No. _____

IN THE

Supreme Court of the United States

In re the Paternity of B.J.M.:

Angela L. Carroll,

Petitioner,

v.

Timothy W. Miller,

Respondent.

On Petition For Review To The Wisconsin Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Judge J.M. Bitney of the Wisconsin Circuit Court was Facebook "friends" with Angela Carroll ("Carroll"), a party appearing before him. Judge Bitney and Carroll did not have any communications on Facebook (or otherwise) regarding the case, the party opponent did not assert that Judge Bitney was subjectively bias or treated him unfairly, and Judge Bitney confirmed the Facebook "friendship" had no impact on his Order. Judge Bitney, who stands for reelection every six (6) years, had over 2,000 "friends" on Facebook, including multiple witnesses of and the sister of the party opponent. The opposing party, however, asserted that the Facebook "friendship" between party and judge violated the Due Process Clause of the Fourteenth Amendment. The Wisconsin Supreme Court agreed. This Petition presents the following question: Was the Due Process Clause of the Fourteenth Amendment violated by a judge and party being Facebook "friends"?

PARTIES TO THE PROCEEDING

Petitioner, who was the joint-petitioner and the moving party below, is Carroll, a Wisconsin resident. Respondent, who was the joint-petitioner below, is Timothy M. Miller ("Miller"), a Wisconsin resident. These parties were the only parties in the Wisconsin Supreme Court.

RELATED PROCEEDINGS

Petitioner is not aware of any other proceedings that are directly related to this case. The prior proceedings in this care are:

Wisconsin Circuit Court:
Petition v. Timothy W. Miller, No. 2016CV253. Judgment entered August 18, 2016.

Wisconsin Circuit Court:
In re the Paternity of B.J.M.: Timothy W. Miller v. Angela L. Carroll, No. 2011PA46PJ. Judgment entered August 1, 2017.

Wisconsin Court of Appeals:
In re the Paternity of B.J.M.: Timothy W. Miller v. Angela L. Carroll, No. 2017AP2131. Judgment entered February 20, 2019.

Wisconsin Supreme Court:
In re the Paternity of B.J.M.: Timothy W. Miller v. Angela L. Carroll, No. 2017AP2132. Judgment entered June 16, 2020.

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INTRODUCTION

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009) (internal quotation omitted).

This Court's precedent sets forth the narrow grounds for judicial disqualification based on the Fourteenth Amendment. A judge cannot have "a direct, personal, substantial pecuniary interest" in the outcome of a case. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). A judge cannot act as "the complainant, indicter and prosecutor". *In re Murchinson*, 349 U.S. 133, 135 (1955). And more recently, this Court recognized the "rare instance" based on "extreme facts" in which "under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883-84 *quoting Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Absent these narrow circumstances, ordinary judicial recusal questions were matters for state law and policy, not the Constitution. *Tumey*, 273 U.S. at 523.

But the Wisconsin Supreme Court dramatically expanded the intended protections and original public meaning of the Constitution and merged an ordinary judicial recusal question with the narrow proscriptions of the Due Process Clause. Without any allegation of subjective bias and without any allegation that objective facts existed that the judge treated the party unfairly, the Wisconsin Supreme Court held that the judge's "friendship" on Facebook with a party constituted a Due Process Violation.

This Court should grant review of this important question of federal law which has not been, but should be, decided. Social media is here to stay. Judges, attorneys, and parties alike are on social media. While certain states

have issued ethics opinions providing guidance as to whether judges and parties may be "friends" on social media, other states have not. And neither this Court nor any other state supreme court have found a Constitutional violation based upon a social media "friendship" between party and judge. The Wisconsin Supreme Court was the first.

This Court's review of Due Process Clause claims of judicial recusal in this era of social media is warranted to provide authoritative guidance to the lower courts and to the public in general. The Wisconsin Supreme Court's Opinion turned what should have been a relatively normal appearance of bias case (or lack thereof) into a Due Process Clause violation by mistakenly relying upon the "rare instance" and the "extreme facts" of the *Caperton* case and dramatically expanding the same. If the Wisconsin Supreme Court's Opinion is permitted to stand, innocuous social media connections (and ordinary social communications) will morph into Due Process Clause weapons. This case presents the Court with the vehicle to rule on this unexplored judicial recusal issue by reversing the Wisconsin Supreme Court and holding that such claims should be resolved based on state law and policy, not the Constitution.

In addition, the Court should grant review to reverse the Wisconsin Supreme Court's Opinion as it dramatically expands this Court's Due Process Clause judicial recusal precedent. The Wisconsin Circuit Court judge presiding over the matter did not have a "direct, personal, substantial pecuniary interest" in the outcome of the case, was not acting as the "complainant, indicter and prosecutor", and was not offered a possible temptation to "lead him not to hold the balance nice, clear and true" such that the probability of actual bias raised to an unconstitutional level. Instead, the judge was Facebook "friends" with a party that had previously appeared before him. Nothing more. There were no direct, no *ex parte* and no personal communications regarding the case between the party and the judge. And the judge had thousands of Facebook "friends". Chief Justice Roberts' dissent in *Caperton* recognized that the *Caperton* decision created more

questions than answers, including: "21. Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?" The Wisconsin Supreme Court's Opinion found a constitutional violation not based on a "close personal friendship between a judge and a party", but rather an innocuous social media connection alone. The Wisconsin Supreme Court Opinion conflicts with the narrow Due Process Clause precedent from this Court and threatens to bombard our courts with an avalanche of Fourteenth Amendment judicial recusal claims. It is time for this Court to answer Chief Justice Robert's question posed in *Caperton* in the negative to prevent lower courts from being overrun with Due Process Clause claims.

