STATE OF FLORIDA

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VIA EMAIL TO ROBERT.BAUER@NYU.EDU AND INFO@PCSCOTUS.GOV

Presidential Commission on the Supreme Court
c/o Mr. Robert Bauer
Co-Chair
New York University School of Law
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RE: PUBLIC COMMENT TO THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT (the "Commission")

Dear Commissioners:

My name is Ashley Moody. I am the Attorney General for the State of Florida. I previously served as a state Circuit Judge in Florida and as a federal prosecutor. I am the daughter of a United States District Court Judge and have a profound respect for our Constitutional system. I served as a Commissioner on the Presidential Commission on Law Enforcement and the Administration of Justice. I understand the time and effort involved by each of you on this Commission and I thank you for your service.

THIS COMMISSION THREATENS THE INDEPENDENCE OF THE COURT

I write to express my profound concern over what this Commission has been asked to study. I fear that this Commission's report will be weaponized to further destabilize our constitutional system and utilized to damage the Supreme Court and its independence. I fully understand that Article III of the Constitution does not set the number of Justices on the Supreme Court or provide the structure of the federal judiciary. I understand that is for an act of Congress. Yet, this Commission is not one established by Congress. It is not even one requested by Congress. It is one created by executive action as a response to political pressure. That fact is one reason why I am so concerned and troubled by the existence of this Commission.

Putting aside the irregular creation of this Commission and the President ordering a Commission to do what normally the Senate or House Judiciary Committee would do, our Framers did not intend that structuring by Congress, that involvement in the judicial branch, to be overtly political and threaten judicial independence of the judicial branch. To the contrary, our Framers created a strict separation of the judicial power from the other branches of government because the colonists had been subjected to judicial abuses by the Crown. King George III "made Judges dependent on his Will alone...." THE DECLARATION OF INDEPENDENCE, ¶ 11. The judicial branch and the judicial power created by Article III was to prevent the new Federal government from repeating those abuses. By appointing judges for life with good behavior and restricting the ability of the other branches to remove them or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered independently and not to curry favor with Congress or the President. Alexander Hamilton commented in the Federalist Papers that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." THE FEDERALIST PAPERS, No. 78. He reasoned that judicial independence was essential because "[w]ithout this, all the reservations of particular rights or privileges would amount to nothing." *Id.* And, he added that more than rights and privileges would be threatened if judicial independence did not exist in the newly created Republic, but that "there [would be] no liberty if the power of judging be not separated from the legislative and executive powers." *Id.* He feared "the encroachments and oppressions of the representative body" and "the effects of those ill humors, which the arts of designing men. . . sometimes disseminate among the people themselves and [which] . . . occasion . . . serious oppressions of the minor party in the community." *Id.*

That idea of judicial independence did not die on a secluded ledge in New Jersey overlooking the Hudson River with Hamilton. As William Howard Taft, then Chief Justice and the only man to serve in that role and as President, once said on the independence of the Court:

> [T]he Court's duty to ignore the acts of Congress or of the State Legislatures, if out of line with the fundamental law of the Nation, inevitably throws it as an obstruction across the path of the then majority who have enacted the invalid legislation. The stronger the majority, and the more intense its partisan feeling, the less likely is it to regard constitutional limitations upon its power, and the more likely is it to enact laws of questionable validity. It is convincing evidence of the sound sense of the American People in the long run and their love of civil liberty and its constitutional guaranties, that, in spite of hostility thus frequently engendered, the Court has lived with its powers unimpaired until the present day.

Taft, William H., *Dedication of Memorial to Chief Justice Salmon Portland Chase*, Vol. 9, No. 6 American Bar Association Journal 347, 352 (June 1923) (viewed on https://www.jstor.org/stable/pdf/25711295.pdf).

Chief Justice Taft is not alone as today's Justices have expressed similar views. A review of the sitting Supreme Court Justices' public statements and testimony from their confirmation hearings confirms the importance of judicial independence and the risk of politics permeating the Court. A couple examples stood out while I prepared this testimony. First, about a month ago, speaking at the Harvard Law School's Scalia Lecture, Justice Breyer stated "[i]f the public sees judges as 'politicians in robes,' its confidence in the courts, and in the rule of law itself, can only diminish, diminishing the Court's power, including its power to act as a 'check' on the other branches." https://today.law.harvard.edu/supreme-court-justice-stephen-g-breyer-cautions-against-the-peril-of-politics/ (last viewed May 14, 2021). Second, speaking at a dedication ceremony for a Georgia state courthouse three years ago, Justice Thomas stated on the subject: "[i]n our great country, the judiciary is not a puppet for those in power, nor is it the engine for pioneering social change… Rather, it is a safeguard against tyranny, and an assurance of neutral arbiters for those seeking the protection of the law." https://apnews.com/article/95155982f51046ab8e242a664341ebae (last viewed May 14, 2021). Past and present Justices seem opposed to the undermining of the

Court and its independence. Yet, President Biden places the independence of our Federal courts in play with the needless creation of this Commission.

