



## Divestment Prospectus

*The Justices Are Selling Some Securities, Still Voting with Certain Publicly Traded Amici*

A New Amicus Report by Gabe Roth, [Fix the Court](#) Executive Director – August 1, 2016

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### A Significant Selloff

The one Fix the Court “fix” that identifies accountability shortcomings of specific justices, as opposed to the Supreme Court as a whole, is related to the **stock ownership of Chief Justice John Roberts and Justices Stephen Breyer and Samuel Alito.**

Fix the Court would like to see these three – who are the only ones to own individual shares of publicly traded companies, as opposed to the mutual funds, retirement accounts and other blended funds preferred by the rest of the court – **sell their shares or place them into blind trusts** during their time on the bench.

We may have reached a turning point on this front:

- Since the start of last year, Roberts, Breyer and Alito have **sold up to \$1.475 million of their individual shares in 15 publicly traded companies while only investing about \$100,000 into four companies.**
- Instead, all three focused their investing on financial instruments – 34 in all – **that would not likely trigger recusals:** Roberts bought shares of nine mutual funds; Breyer purchased three treasury notes and a bond fund; and Alito invested in 21 mixed funds, mostly ETFs and mutual funds.
- Alito **cashd out an estate comprising the securities of 10 publicly traded companies** valued at more than \$1 million.
- All told, Roberts, Breyer and Alito owned shares **in 58 companies at the end of 2015<sup>1</sup>**, compared to **76 companies at the end of the 2014.**

*In the past year Roberts, Breyer and Alito have divested from companies that often have business before the court as litigants or amici, and when the three have looked to add to their portfolios, they chose, more often than not, to invest in the type of funds that would not yield an unnecessary recusal down the line.*

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<sup>1</sup> These numbers take into account spinoff companies that themselves became listed on a stock exchange and remained in a justice’s portfolio, as well as Alito’s cashd out estate, which included shares in some companies he had other individual investments in and did not sell.

## The Amicus Problem

That said, Fix the Court is still concerned with what we call the “amicus problem,” which we will explain thus: take a hypothetical dispute in which Intel has a case before the court, and Microsoft, whose shares Roberts owns, supports Intel’s argument in an amicus.

Roberts would not have to recuse himself from the case because he does not own Intel shares – **even though a victory for Intel would most likely help Microsoft’s bottom line.**

Between 2009 and 2014, Roberts, Breyer and Alito sided with the position of amici whose shares they owned **more than 68 percent of the time.** So, in the example above, there were **better than 2-to-1 odds that Roberts would vote with Intel.**

(Fix the Court released its first amicus report in [May 2015](#), which covered 2009-2013, and we issued a [2014 update](#) once the justices’ financial disclosure reports were released last summer.)

*Despite predictable opposition from two justices to the arguments made by businesses in 2015 regarding affirmative action and same-sex marriage, Roberts, Breyer and Alito have still voted with their amici more than 60 percent of the time since Fix the Court started tracking this phenomenon.*

For 2015, though, the numbers are down a bit – from 67.6 percent in 2009-2014 to 43.8 percent in 2015 – **primarily due the business support of same-sex marriage and affirmative action** in *Obergefell v. Hodges* and *Fisher v. UT-Austin*, respectively, and the Roberts and Alito opposition to those positions.

Including those two cases, though, the justices have still been voting with their amici more than 60 percent of the time since 2009. ([See 2015 chart here.](#))

Tracking with previous years, there were eight cases argued last year that included an amicus whose shares a justice owned.

They are described in detail below after a summary of the justices’ remaining stock holdings, as well as our comments noting the inconsistency that permeates the justices’ financial disclosures forms.

## Changes in Investments

Let's look at the ways in which the justices' portfolios have changed since the last time Fix the Court issued an amicus report:

### Chief Justice John Roberts

**Roberts most likely sold all of his Microsoft shares**, valued between \$250,001 and \$500,000, in Jan. 2016, and he sold his AOL shares, valued between \$15,001 and \$50,000, in June 2015, about a week after Verizon acquired AOL.

The Microsoft sale was likely in response to a cert. petition in *Microsoft v. Baker*, a case that the court decided to hear last winter that will be on the court's docket in the fall.

**Roberts did not buy any new shares of common stock in publicly traded companies** but did buy shares of nine mutual funds, six of which he previously had positions in.

