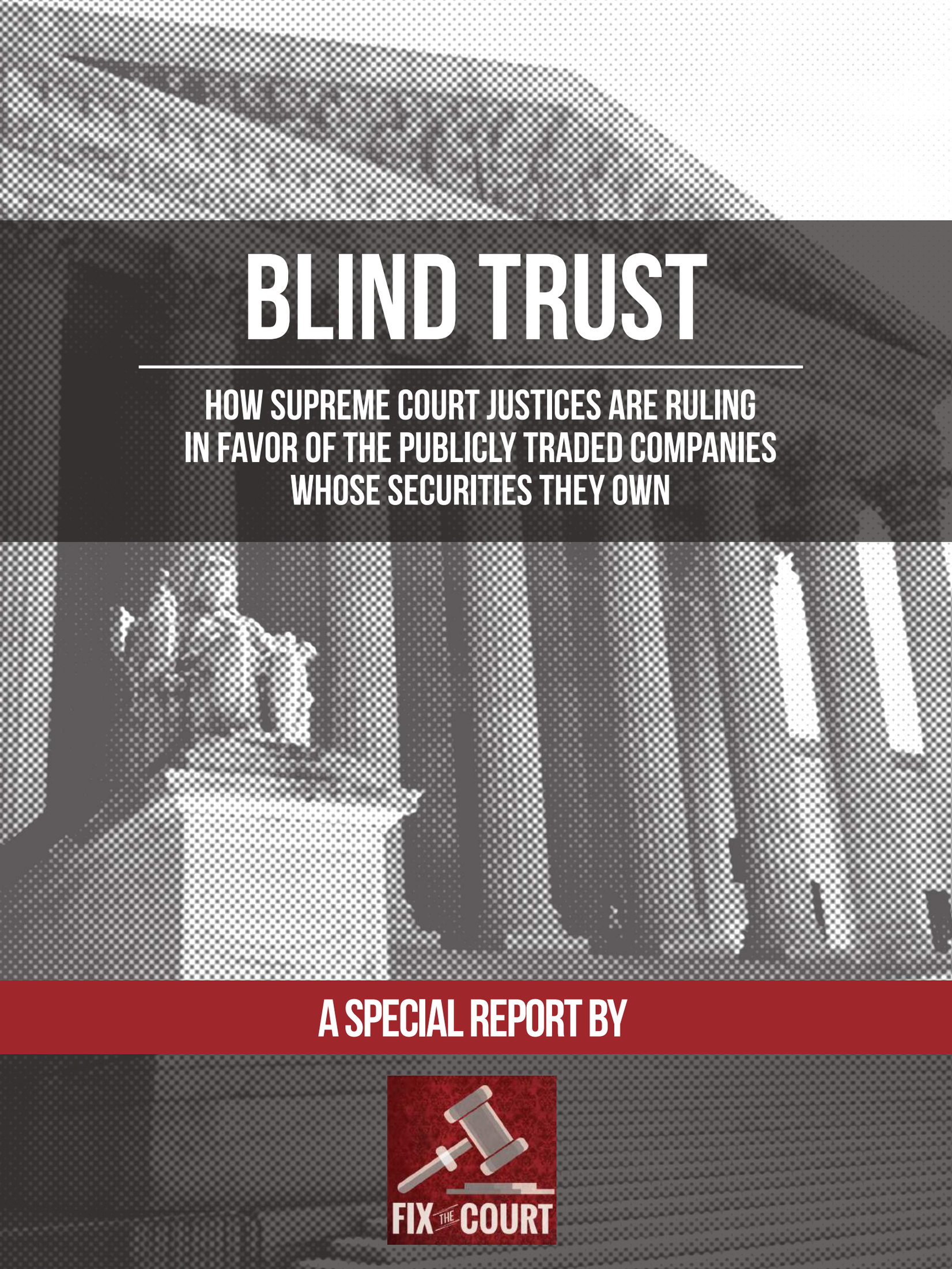

BLIND TRUST

HOW SUPREME COURT JUSTICES ARE RULING IN FAVOR OF THE PUBLICLY TRADED COMPANIES WHOSE SECURITIES THEY OWN

A SPECIAL REPORT BY

FIX THE COURT

BLIND TRUST: HOW SUPREME COURT JUSTICES ARE RULING IN FAVOR OF THE PUBLICLY TRADED COMPANIES WHOSE SECURITIES THEY OWN

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FIX THE COURT

EXECUTIVE SUMMARY

A new Fix the Court study has found that in the past five years Chief Justice John Roberts and Associate Justices Stephen Breyer and Samuel Alito sided with companies whose stocks they own nearly 70 percent of the time in cases in which those companies filed a "friend of the court," or amicus curiae, brief.

