**PREPARED STATEMENT OF NEIL S. SIEGEL**
**DAVID W. ICHEL PROFESSOR OF LAW**
**DUKE LAW SCHOOL**

**FOR THE**

**HEARING OF THE SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS –**

**"WITH PREJUDICE: SUPREME COURT ACTIVISM AND POSSIBLE SOLUTIONS"**

**JULY 22, 2015**

Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee, thank you for inviting me to testify today. I am honored to be here. My name is Neil Siegel. For the past eleven years, I have served as a professor of constitutional law and federal courts at Duke Law School, where I co-direct the Law School's Program in Public Law and direct the Law School's DC Summer Institute on Law and Policy. During the Supreme Court confirmation hearings of Chief Justice John Roberts and Associate Justice Samuel Alito, I was privileged to work for the United States Senate as special counsel to Vice President Joseph Biden when he served on the Senate Judiciary Committee. In the several years before joining the faculty at Duke, I was fortunate to have served as a law clerk to Circuit Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit, as a Bristow Fellow in the Office of the Solicitor General under the leadership of Solicitor General Theodore Olson and Principal Deputy Solicitor General Paul Clement during the Administration of President George W. Bush, and as a law clerk to Associate Justice Ruth Bader Ginsburg of the Supreme Court of the United States.

I have studied and written about the issue of judicial activism, and I have concluded that the "activism" label, especially as it is used in public debates today, is either over-inclusive or misleading.[1] Consider two possible definitions of the term. First, one might define judicial

[1] *See* Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555 (2010).

activism in the way that Chief Justice William Rehnquist traditionally defined the term—that is, as the *absence of judicial deference* to democratic decision-making.[2] The problem with this definition is that it renders every current and recent Justice on the Supreme Court an activist. Both the so-called liberal Justices and the so-called conservative Justices have exercised the power of judicial review to invalidate democratic decision-making. For example, the so-called liberal Justices joined majority opinions that invalidated democratic decision-making in key cases involving gay rights[3] and the death penalty.[4] And the so-called conservative Justices joined majority opinions that invalidated democratic decision-making in key cases involving voluntary community efforts to integrate public schools,[5] gun rights,[6] campaign finance regulation,[7] health care reform,[8] and the Voting Rights Act.[9] Those who accuse the Court of activism, however, do not mean to indict every Justice or all of the foregoing decisions. Accordingly, Chief Justice Rehnquist's traditional understanding of activism does not capture what critics of the Court have in mind when they condemn how only one group of Justices has been exercising the power of judicial review.

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[2] *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 703, 706 (1976) (rejecting "the notion of a living Constitution" because it potentially empowers individuals to persuade "one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution").

[3] *See* Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 570 U.S. __ (2013); Obergefell v. Hodges, 576 U.S. __ (2015).

[4] *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Kennedy v. Louisiana, 554 U.S. 407 (2008).

[5] *See* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

[6] *See* District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010).

[7] *See, e.g.*, Citizen United v. FEC, 558 U.S. 310 (2010).

[8] *See* NFIB v. Sebelius 567 U.S. __ (2012) (holding that the Affordable Care Act's expansion of Medicaid was beyond the scope of Congress's conditional spending power, and also concluding that the law's "individual mandate" was beyond the scope of the Commerce and Necessary and Proper Clauses but within the scope of the Taxing Clause).

[9] *See* Shelby County v. Holder, 570 U.S. __ (2013).

Consider, then, a different definition of activism. One might object that it is incorrect to define activism as the opposite of judicial deference—that activism is not simply the absence of judicial deference to the legislative branch, but rather is the *presence of legal infidelity*. On this definition of activism, a judge can be an activist *both* for not deferring to democratic decision-making when he or she should, *and* for deferring when he or she should not. But under this definition of activism—the one more prevalent in current debates—labeling a decision "activist" is misleading because it ends up being just another way of saying that one disagrees with the decision. A charge of activism seems to be an effort to accuse certain Justices of some kind of serious procedural error apart from the substance of the ruling. But it does not accomplish that purpose, and we would be better off simply debating whether the ruling was right or wrong.