THERE IS NO NEED FOR THE REFORM THAT THIS COMMISSION IS EXAMINING

My concerns over this Commission would diminish, if the Court, itself, or its justices were clamoring for reform. The Justices are not. To the contrary, there is not just silence, but you have a Justice urging caution. https://today.law.harvard.edu/supreme-court-justice-stephen-g-breyer-cautions-against-the-peril-of-politics/ (last viewed May 14, 2021). In his recent Scalia Lecture mentioned above, Justice Breyer spoke against court packing. https://www.youtube.com/watch?v=bHxTQxDVTdU (starting at 24:30) (last visited May 14, 2021). Indeed, while I often disagree with Justice Breyer's judicial approach and philosophy, I would urge this commission to listen to his entire presentation at the Scalia Lecture as it presciently deals with many of the subjects this Commission is to cover. *Id.* It appeals for caution and restraint. Justice Breyer is not alone, in 2019, Justice Ginsburg said in an NPR interview: "Nine seems to be a good number. It's been that way for a long time," concluding, "I think it was a bad idea when President Franklin Roosevelt tried to pack the court." https://www.npr.org/2019/07/24/744633713/justice-ginsburg-i-am-very-much-alive (last visited May 14, 2021). The Justices belief that reform is unnecessary and is harmful should be given great deference by this Commission.

My concerns over this Commission would also diminish if there were some non-political reason for its existence. There does not appear to be an institutional need for reform of the Court. The workload of the Court is readily ascertainable and has remained steady for the last twenty-five years and the number of cases dropped last term. https://www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf (last visited May 14, 2021). That fact would not seemingly suggest the need for increasing the size of the Court or support other "reform" measures. And, even if case load could justify some structural changes, I would quote you Chief Justice Hughes's comments about whether expanding the Court would make it more efficient. Chief Justice Hughes, the Chief Justice when President Roosevelt attempted to pack the Court, stated in a letter to the Senate Judiciary Committee:

> An increase in the number of Justices of the Supreme Court, apart from any questions of policy, which I do not discuss, would not promote efficiency of the Court. It is believed that it would impair that efficiency so long as

> the Court acts as a unit. There would be more judges to hear, more judges to discuss, more judges to be convinced to decide.

Committee on the Judiciary, Reorganization of the Federal Judiciary, S. Rep. 75-711, at 40 (1937).

Chief Justice Hughes's statements remain true today. Indeed, given some of the changes with law clerks and pooling, the Court is more efficient today than it was in Chief Justice Hughes's time. That being the case, I frankly do not understand why this Commission is needed other than to provide a fig leaf of cover to justify changing the Court for political purposes. This Commission is not needed to fill a void in legal scholarship surrounding these issues. The topics have been repeatedly written about and thoroughly discussed.[1] Another article or a joint