Had any of these businesses been litigants and not just "friends," the justices would have been required to recuse themselves from those cases given current ethics laws[1], which require a justice to abstain from ruling when he or she "has a financial interest in the subject matter in controversy or is a party to the proceeding."

Amici are not named "parties" to a court case, and, to our knowledge, no justice has ever recused due to ownership in a company that has filed an amicus brief. But it is clear that a decision favoring one software company or financial institution, for example, could affect the stock price of a similarly situated software company or financial institution that may have filed an amicus brief in the case – and whose shares may be owned by a justice.

"Congress – and the court itself – should take steps to ensure that our nation's top jurists are not profiting from their votes in court cases."

In this report, Fix the Court is not calling for a blanket increase in recusals; instead, we are calling on the justices – and Congress – to take discrete steps that ensure our nation's top jurists are not gaining financially from their votes.

That much should be straightforward. That our research demonstrates that three jurists are favoring arguments put forth by the publicly traded amici whose shares they own nearly 70 percent of the time gives this report greater urgency.

To correct these ethical lapses, Fix the Court calls on the justices to:

1. Work with Congress to clarify the term "party" in the law that governs recusals to include amici and make the 2012 STOCK Act binding to the justices;
2. Establish blind trusts into which they place their securities during their tenure on the court[2] ; and
3. Should the first two solutions not be implemented immediately, sit out the cases in which a company that they hold a stake greater than $15,000 in submits an amicus brief in favor of one of the parties.

[1] While the justices are currently exempt from the Code of Conduct for U.S. Judges, they do have to follow certain rules, such as 28 U.S.C. 455(b), related disqualification in cases in which a justice owns stock of a litigant company.

[2] The index funds, retirement accountants and annuities that most justices own are already being managed by individuals with no connection to the court, and that's a practice that should continue.

ARE AMICI AT THE HIGH COURT INFLUENTIAL?

During the course of a nine-month term, Supreme Court justices are asked to dissect the most arcane corners of the law while weighing more attention-grabbing constitutional issues. Given the technical nature of many of these cases – and the high stakes of others – individuals, interest groups and corporations offer guidance to the justices on how to rule in the form of amicus briefs.

"An amicus curiae brief […] may be of considerable help," states Supreme Court Rule 37, especially in regards to more complex legal issues. But do justices believe this? The nine currently on the court have not said much on the issue. But a 2004 study on amicus briefs by Kelly Lynch of Sidley Austin, for which she interviewed 70 former clerks, found the briefs helpful in general – especially since the clerks themselves and the justices they served tended to be generalists. "Amicus briefs […] filed in technical cases by industry experts having a familiarity with the specialized legal issues at stake" are the most helpful, the clerks in the study reported, noting that patent, bankruptcy, tax and other business-related cases can often be the most obscure legalistically and thus require the most assistance.

"The Supreme Court's 'friends' seem to be ahead of the curve in understanding just how powerful the institution has become in recent years."

One thing about these briefs is undisputed: there have been more of them submitted to the high court in the last few years than ever before. Amicus briefs were filed in 39 percent of the cases during the Warren Court (1953-1969) and in 67.5 percent of the cases in the Burger Court (1969-1986). The trend continued under Rehnquist, with amicus briefs filed in more than 80 percent of cases during his tenure. In the last full term, a whopping 96 percent of cases included such briefs.

With this green-book proliferation[3] – some 1,000 were filed (and, per court rules, bound with a green cover) in OT12, 800 were submitted in OT13 and a record 148 were submitted for a single case (Obergefell v. Hodges) in OT14 – one might presume that justices and their clerks would throw up their hands at the sheer volume of paper. But that is not the case.

According to a 2014 study conducted by Anthony J. Franze and R. Reeves Anderson of Arnold & Porter, the justices cited amicus briefs in 60 percent of the cases that had amici in OT13 – up from 53 percent in OT12. What is more telling is that the nine justices cited amicus briefs in 80 percent of their 5-4 decisions in OT13. In unanimous decisions, these briefs were cited just 54 percent of the time.

[3] Volume-wise, this explosion is unique to the Supreme Court. At the district court level and in federal appeals courts, the number of amicus briefs is significantly lower.