It is entirely appropriate—indeed, vital—for Americans in and out of government to gather to discuss, criticize, and consider proportionate responses to decisions of the Supreme Court with which they disagree. The Justices regularly disagree about questions of statutory and constitutional interpretation, as do the rest of us in responding to cases. Such disagreements are in fact the hallmark of the Court's—and the nation's—history on matters of legal interpretation.

I vigorously disagree with several important decisions of the Roberts Court. *Citizens United* and *Shelby County* come immediately to mind. More generally, the Roberts Court, with the notable exception of gay rights, is a conservative Court. Republican Presidents nominated a majority of its members, and the Court became substantially more conservative in a number of critical areas of law when Justice Samuel Alito replaced Justice Sandra Day O'Connor.

But in the wake of decisions with which I have disagreed, it never crossed my mind to attack judicial independence by advocating a fundamental restructuring of the constitutional relationship between Congress and the Court. It never crossed my mind to advocate jurisdiction

stripping, which is fraught with constitutional difficulties and is likely to prove profoundly shortsighted. It never crossed my mind to call for retention elections for the Justices. On the constitutional Richter scale, retention elections are of a similar magnitude to President Franklin Delano Roosevelt's infamous, failed court-packing plan[10] and may be even more harmful to judicial independence. A packed Court, once packed, may stay packed. But retention elections pose a continuous threat to unpack a Court if it renders unpopular decisions, including decisions that protect the rights of unpopular minorities, whether secular or religious.

Why didn't I advocate these measures? Because the whole point of having a Supreme Court is to enable it to exercise independent judgment, which typically means that it will help one's own causes at certain times and will help the causes of one's opponents at other times. Courts function as a balance wheel, thereby helping to prevent ideological extremism. Our Supreme Court in particular plays a vital role in maintaining our structural systems of separation of powers and federalism, and in protecting individual rights—whether those rights concern speech critical of the government, religious liberty, gun ownership, equal citizenship, procreation, contraception, marriage, or other rights that are important in our democracy.

In addition, for more than a century now, efforts at limiting the authority of the Court have almost always been unsuccessful. And viewed with the benefit of hindsight, they have not been shining moments in our history. Whether it be FDR's attempt to pack the Court or jurisdiction-stripping bills that were introduced in Congress to oppose desegregation in the years following *Brown v. Board of Education*,[11] these episodes have not been ones in which the President or Members of Congress have acquitted themselves well.

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[10] *See* WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 82-162 (1995) (chapters 4 and 5).

[11] 347 U.S. 483 (1954).

Given what is at stake in rewriting or potentially violating part of Article III of our Constitution, it is puzzling that any of the Court's recent decisions would elicit a call to severely compromise judicial independence. The targets do not appear to be any of the Court's many conservative rulings in recent years, but rather the Court's decisions in *King v. Burwell*[12] and *Obergefell v. Hodges*.[13] But those rulings make the timing of a proposal for radical institutional reform all the more curious because the Court decided both cases correctly.

In *King*, a cross-ideological super-majority of Justices sensibly read the Patient Protection and Affordable Care Act (ACA)[14] to allow taxpayers to obtain tax credits, which make health insurance affordable for them, regardless of whether they purchase the insurance on a state health insurance exchange or on a federal exchange. A provision in the ACA provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in a health insurance plan through "an Exchange established by the State."[15]

Writing for the Court, Chief Justice Roberts candidly acknowledged the force of the challengers' argument that, because an exchange established by the federal government is not literally an exchange established by the state, taxpayers buying insurance on federal exchanges are ineligible for tax credits. But the Chief Justice went on to explain that a bedrock principle of statutory interpretation requires courts to read statutes in context and as a whole, and that numerous other provisions of the ACA would not make sense if that one phrase buried in the Internal Revenue Code were given its literal meaning.

