,[ii] and the threat posed to religious minority and nonreligious communities should the Supreme Court grant an exemption from state nondiscrimination laws.[iii]

Interfaith Alliance's amicus practice is based on the tacit assumption that members of the federal judiciary will, as their oath of office requires, "faithfully and impartially discharge and perform" their duties without fear or favor. Yet recent disclosures by the Rev. Rob Schenck, former head of Faith and Action, reveal a religiously motivated influence campaign targeting members of the Supreme Court to "embolden the justices" to issue increasingly conservative decisions on key issues.[iv] Rev. Schenck will elaborate on this effort in his testimony before the Committee.

In anticipation of Rev. Schenck's testimony, I offer two important pieces of context. First, during the period in which "Operation Higher Court" was underway, the Court experienced a dramatic rightward shift in its religious freedom jurisprudence. While one group, even one as well connected and well-resourced as Faith and Action, cannot receive sole credit for this transformation, the religious freedom decisions of the 1960s - 1990s bear little resemblance to those of the current Roberts Court. Second, this distortion of one of our most basic freedoms has had a deleterious effect on the civil rights and civil liberties of millions of Americans.

110 Maryland Ave NE, Suite 509, Washington, DC 20002 | TEL: 202.466.0567 | FAX: 202.857.3977 | WEB: interfaithalliance.org

I. A "Doctrinal Sea Change" Occurred During the Period of Operation Higher Court, Accelerated Under Chief Justice Roberts

The ability of the Supreme Court to alter the contours of our constitutional rights, like those protected under the Establishment and Free Exercise Clauses of the First Amendment, cannot be overstated. Our "living" Constitution figures differently in the interpretative and ideological perspectives of the nine justices who grapple with its text. Just as court watchers observed a leftward shift in the Court's religious freedom jurisprudence in the 1960s and 1970s,[v] a strong rightward trend emerged in the late 1990s and accelerated under Chief Justice Roberts.[vi]

A robust statistical analysis, conducted by leading scholars Lee Epstein and Eric A. Posner in 2021, confirmed "the popular notion that the Roberts Court represents a break in the development of the jurisprudence of the religion clauses is amply supported by the data."[vii] Together they examined every Supreme Court opinion issued between the 1953 and 2020 terms relating to the Free Exercise or Establishment Clauses, for a dataset of 95 cases. They conclude:

> *Over the entire period, the Court ruled in favor of religion 59% of the time. Win rates do not differ significantly for Free Exercise Clause cases (59%) and Establishment Clause cases (57%). Across the Warren, Burger, and Rehnquist courts the religious side prevailed about half the time, with gradually increasing success. In the Roberts Court, the win rate jumps to 83%.*

And the "religious side" referenced above often reflects a particular subset of American religious identity. During this period rulings in favor of mainstream Christian parties, as opposed to members of Christian minority or non-Christian religious groups, increased dramatically. For instance, such parties won 44% of the cases in the Warren court, 52% in the Burger court and 57% in the Rehnquist court. After Chief Justice Roberts assumed the role in 2005, favorable outcomes for mainstream Christian groups increased to 80%.

These victories are not solely attributable to Faith and Action, but emerge through the efforts of a constellation of conservative Christian legal institutions that recruit, train, litigate, and lobby for judicial candidates that will advance their agenda. Rev. Schenck has described this an "an ecosystem of support for conservative justices"[viii] as they work to expand the role of religion in American public life. In July 2022, speaking at the University of Notre Dame, Justice Sam Alito seemed to offer words of encourage to these groups saying, "the champions of religious liberty who go out as wise as serpents and as harmless of doves can expect to find hearts that are open to their message."[ix]

A telling echo came from Rev. Schenck himself who, reflecting on the work of Operation Higher Court in a recent interview with the Daily Podcast, noted that "a favorite bible of mine in those days came from the words of Jesus Christ himself, who said to his followers 'you must be as wise as serpents and as harmless as doves." But, he added, "when you're working in the environment that we're in, we not only have to be wise as serpents – we have to be downright snakey."[x]

II. Recent Decisions by the Roberts Court Are Exposing Millions to Harm Under the Guise of Religious Freedom

Even as the efforts of groups like Faith and Action come to light, some are still heralding the decisions highlighting by Epstein and Posner as victories for religious freedom writ large. In fact, the New York Times ran a piece highlighting Epstein and Posner's work under the title "An Extraordinary Winning Streak for Religion at the Supreme Court."[xi] Yet for Interfaith Alliance and many of our partners with deep roots in diverse religious communities, the Court's dramatic redefinition of religious freedom has meant fewer – not more – protections for our most fundamental rights.

The Court's recent decision in *Kennedy v. Bremerton* encapsulates this shift. On its most basic level the First Amendment grants us the freedom to believe as we choose, with respect for the autonomy of others to do the same. For decades, the Supreme Court has upheld this right in our schools by protecting students' religious freedom and preventing the use of public funds for religious activities. But recent changes to the Court have presented an opportunity for the Religious Right to overturn decades of settled law.