### Justice Stephen Breyer

For Breyer, the most glaring change from this year's disclosure report to last was regarding his wife's share of Johnson Controls stock, which were sold after a reporter noticed that the company was a litigant in *FERC v. EPSA*, and the justice had failed to step aside at oral argument. Breyer sold the shares the following day **and still voted on the case.**



*Justice Breyer noted that he and his wife had "no control" over a retirement account.*

For the first time this year, Breyer recorded his wife's work-based retirement account on the form. On the last line of the "investments and trusts" section, the justice lists "DFCI Retirement Plan (Fidelity Investments) - **No Control.**" DFCI is the Dana Farber Cancer Institute where Breyer's wife works as a psychologist, and Fix the Court would, of course, **prefer if Breyer had "no control" of his individual shares of stock.**

Breyer sold all of his shares in six companies - Johnson Controls, Suncor Energy, South32, BHP Biliton, CDK Global, Sigma Aldrich - valued at between \$145,000 and \$430,000. Breyer bought shares in only one publicly traded company, up to \$50,000 in Fastenal, an industrial supplies wholesaler, and purchased three treasury notes and one mutual fund comprising government bonds.



*Chief Justice Roberts likely sold his Microsoft shares this past January.*

## Justice Samuel Alito

Alito sold all of his shares of Exxon, Sysco, ADP, Target, WPP, Prudential, Kinder Morgan and Apache<sup>2</sup>, valued between \$160,000 and \$495,000 in total.

Alito bought shares in only three publicly traded companies – between \$5,000 and \$45,000 total in a mining company, a cosmetics company and T.J. Maxx’s parent company, TJX – but invested in a total of 21 other financial instruments, namely ETFs, bonds and mutual funds, most of which he already had positions in.

### Adding a Level of Specificity...

**Breyer and Alito were more specific in describing some of their investments this year**, with Breyer choosing to list out six of the funds that comprised one of his money market accounts with TIAA-CREF and Alito choosing to note this year that his stock holdings are part of a larger Edward Jones trading account.

### ...Yet Often Listing Investments Inconsistently

Despite these examples of increased precision, that’s more the exception than the rule. Through the years, one of the main challenges when analyzing a Supreme Court justice’s financial disclosure report has been deciphering the identity of certain holdings.

Take this example: on consecutive lines in Roberts’ report, he writes, “Texas Instruments (Common) TXN,” then “TMO (Common)” then “Sirius XM Radio (Common).” First, he delineates the **name of the company and its stock symbol**, then **just a stock symbol** with no company name and then **just a company name** with no stock symbol.



Screenshot from the “Met WA DC Arpts Auth” website.

Or these: Alito lists on page seven of his report that he owns up to \$50,000 in “**Met WA DC Arpts Auth Sys Rev.**” On first glance, it’s not clear that it’s an A1-rated bond issued by the Metropolitan Washington (D.C.) Airports Authority that, according to [Moody’s](#), has a stable outlook given “the high travel demand [to] the nation’s capital.” It is unclear why the justice or an assistant chose to abbreviate the fund in such a way as to make it look like nonsense when listed on the disclosure report.



Only three Justice Alito’s 24 new investments in 2015 were in individual stocks.

<sup>2</sup> It’s likely that Alito still owns some Apache shares in a trust, though that investment is labeled “Appache” on his report.

## The 2015 Amicus Cases

Below are the eight cases argued in 2015 in which publicly traded companies whose shares are owned by the justices weighed in as amici.

### KBR v. U.S. ex rel. Carter

This case determined the **extent to which whistleblower lawsuits may be brought to court under the False Claims Act may be brought in court**, the theory being that once such a suit is presented and certain details are made public, there may not be a compelling reason for courts to entertain a barrage of similar lawsuits while the first one remains “pending.” While KBR technically won the case on the merits, 9-0, the court rejected KBR’s claim about what the word “pending” means in the FCA – a claim also made by Verizon in its [amicus brief](#). At the time of the argument, Alito owned shares in Verizon as part of a larger, multi-million-dollar trust. His Verizon shares were paid out a few weeks after oral argument in this case.

### City of Los Angeles v. Patel

This case dealt with the constitutionality of a Los Angeles ordinance that **required hotels keep certain records about their guests – and allow law enforcement to search those records without a warrant**. At the time of the argument, Roberts owned up to \$500,000 in shares of Microsoft, which sided with Patel in an [amicus brief](#). Patel won the case, 5-4, but Roberts sided with L.A. in voting to uphold the law.