[12] 576 U.S. __ (2015).
[13] 576 U.S. __ (2015).
[14] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered Sections of 21, 25, 26, 29, and 42 U.S.C.).
[15] 26 U.S.C. §§36B(b)–(c).

For example, the ACA requires all exchanges to "make available qualified health plans to qualified individuals,"[16] and defines the term "qualified individual" in part as a person who "resides in the State that established the Exchange."[17] But if that phrase were given its literal meaning, there would be no "qualified individuals" on federal exchanges, even though—as just noted—the ACA plainly anticipates that there will be qualified individuals on federal exchanges. The very point of federal exchanges is to make qualified health plans available to qualified individuals.

In light of this interpretive problem and numerous others, the Court concluded that the statute is ambiguous. The Court then properly looked to the basic purpose of the ACA to improve access to health insurance and enhance the functioning of insurance markets. The Court's conclusion regarding the animating purpose of the ACA is clearly correct. So is the Court's decision to read the statute so as to vindicate its purpose, rather than to undermine that purpose so severely as to threaten grave moral, political, and financial consequences for the nation. As the Chief Justice explained, "[a] fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."[18]

To be clear, I am no apologist for Chief Justice Roberts. I disagree with him much of the time. But his opinion for a six-Justice majority in *King* is carefully constructed, respectful, evenhanded, and persuasively reasoned. What is more, the Court's opinion has the virtue of returning the issue of the size of government in the field of health care—including whether and how to expand access to health insurance—to the political arena where it belongs. The decision

[16] 42 U.S.C. §18031(d)(2)(A).
[17] 42 U.S.C. §18032(f)(1)(A).
[18] *Obergefell*, Slip Op. at 21.

leaves this Congress free, if it disagrees with the Court and has the necessary votes, to amend the relevant statute.

While the Court's decision in *Obergefell* imposed a greater limitation on the democratic process, at least at the state level, the Court was entirely justified in doing so in light of the constitutional rights at issue. By the time of the decision, it had become clear that state bans on same-sex marriage violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment in several ways. First, they discriminate against gay people, a group of Americans that has suffered a long, humiliating history of discrimination based on an immutable characteristic that bears no relation to an individual's ability to contribute to American society. Accordingly, discrimination on the basis of sexual orientation is suspect for many of the same reasons that discrimination on the basis of race or sex is suspect, and so should trigger heightened judicial scrutiny under the Equal Protection Clause.[19]

Second, bans on same-sex marriage facially discriminate on the basis of sex. Such bans allow a man to marry a woman but not to marry a man, and they allow a woman to marry a man but not to marry a woman. Facial sex discrimination triggers heightened judicial scrutiny under the Equal Protection Clause.[20] Moreover, bans on same-sex marriage implicate the very concerns that have caused the Court to police sex classifications since the 1970s: such bans reflect and reinforce traditional gender stereotypes about the inherent "nature" of men and women and the social roles that they are destined to perform.

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[19] Although the Court has yet to hold expressly that discrimination on the basis of sexual orientation triggers heightened scrutiny, its equality reasoning in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence*, and *Windsor* is incompatible with genuine rational basis review. For a discussion, see, for example, Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87 (2015).

[20] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996).

Third, bans on same-sex marriage burden the fundamental right to marry, which triggers strict judicial scrutiny under the Due Process and Equal Protection Clauses.[21] The Court has long understood the right to marry as more encompassing than what the institution of marriage historically and traditionally looked like in America. If the Court had limited the right to only those marriages that were deeply rooted in American history and tradition, it would not have been able to hold in *Loving v. Virginia* that bans on inter-racial marriage—which go back to the days of slavery—violate the fundamental right to marry.[22]