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[1] The following is a non-exhaustive list of the articles and books related to Supreme Court reform in the last twenty-five years. Feldman, Stephen M., *Court-Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 BUFFALO LAW REV. 1519 (2020); Braver, Joshua, *Court-*Packing: An American Tradition? 61 B.C. LAW REV. 2747 (2020); Court-Packing in 2021: Pathways to Democratic Legitimacy, 44 SEATTLE LAW REV. 35 (2020); Ledewitz, Bruce, *Saving Judicial Independence from the Nihlism of Court-Packing*, 12 ELON LAW REVIEW 317 (2019); Ledewitz, Bruce, *A Call for America's Law Professors to Oppose Court-Packing*, 2019 PEPP. L. REV. 1 (2019); Braga, Justin R., *The other "Switch in Time": How the Opposition Changed the Debate over the Court-Packing Plan and Won,* 17 GEORGETOWN J. L. PUB. POLICY 653 (2019); Badas, Alex, *Policy Disagreement and Judicial Legitimacy: Evidence from the 1937 Court-Packing Plan*, 48 J. LEGAL STUD. 377 (2019); Grove, Tara L., *The Origins (and Fragility) of Judicial Independence*, 71 VAND. LAW REV. 465 (2018); Friedland, Steven I., *"Advice and Consent" in the Appointments Clause: from another Historical Perspective*, 64 DUKE L.J. ONLINE 173 (2015); Cisneros, Laura A., *Transformative Properties of FDR's Court-Packing Plan and the Significance of Symbol*, 15 U. PA. J. CONST. LAW 61 (2012); Savelieff, Ludmilla, *Hyper-partnership's Impact on the Supreme Court Nomination and Confirmation Process*, 10 GEO. J. LAW & PUB. POL'Y 563 (2012); Tushnet, Mark, *1937 Redux? Reflections On Constitutional Development And Political Structures*, 14 U. PA. J. CONST. LAW 1103 (2012); Simon, James F., *Court-Packing and Legal Creation Review of FDR and Chief Justice Hughes: The President, The Supreme Court, and the Epic Battle Over the New Deal* (2012); Lambert, William G., *The Real Debate over the Senate's Role in the Confirmation Process*, 61 DUKE L. J. 1283 (2012); Shesol, Jeff, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (2010); Stone, Geoffrey R., *Understanding Supreme Court Confirmations*, 2010 Sup. Ct. Rev.381 (2011); Burns, James MacGregor, *Packing the Court-The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (2009); Ringhand, Lori A., *In Defense of Ideology: A Principled Approach to The Supreme Court Confirmation Process*, 18 WMMBRJ 131 (2009); Ross, William G., *The Role of Religion in the Defeat of the 1937 Court-Packing Plan*, 23 J. OF LAW AND RELIGION 629 (2007); Pryor, Jr., William H., *Judicial Independence and the Lesson of History*, 68 ALA. LAWYER 389 (2007); Abraham, Henry J., *Justices, Presidents, and Senators: A*

report parroting the scholarship on these subjects from all the law school professors on this Commission will add very little to the discussion, but that appears to be exactly what you have been asked to accomplish. The Adverse Report on the Reorganization of the Federal Judiciary by the United States Judiciary Committee in 1937 contains all the relevant historical precedents about court packing. *See, e.g.,* Senate Committee on the Judiciary, Reorganization of the Federal Judiciary, S. Rep. 75-711 (1937). Having activists or legal and historical scholars debate these precedents does not seem particularly enlightening or useful. Nor does discussing the length of time between nomination and confirmation for modern Supreme Court Justices or timing before an election, has already been documented and discussed ad nauseum. *See, e.g.* https://www.washingtonpost.com/politics/2020/09/19/is-it-too-close-election-confirm-supreme-court-nominee/ For all the venom that Democrats hurl at Republicans for the treatment of Judge Garland, Republicans can point to the treatment of Judge Bork and Justice Thomas, and Justice Kavanagh. While not the same and not even in the same ballpark, as Republicans did not assault Judge Garland's character, determining and distilling who is more aggrieved seems particularly pointless for this Commission and not worth the threat that the proposed reforms could do to the Court and this Country.

In the end, the issue does not appear to lie with the Court or with Article III of the Constitution. The issue, to the extent it is viewed as one, seems to lie in the relations between the President and the Senate. It is an Article II issue. In the last thirty years, when the President and the Senate are controlled by different parties the Senate's advice and consent of nominees takes longer, is more adversarial, and can lead to failure. Judge Garland's nomination failed for the same reason that Judge Bork's failed. The opposing political party controlled the Senate and did not want the judge to be confirmed. Why did Justice Barrett's nomination in an election year move forward when Judge Garland's did not? The President and the

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History of the U.S. Supreme Court Appointments from Washington to Bush II (5th Ed. 2007); Greenberg, Jan C., *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (2007); Wittes, Benjamin, *Confirmation Wars: Preserving Independent Courts in Angry Times* (2006); McKenna, Marian C., *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* (2002); McConkie, Taylor, *The Senate's New Battlefield: The Role of Ideology in Supreme Court Confirmation Hearings,* 1 GEO. J. LAW & PUB. POL'Y 175 (2003); Yalof, David A., *Pursuit of Justices* (2001); Gerhardt, Michael J., *The Federal Appointments Process: A Constitutional and Historical Analysis* (2000); Kalman, Laura, *Law, Politics, and the New Deal(s)*, 108 YALE LAW J. 2165 (1999); Friedman, Richard D., *Chief Justice Hughes' Letter on Court-Packing*, 1 J. OF SUPREME COURT HISTORY 76 (1997); Maltese, John A., *The Selling of Supreme Court Nominees* (1995); Leuchtenburg, William E., *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995).