No student should ever be made to feel excluded—whether in the classroom or on the football field—because they do not share the religious beliefs of their coaches, teachers, or fellow students. Yet Bremerton, Washington, students repeatedly felt pressured by their football coach to participate in public prayer. After Kennedy refused accommodations to facilitate his religious practice while protecting students' religious freedom, the school district placed the coach on administrative leave. Interfaith Alliance joined 33 faith-based and civil rights organizations in an amicus brief supporting the actions of the Bremerton school district to prioritize the rights, safety, and well-being of its students.[xii]

But Justice Gorsuch, writing for the majority, instead cast Kennedy as the target of "discipline" for offering a "private quiet prayer" while students were otherwise engaged.[xiii] Throughout the opinion, he makes no mention of the impact an administrator's religious conduct might have on students' religious freedom – those who share their coach's beliefs but would rather not participate in a public prayer as well as those who believe differently. Instead, the very facts of the case were recast to position Kennedy as the harmed party in service of a decision that radically expanded the meaning of free exercise. This disparity was so striking that Justice Sotomayor included photos of the "private" prayer in her dissent, showing Kennedy on the 50-yard line surrounded by dozens of students, community members, and media.

The same pattern appears in *303 Creative LLC v. Elenis*, argued before the Court earlier this week. A successful website designer in Colorado seeks an exemption from the state's nondiscrimination law, permitting her to reject same-sex couples due to her conservative Christian beliefs about marriage. The twist, however, is that no same-sex couple has sought her services. Despite the absence of a live controversy, the Court heard arguments suggesting that the state has unfairly burdened this designer because of her religious convictions. Interfaith Alliance again joined partners in an amicus brief emphasizing the threat such an exemption would pose to religious minority and non-religious people.[xiv]

As the Supreme Court has grown increasingly receptive to religious freedom claims levied by conservative Christian legal entities, Americans who have historically been protected under robust civil rights and civil liberties laws face increased harm. The rightward shift of the Court is not a victory for religion, but a win for the many groups aligned with Operation Higher Court in warping our first freedom.

III. Conclusion

The right to religious freedom is under threat, hastened by the work of groups like Faith and Action and their allies in the conservative Christian legal movement. On behalf of Interfaith Alliance, I commend the Committee for exploring this area of urgent concern and urge you to consider swift action to ensure that all Americans may see the Supreme Court as a beacon for equal justice under the law.

Respectfully,

Katy Joseph
Director of Policy & Advocacy
Interfaith Alliance Foundation
kjoseph@interfaithalliance.org

[i] Interfaith Alliance, Interfaith Alliance Files Amicus Brief Urging Religious Accommodations for Sikh Marines, https://interfaithalliance.org/interfaith-alliance-files-amicus-brief-urging-religious-accommodations-for-sikh-marines/.
[ii] Buchanan v. Barr, Clergy Amicus Brief, No-22-5139 (CADC), https://interfaithalliance.org/wp-content/uploads/2022/12/Buchanan-v-Barr-Clergy-Amicus-Brief-No-22-5139-CADC-as-filed.pdf.
[iii] Interfaith Alliance, Advocates Raise Concerns for Democracy as Supreme Court Begins, https://interfaithalliance.org/advocates-raise-concerns-for-democracy-as-supreme-court-term-begins/.
[iv] Jo Becker and Jodi Cantor, Former Anti-Abortion Leader Alleges Another Supreme Court Breach, NY TIMES (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html.
[v] *See, e.g.,* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Engel v. Vitale, 370 U.S. 421 (1962); School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963).
[vi] *See, e.g.,* Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014); Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018); 15 Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020); Town of Greece v. Galloway, 572 U.S. 565 (2014); The American Legion v. American Humanist Association, 139 S. Ct. 2067 (2019).
[vii] Lee Epstein and Eric A. Posner, The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait, Supreme Court Review, Vol. 2021 (2021), https://static1.squarespace.com/static/60188505fb790b33c3d33a61/t/61eee4e4234845046306c081/1643046117666/religionincourt.pdf.
[viii] Peter Canellos and Josh Gerstein, 'Operation Higher Court': Inside the religious right's efforts to wine and dine Supreme Court justices, POLITICO (July 8, 2022), https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739.
[ix] Notre Dame Law School, U.S. Supreme Court Justice Samuel Alito delivers keynote address at 2022 Notre Dame Religious Liberty Summit in Rome (July 28, 2022), https://law.nd.edu/news-events/news/2022-religious-liberty-summit-rome-justice-samuel-alito-keynote/.
[x] The Daily, A Secret Campaign to Influence the Supreme Court, NYTIMES, at 0:40 (Nov. 29, 2022), https://podcasts.apple.com/us/podcast/a-secret-campaign-to-influence-the-supreme-court/id1200361736?i=1000587911015.
[xi] Adam Liptak, NY TIMES (April 5, 2021), https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html.
[xii] Interfaith Alliance, On the Docket: Students' Religious Freedom, https://interfaithalliance.org/get-involved/issues/religiousfreedomincourt/on-the-docket-religion-in-public-schools/.
[xiii] Kennedy v. Bremerton School District, 597 U.S. ____ (2022).
[xiv] Ibid, n. iii.