The federal government in *Obergefell* argued for the first rationale.[23] Thoughtful commentators and judges have advanced the second.[24] And the Court adopted the third. Writing for the majority, Justice Anthony Kennedy emphasized with admirable clarity that all of the reasons why opposite-sex marriage is constitutionally protected—safeguarding individual autonomy, supporting a two-person union of profound significance to the individuals involved, protecting children and families, and supporting a central institution in American society—apply to same-sex marriage.[25] For example, Justice Kennedy observed that "[t]he States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order," and he concluded that "[t]here is *no difference* between same- and opposite-sex couples with respect to this principle."[26]

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[21] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

[22] *See Loving*, 388 U.S. at 6, 7 (noting that "[p]enalties for miscegenation arose as an incident to slavery, and have been common in Virginia since the colonial period," and reporting that the Supreme Court of Appeals of Virginia upheld Virginia's ban on interracial marriage partly because "marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment").

[23] *See* Brief for the United States as *Amicus Curiae*, Obergefell v. Hodges, 576 U.S. __ (2015).

[24] *See, e.g.*, Latta v. Otter, 771 F.3d 456 (9th Cir. 2014) (Berzon, J., concurring); Brief *Amici Curiae* of Legal Scholars Stephen Clark, Andrew Koppelman, Sanford Levinson, Irina Manta, Erin Sheley, and Ilya Somin, Obergefell v. Hodges, 576 U.S. __ (2015).

[25] *See Obergefell*, Slip Op. at 12-18.

[26] *Id*. at 17 (emphasis added).

What unites these three rationales doctrinally is that they trigger a presumption of unconstitutionality. States that banned same-sex marriage could have overcome this presumption only if they had been able to demonstrate that excluding gay people from the institution of marriage is substantially related to an actual and important state interest. This means an interest that is other than something made up for purposes of litigation, and an interest that is other than an expression of moral opposition to homosexuality.[27] In years of litigation culminating in the Supreme Court, able lawyers for the states that banned same-sex marriage proved unable to make this showing.

For example, it is untenable to argue that states may permissibly exclude same-sex couples from the institution of marriage because states allow opposite-sex couples to marry only in order to solve the policy problem of accidental procreation by heterosexuals. It is also untenable to argue that allowing same-sex couples to marry will harm the institution of marriage or the children of opposite-sex couples by making it less likely that opposite-sex couples will get married or stay married. It is particularly untenable for states that have no-fault divorce to invoke such an interest in litigation. It is therefore unsurprising that the overwhelming majority of courts that have decided same-sex marriage cases in the past few years have invalidated the bans before them.

I recognize that the issue of same-sex marriage is difficult religiously for some Americans. They are constitutionally entitled to their convictions, and no religious organization or leader may constitutionally be required to perform same-sex marriages. But even opponents of same-sex marriage should agree that the Court's decision in *Obergefell* should not be met with threats to the institutional integrity of the Supreme Court any more than other conservative or liberal decisions that have caused some controversy in recent years. At the very least, the Court

[27] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

in *Obergefell* reached a reasonable interpretation of the Constitution within the bounds of its accepted authority.

My own view is that the Court reached the right decision, and that Americans should pay particular attention to the uncommonly poignant and moving language that Justice Kennedy used to describe the stakes and urgency for same-sex couples and their children.[28] The Court's decision vindicates basic constitutional principles of equal citizenship, personal autonomy, and human dignity—and, in doing so, will help bring to an end the pain and humiliation that gay Americans and their families have long endured.

With all due respect to the dissenting opinion of Chief Justice Roberts in *Obergefell*,[29] the Constitution had *everything* to do with it. And it now seems likely that the day will come when the lawfulness and legitimacy of this decision will not be subject to much professional or popular disagreement, but will instead be viewed as one of the finer hours in the Court's history on the long road to equal citizenship stature for all Americans.[30]

[28] *See, e.g.*, *Obergefell*, Slip Op. at 25 ("April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon.").

[29] *See Obergefell*, Slip Op. at 29 (Roberts, C.J., dissenting) ("If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.").

[30] *Compare* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429-30 (1960).