Senate were controlled by the same party. This is unremarkable and the direct result of the checks and balances that our Founders placed on the President.

Ironically, one of the chief, if not the original, perpetrators of aggressively asserting the Senate's advice and consent prerogative is the person that is the current President of the United States. The man that created this Commission to examine "reform" of the Supreme Court was the Chair of the Senate Judiciary Committee who more aggressively asserted the Senate's power over nominees in a way historically rarely seen. President Biden was the Chair of the Senate Judiciary Committee who "borked" Judge Robert Bork. President Biden was the Chair of the Senate Judiciary Committee during Justice Clarence Thomas's hearings. But, instead of taking responsibility for the seeds President Biden sowed, the President aims this Commission, not at the source of the issue, the Senate, but at the Court. President Biden is not playing it straight with the American public. President Biden is like the arsonist who blames the building for the fire that he started and the results of the blaze he set. This Commission should not conspire with the President and propose reform of the Court because that will not solve the "issue" that President Biden and the Congressional Democrats complain.

THIS COMMISSION SHOULD FOCUS ON WHAT COULD HAPPEN WITH ANY PROPOSED REFORM

If this Commission is truly interested in gathering facts about the effects that Supreme Court reform and the politicization of courts may have, this Commission should take testimony from witnesses that have actually endured and experienced what happens when you undermine the rule of law in such a manner. This Commission should hear from people like Antonio Marval, Chief Justice of the Venezuela Supreme Court in exile, or Roberto Marrero, an opposition leader and political prisoner from Venezuela. Both these gentlemen now live in Florida. Both would lay out in stark detail what happens when a president packs a supreme court to achieve the policies that he prefers. That is what happened in Venezuela, where almost overnight, the rule of law eroded and the country descended into dictatorship. The story of Venezuela is one of many, where once vibrant democracies devolved triggered largely by actions like the packing of courts.

Such changes would undermine the rule of law, respect for our courts, and the independence of our judiciary and could lead to devolution of our Constitutional system. I am not saying that as a certainty the United States would end up like Venezuela. What I question is why should the United States even hazard the risk of such an outcome.

THIS COMMISSION SHOULD REJECT ANY REFORMS OF THE COURT

The Commission that I was a part of existed for a reason. There were and are legitimate issues, beyond political ones, regarding law enforcement, its role, the problems it is facing in recruiting, training, and retention, and its interactions with communities (especially minority communities). There was a need to gather facts and not just generalize on a nationwide basis. That is not present with the direction given to this Commission in the President's Executive Order. It is clear to the American public why this Commission exists. It is an attempt by the President and his Congressional allies to justify the imposition of a course of action upon the Court, court packing, that will result in decisions to the liking of the President and his party. It is nakedly political. It is result oriented. It should scare to death every Commissioner sitting on this panel how the report requested will be utilized. In the near term, it will be utilized by the President and some in Congress to urge the passage of legislation like H.B. 2584 to pack the Court. But, I caution progressives on this Commission, this report may live far longer and have far reaching effects beyond this congressional term and this President.

Given the political nature of and use for this Commission's report, it is important for each of you to realize that this is not some esoteric, academic exercise, which is what the Executive Order seemingly implies. My concern is that, while many of you are well respected in academia. You may not fully grasp the havoc that can result of the political manipulation of your words.

In closing, I leave you with the warning from the Senate's Adverse Report:

> Today it may be the Court which is charged with forgetting its constitutional duties. Tomorrow it may be the Congress. The next day it may be the Executive. If we yield to temptation now to lay the lash upon the Court, we are only teaching other how to apply it to ourselves and to the people when the occasion seems to warrant. Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and different interpretation and one which may no sound so pleasant in our ears as that for which we now contend.

Committee on the Judiciary, Reorganization of the Federal Judiciary, S. Rep. 75-711, at 10 (1937).

I ask each of you to consider and act cautiously with regards to our nation's highest court, not undermine it further, but protect it from further politicization that President Biden and Congressional Democrats are seeking. From the beginning of our Republic until the present, there has been a robust history of judicial independence. Our system of checks and balances is not easy—politics and the desire to accomplish strongly held objectives by the party in power has always led to tension between the Supreme Court and the other branches. Allow the Court to do its duty unmolested. Allow the Court to continue to defend every American's liberty unobstructed. Disregard the politics of the "now" for the promise that our strong, unaltered constitutional system allows to be delivered over the span of this Country's future.

Sincerely,

Ashley Moody

Ashley Moody
Florida Attorney General