From one year to the next, there is significant variation among the justices in terms of amicus briefs cited. As Franze and Anderson point out, Justice Antonin Scalia cited amicus briefs in 60 percent of his opinions in OT13, for example, but in only 13 percent of OT12 opinions. On the other hand Justice Sonia Sotomayor, who had cited amici in about two-thirds of her OT12 opinions, referred to them just 32 percent of the time in OT13.

All in all, despite the reams of paper the justices and their clerks must read through to learn the views of the court's wide range of amici, there is no question that amicus briefs are important – and are particularly persuasive for the most contentious issues that reach the court.

IGNORING QUESTIONS RAISED BY AMICUS SUBMISSIONS

DOCKETS FULL OF CONFLICTS?

At this point, we know that the court receives hundreds of amicus briefs each year – many of which are highly influential – and that a number of justices (namely Roberts, Breyer and Alito) maintain shares in individual corporations that often file briefs.

And we know this: in our research Fix the Court did not find a single instance in which a justice made the decision to recuse due to an amicus-based conflict.

As such, the Supreme Court docket each year has remained relatively recusal-free – even though the docket is full of conflicts that should trigger recusals (or a stock sale, or the creation of a blind trust) due to amici. In fact, there are a mere two or three instances of self-disqualification at the court each year instead of the six to 12 one might expect given the proliferation of amicus briefs.[4]

"Fix the Court did not find a single instance in which a justice made the decision to recuse due to an amicus-based conflict."

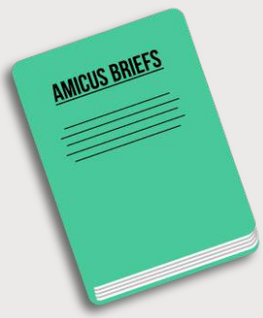
[4] Fix the Court does not prefer a situation in which only eight justices are hearing a case. Establishing a blind trust upon appointment to the Supreme Court is more rational.

EXAMPLES

Here are examples of situations that would trigger a recusal due to a perceived or actual conflict of interests, according to current ethics laws:

- If a justice's relative had participated in a case, either as a judge or as counsel, before it reached the high court[5] ;
- If a justice herself ruled on that case as a lower court judge[6] ; or
- If a justice worked on the case while elsewhere in government[7].

Since there are only nine of them[8], the justices have gone on record to say they try to avoid conflicts whenever possible. It is only natural they would prefer to sit on a case and potentially cast the deciding vote on a major issue.



Fix the Court believes the example outlined below should also trigger a recusal (or stock sale, or the creation of a blind trust):

If Company X files a brief on behalf of Company Y in its case against Company Z, and a justice owns $100,000 of stock in Company X but not in Company Y, a justice under current rules will never recuse – even though it is clear that a positive outcome for Company Y has the potential to affect the stock price of Company X. In other words, what is good for the goose (Company Y) is good for the gander (Company X).

TAKEAWAY

What is critical here is ensuring that the justices do not sit on cases in which they would stand to gain financially from the outcome. That the justices rule despite these perceived conflicts gives the public good reason to question their ability to decide cases impartially.

[5] Justice Breyer's brother is a federal judge in California.

[6] All of the current justices, save Justice Kagan, were federal judges before their appointments to the high court.

[7] Here we are referring to Justice Kagan and Chief Justice Roberts, who were nos. 1 and 2 in the office of U.S. solicitor general, albeit at different times, before their nominations; Justice Thomas, who was chairman of the U.S. Equal Employment Opportunity Commission; and Justice Breyer, who was counsel for the Senate Judiciary Committee. Chief Justice Roberts and Justice Scalia had various roles in presidential administrations as well.

[8] It has been suggested that justices who retire (i.e., attain senior status) act as fill-ins when a sitting justice recuses herself in a case. Fix the Court is currently researching the wisdom and efficacy of such a proposal.

METHODOLOGY AND FINDINGS

To determine whether a justice had a financial interest in a specific case at the time it was argued or decided is no easy task. The justices are required to list their assets as part of the financial disclosure reports they file each May, which then become available to the public in June. In their reports, the nine justices usually list the names of the stocks they own, as well as their life insurance policies, retirement funds and real estate holdings.