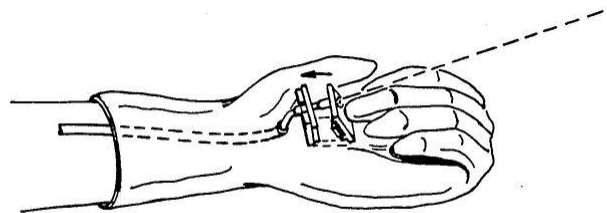
### Commil v. Cisco Systems

This case concerned patent trolls and the **extent to which a patent holder has to be cognizant of the state of affairs with regards to their erstwhile patent**. At the time of the argument, Roberts owned up to \$65,000 in shares of two Hewlett-Packard stocks (HP, like Roberts, sided with Cisco in an amicus brief), and Alito owned as much as \$330,000 combined in shares of 3M, AbbVie, Caterpillar, Conoco Phillips, Johnson & Johnson, Merck, Oracle, Procter & Gamble and United Technologies, which all signed on to pro-Commil briefs. Alito also owned up to \$250,000 in shares of Oracle, which sided with Cisco. Commil won the case, 6-2.

### Kimble v. Marvel

A Spiderman-based toy glove that shoots foam from the wrist (seen at right) was at the center of this patent suit, the issue being **whether a patent-holder may reap royalties after the terms regarding an exclusive right to intellectual property have expired**.

At the time of the argument, Roberts owned up to \$500,000 in shares of Microsoft and up to \$65,000 in shares of Hewlett-Packard, which, like Roberts, both sided with Kimble; Breyer owned up to \$100,000 in shares of EMC and up to \$250,000 in shares of United Technologies, which both sided with Kimble (Breyer sided with Marvel); and Alito, who sided with Kimble, owned up to a combined \$530,000 in shares of 3M, Caterpillar, Conoco Phillips, Johnson & Johnson, Merck, Oracle, Procter & Gamble and United Technologies, which all signed on to pro-Kimble briefs. Marvel won the case, 6-3.



*Fig. 4*

### Obergefell v. Hodges

This case established the right to **same-sex marriage in all 50 states**. At the time of the argument, Roberts owned up to \$500,000 in shares of Microsoft, and up to \$50,000 of AOL, both of which sided with Obergefell (though Roberts did not); Breyer owned up to \$50,000 in Air Products & Chemical and up to \$100,000 in Cisco, both of which sided with Obergefell; and Alito owned up to \$250,000 in Oracle and up to \$50,000 Procter & Gamble, which also sided with Obergefell (though Alito did not). Obergefell won the case, 5-4.

### Tyson Foods v. Bouaphakeo

Here an employee of a Tyson's pork processing plant (Bouaphakeo) brought a class action lawsuit on behalf of herself and other plant workers **seeking to be paid for the time it took them to put on the gear they needed to do their jobs**. At the time of the argument, Roberts owned up to \$500,000 in shares of Microsoft, which sided with Tyson Foods (though Roberts did not), and Alito owned up to \$365,000 in Boeing, Caterpillar, CR Bard, Du Pont, Johnson & Johnson, Merck and 3M, which all sided with Tyson Foods, as Alito did. Bouaphakeo won the case, 6-2.

### Spokeo v. Robins

The overarching result of this case concerning online privacy and mistaken identities was that it was **remanded to the Ninth Circuit**. Plus, two companies whose shares Roberts owned at the time – Time, Inc., and Microsoft – split, as the former supported Spokeo in its brief and the latter support Robins.

### Fisher v. UT-Austin

This case **saved affirmative action in the university admissions process** – at least when race is a factor of a factor. At the time of the argument, Roberts owned up to \$500,000 in shares of Microsoft, which sided with UT-Austin (though Roberts did not) and Breyer owned up to \$50,000 in IBM and up to \$250,000 in United Technologies, all of whom sided with the university. Though Alito himself did not support the university, seven of the companies he had up to \$515,000 in investments in – 3M, Caterpillar, Du Pont, Johnson & Johnson, Merck, Procter & Gamble and United Technologies – did. The Longhorns won, 5-3.

## Conclusion

The justices' six-year streak of voting overwhelmingly with their amici came to an end this year, namely due to the results of two cases, *Obergefell* and *Fisher*. Even including this year's numbers, though, Roberts, Breyer and Alito **have still voted with their amici more than 60 percent of the time since 2009**.

Publicly traded companies are continuing to submit amicus briefs to the court at a record rate, and that does not seem to be a trend that will change anytime soon. Yet all three justices have within their power the ability to **“avoid the appearance of impropriety”<sup>3</sup>** by divesting from their individually held stocks.

Roberts, Breyer and Alito have started down that path. They should continue to do so – **and pick up the pace** – in the future.

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<sup>3</sup> From Canon 2 of the [Code of Conduct for United States Judges](#)