Fix the Court gathered the justices' disclosure reports for the last five years beginning Jan. 1, 2009, and ending Dec. 31, 2013. We then homed in on three of the nine justices – Roberts, Breyer and Alito. The other six – Scalia, Kennedy, Thomas, Ginsburg, Sotomayor and Kagan – have been omitted from the data outlined later in this report because they do not own a significant amount of common stock in individual companies. The vast majority of their financial assets are in exchange-traded funds, index funds, retirement accounts, pensions or some combination thereof – all of which get a pass since those instruments consist of more than one publicly traded company. Roberts, Breyer and Alito all own various forms of these financial instruments as well – complemented, of course, by individual securities.

Next, Fix the Court looked at the cases the court heard over that five-year period and zeroed in on the 19 cases in which companies with justice-owned shares filed an amicus brief before the court[9]. In many of those cases, more than one company in which the justices had a financial stake filed an amicus brief. Sometimes multiple companies joined the same brief. In all but one instance, the publicly traded companies all filed briefs for the same side.

> ***"[The justices] voted with [...] amici nearly 70 percent of the time, on issues ranging from affirmative action to mandatory arbitration to corporate immunity for violations of international law."***

Each time this scenario occurred, the justices who owned shares of the company that filed the brief sat on the case. Further, they voted with these amici nearly 70 percent of the time, on issues ranging from affirmative action to mandatory arbitration to corporate immunity for violations of international law. But should the justices have been hearing the cases to begin with? Fix the Court believes the answer is "no."

Chief Justice John Roberts

Associate Justice Stephen Breyer

Associate Justice Samuel Alito

[9] As was mentioned earlier, this study did not focus on briefs filed by trade associations or other membership organizations mainly due to their size and scope, as those groups comprise hundreds of loosely affiliated companies of indeterminate relative importance.

DO SUPREME COURT JUSTICES' VOTES SUPPORT THEIR FINANCIAL INTERESTS?

Three justices voted to support the positions of companies whose stock they own 68% of the time from 2009-2013 in cases for which those companies filed amicus briefs.

CASES	DATE DECIDED	VOTE	WINNER	HOW DID THEY VOTE?			
Caperton v. Massey Coal	March 3, 2009	5-4	Caperton	Roberts	Breyer		
Bilski v. Kappos	June 28, 2010	9-0	Kappos	Roberts	Breyer		
Wal-Mart v. Dukes	March 29, 2011	5-4	Wal-Mart	Roberts			
Microsoft v. i4i LP	April 18, 2011	8-0	i4i LP	*Recused**	Breyer		
AT&T v. Concepcion	April 27, 2011	5-4	AT&T	Roberts			
Schindler Elevator Corp. v. Kirk	May 16, 2011	5-3	Schindler				
Global-Tech Appliances v. SEB S.A.	May 31, 2011	8-1	SEB S.A.	Roberts	Breyer		
Stanford Board v. Roche Molecular Systems	June 6, 2011	7-2	Stanford	Roberts			
Brown v. Entertainment Merchants Association	June 27, 2011	7-2	EMA	Roberts			
Kappos v. Hyatt	January 9, 2012	9-0	Kappos	Roberts			
Mayo Collaborative Services v. Prometheus Labs	March 20, 2012	9-0	Mayo	Roberts			
Comcast v. Behrend	Nov. 5, 2012	5-4	Comcast	Roberts			
Kiobel v. Royal Dutch Petroleum	April 17, 2013	9-0	Kiobel		Breyer	Alito	
FTC v. Actavis	June 17, 2013	5-3	FTC			*Recused**	
Fisher v. University of Texas	June 24, 2013	7-1	UT	Roberts	Breyer	Alito	
Hollingsworth v. Perry	June 26, 2013	5-4	Perry	Roberts	Breyer	Alito	
U.S. v. Windsor	June 26, 2013	5-4	Windsor	Roberts	Breyer	Alito	
Octane Fitness v. Icon Health and Fitness	April 29, 2014	9-0	Octane		Breyer	Alito	
Highmark v. Allcare Health Management	April 29, 2014	9-0	Highmark		Breyer		
				Roberts	Breyer	Alito	Total
Votes with amici whose shares they own:				9	7	3	19
Votes against amici whose shares they own:				4	3	2	9
			Percentage	69.2%	70.0%	60.0%	67.9%

Green: a justice voted with his financial interest(s) | **Red:** a justice voted against his financial interest(s)

** Justices Roberts and Alito recused in those cases because of ownership of Microsoft and Actavis stocks, respectively.*

NO RECUSALS, BUT PLENTY OF AMICI

WAL-MART V. DUKES, AT&T V. CONCEPCION AND COMCAST V. BEHREND

Let's start the analysis with class-action lawsuits and whether companies can force large groups of litigants out of the courtroom and into arbitration. Businesses favor arbitration over class-action lawsuits since few members of the allegedly harmed class ever follow through with arbitration, and those that do face an uphill battle to win their case before a typically business-friendly arbitrator.

At the time these three suits were heard (2011 and 2012), Chief Justice Roberts owned up to $100,000 in shares of Intel[10], which filed a brief in support of Comcast; up to $100,000 in shares of Dell, which supported AT&T; and up to $400,000 combined in shares of Intel, Microsoft and Hewlett-Packard, which filed for Wal-Mart.

That Wal-Mart, AT&T and Comcast won the cases undoubtedly saved them – and their amici – the potential for major litigation down the road, thereby assisting their bottom lines. Microsoft even said as much in 2012, claiming it is just going along to get along. "Many companies have adopted [mandatory binding arbitration to resolve disputes], which the Supreme Court permitted in a case it decided in 2011. […] We think this is the right approach for both Microsoft and our U.S. customers" – and, of course, its shareholders, like the chief justice.

KIOBEL V. ROYAL DUTCH PETROLEUM

A similar result in terms of litigation avoidance arose out of Kiobel v. Royal Dutch Petroleum, decided in 2013. Multinational corporations like Royal Dutch Shell operating in countries with less-than-stringent civil rights laws often face blowback for acceding to local customs – or, in this case, unspeakable atrocities – instead of standing up for the well-being of their employees. Those employees have often looked to U.S. courts for relief.

In *Kiobel*, though, the Supreme Court held that corporations could not be sued in U.S. courts for alleged human rights violations overseas. Justices Breyer and Alito sided with Royal Dutch Petroleum in this case, as did the companies they owned. IBM, whose common stock (up to $50,000) Justice Breyer owned at the time, submitted a brief in favor of RDP, as did companies whose shares Justice Alito owned, including Caterpillar, Chevron, ConocoPhillips, IBM and Proctor & Gamble. Those securities totaled as much as $280,000 for the third most junior justice.

[10] "Up to" is used here and throughout the report because the justices' stock holdings are given in ranges – e.g., "$50,001-$100,000" – on their annual financial disclosure reports.

OCTANE FITNESS V. ICON HEALTH AND FITNESS

As was mentioned before, business briefs come into play even in the more obscure cases that reach the high court. In Octane Fitness v. Icon Health and Fitness, a number of leading corporations banded together to support the petitioner, including half a dozen firms whose shares were owned by Justices Breyer and Alito. 3M, Johnson & Johnson and Proctor & Gamble – whose Alito-owned shares totaled up to $150,000 – filed a brief supporting Octane's view of how attorney's fees in patent cases should be awarded, as did Cisco and EMC – companies whose Breyer ownership stake also totaled as much as $150,000.

U.S. V. WINDSOR AND HOLLINGSWORTH V. PERRY

One of the remarkable aspects of the two same-sex marriage cases decided in 2013 was that dozens of Fortune 500 businesses, judging the rapid winds of change on the issue nationwide and believing their businesses would suffer if they opposed same-sex marriage or remained silent on the issue, came together to side with the pro-marriage respondents

Justice Breyer, who had stakes in two companies that supported *Windsor* and two that supported *Perry*, voted with those firms in both cases; Chief Justice Roberts, who voted against *Windsor* but with *Perry*, held shares in two corporations that submitted briefs on the issue, one in each case; and Justice Alito, who was in the minority in both *Windsor* and *Perry*, cast votes that were contrary to the positions noted in pro-marriage briefs joined by Oracle in both cases.

A CONTINUING TREND?

This study includes cases heard from Jan. 1, 2009, until Dec. 31, 2013. The public will not know for certain the names and amounts of securities owned by the justices in 2014, as that information will be released some time after their financial disclosure reports are due on May 15, 2015[11].

Still, it is safe to say that the justices owned shares of companies that filed amicus briefs in October Term 2013, which ran from October 2013 until June 2014.

[11] Fix the Court has called on the justices – or, alternatively, the Administrative Office of U.S. Courts – to place the justices' disclosures online. For now, Fix the Court will look to procure them the old-fashioned way, via paper, and scan and post them as soon as they become available in June; here is a link to the 2013 reports.

ABC V. AEREO

One such case was *ABC v. Aereo*, in which large media conglomerates sued an upstart company building a new means of distributing broadcast TV signals. (Aereo lost the case and has since filed for bankruptcy.) Time Warner was one of the media companies that filed a brief, as a pro-Aereo outcome would have likely harmed the bottom line of its TV distribution services. According to the most recent data, Chief Justice Roberts owned up to $750,000 in stock in Time Warner and its subsidiaries at the time of the hearing.

Justice Alito sold some of his stock in one of the litigant companies, as he was recused at the certiorari stage but then sat on the case, though the public will not know which stock he sold for another few months.

SOLUTIONS TO THE AMICUS CONFLICT-OF-INTERESTS PROBLEM

In the executive summary, Fix the Court mentioned a number of ways to solve the problems raised by amicus submissions from publicly traded companies. Here is an opportunity to dive deeper into these solutions:

REDEFINING "PARTY" TO INCLUDE AMICI

While the justices are not obligated to follow the Code of Conduct for U.S. Judges that applies to all other federal jurists, recusal for financial conflicts, including stock ownership, is mandated by federal law. That law, 28 U.S.C. 455, requires recusal when a judge or justice owns any financial interest that is a "party" in a proceeding.

Since, in practice, an amicus is not included in the term "party," our preferred way of fixing the ethical problems outlined in this report is for Congress to clarify that "party" includes amicus parties.

The wisdom of this fix comes into greater focus when considering the rest of the law, which also requires justices to recuse if they possess "any other [financial] interest that could be substantially affected by the outcome of the proceeding." This vague provision – how much is substantial? – has been on the books for decades but has never resulted in recusal by a justice, even in high-stakes cases with dozens of corporate amicus briefs. What is needed is a bright-line rule.

Defining an amicus as a "party" would provide such a rule and would raise the level of ethical oversight at the court. After all, owning stock in amici looks awful to a public that already believes the court rules too frequently for corporations, as numerous studies conducted over the past few years have found. While this change could trigger recusals (less preferable) at first, it would more likely lead to the justices either selling off some common stock or placing their individual shares into a blind trust.

This solution may seem heavy-handed, but the law already requires recusal (or triggers a stock sale) whenever a justice owns even one share of stock in a named party. And once this new provision were implemented, the justices would still be able to invest in the market through a wide variety of mutual funds and other financial instruments.

BLIND TRUSTS

Other than forming an exploratory committee, one surefire way to tell if a politician is running for President is if he or she begins to resign from corporate boards or divest from their financial holdings. In fact, most candidates put their assets into a blind trust during their run for higher office and keep them there should they win.

But there is no requirement for Supreme Court justices to do the same once they ascend to the bench, nor is there even an informal tradition of doing so. Fix the Court joins Peter Schweizer of the Hoover Institution, David Ridenour of the National Center for Public Policy Research and William Peacock of FindLaw in calling on the current justices to put their individual stock holdings into blind trusts.

Whenever the next vacancy on the court occurs, Fix the Court will also call on the nominee to put his or her assets into a blind trust, or at least divest themselves from owning parts of individual companies that may one day find themselves before the court – either as litigants or as amici.

Nominees to the high court should be asked during their confirmation hearings if they would agree to do this should they be confirmed, and we would expect an answer in the affirmative.

STOCK ACT

Yet another solution involves Congress, which, in spite of its famous inactivity, passed the Stop Trading on Congressional Knowledge (STOCK) Act three years ago. While there is no reason to believe the justices have any insider information on individual companies, that Congress identified a problem with the current system of financial disclosures from public officials demonstrates their ability to come together (the law passed both chambers nearly unanimously) and strengthen government accountability. The law should be amended so the justices are bound to this act.

In addition to its major directive (spelled out in its title) the legislation requires members of Congress to file reports within 45 days after selling a security worth more than $1,000. This section would be especially apt for members of the Supreme Court, as it would assist the public (albeit a few weeks late) in understanding why a justice may be recused in a certain case one minute but then, post-stock sale, sits on the case the next.

CONCLUSION

Over the past few years, the number of amicus briefs submitted to the Supreme Court has increased, even as the justices' caseload has diminished.

Many of these briefs are written by publicly traded companies that have tens of thousands of dollars in securities owned by Chief Justice Roberts and Associate Justices Breyer and Alito.

Although these justices recuse themselves from cases in which their holdings are litigants, they have refrained from doing so when these corporations are amici.

That practice should end, and in order to bolster the credibility of their institution and demonstrate a basic level of accountability, the justices – with help from Congress – should establish rules that prevent situations in which they decide cases whose outcomes may affect the value of their brokerage accounts.

For more information, visit FixTheCourt.com.