OPINIONS BELOW

The Wisconsin Supreme Court Opinion (Pet.App.1a-77a) is reported at 944 N.W.2d 542. The Wisconsin Court of Appeals Opinion (Pet.App.78a-92a) is reported at 925 N.W.2d 580. The Wisconsin Circuit Court's Orders (Pet.App.93a-111a) are unreported.

JURISDICTION

The Wisconsin Supreme Court entered judgment on June 16, 2020. Carroll timely filed this petition within 90 days. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

1. Amendment XIV, §1 of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

STATEMENT

A. The Due Process Clause.

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. "It is axiomatic that 'a fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton*, 556 U.S. at 876 *quoting Murchison*, 349 U.S. at 136.

B. Due Process Clause precedent.

The benchmark for a claim based on the Due Process Clause is the "settled usages and modes of proceeding existing in the common and statute law of England." *Tumey*, 273 U.S. at 523. As this Court recognized, however, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). This Court has never held that the Due Process Clause requires recusal based on a "probability" or "appearance" of bias stemming from a friendship between a judge and party. *Caperton*, 566 U.S. at 892-93 (Roberts, C.J., dissenting). Instead, "matters of kindship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey*, 273 U.S. at 523. The "Due Process Clause demarks only the outer boundaries of judicial disqualification." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986). And there is a "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Under the common law, the grounds for judicial disqualification were simple and narrow: (a) a judge must

recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case, *Tumey*, U.S. at 523 (holding recusal required of a judge who would profit from a case only upon a conviction of the defendant); *Aetna Life Ins.*, 475 U.S. at 823-24 (holding recusal required of a judge whose decision in a case would have a "clear and immediate effect of enhancing both the legal status and the settlement value of" the judge's own case against the same defendant"); and (b) due process was violated by a "judge who was at the same time the complainant, indicter and prosecutor." *Murchison*, 349 U.S. at 135. The standards set forth in *Tumey* and *Murchison* were based on the notion of a direct conflict and personal interest-actual bias. States had considerable room to enact stricter judicial recusal rules based on policy and prudence, but not constitutional command.

In 2009, this Court entertained the *Caperton* case and issued a limited expansion of the protections afforded by the Constitution based on the "extreme facts" of that "exceptional case". West Virginia Supreme Court Justice Brent Benjamin declined to recuse on a case reviewing a $50 million verdict. 556 U.S. at 873-74. From the time the verdict was issued to the time the appeal reached Justice Benjamin's court, one of the parties in the case spent $3 million to help elect Justice Benjamin to the Virginia Supreme Court. *Id*. at 872-73. Those expenditures, more than all other supporters combined, had a "significant and disproportionate influence" on Justice Benjamin's election in a close race. *Id*. at 873, 874.

Based on the "extraordinary situation" of the *Caperton* case, this Court, in its sharply divided 5-4 decision, held that recusal was required where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable". *Id* at 877. In an effort to ensure crystal clarity, this Court added that "[a]pplication of the constitutional standard implicated in this case will thus be confined to rare instances." *Id*. at 890. Recusal following *Caperton* under the Constitution was only required in the extreme, exceptional, and extraordinary

case where the risk of actual bias was so unusually high that it could not be tolerated. *Id*. at 877.

Chief Justice Roberts wrote the dissent in *Caperton*, with whom Justices Scalia, Thomas and Alito joined. The Chief Justice stressed-with no disagreement from the majority-that recusal is generally not an issue of constitutional concern and noted that the new standard set forth in *Caperton* of a "probability of bias" "cannot be defined in any limited way." *Id*. at 891, 892-93. Prophetically, Chief Justice Roberts stated that "there are a number of factors that could give rise to a 'probability' or 'appearance' of bias: friendship with a party or lawyer…We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a 'probability of bias.'" *Id*. at 892-93. Rhetorically, Chief Justice Roberts asked: "21. Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?" *Id*. at 896.

The time for answering Chief Justice Roberts' rhetorical question and ensuring *Caperton* is not expanded and wielded as a weapon in this day of omnipresent social media has arrived.

C. Wisconsin Circuit Court Order.

This case originated in Barron County (Wisconsin) Circuit Court when Carroll moved to modify legal custody, physical placement and child support of their joint minor child and requested approval of a change in residence as a result of Miller's serious pattern of domestic abuse. Petition Appendix ("Pet. App.") at 94a. The Circuit Court, Judge J.M. Bitney, held the hearing on Carroll's Motion on June 7-8, 2017. *Id*.

On July 14, 2017, Judge Bitney granted Carroll's motion awarding Carroll full physical and legal custody of the joint minor child and permitting her change in residence with the child. *Id*. at 97a-111a. Judge Bitney issued his Order on August 1, 2017 memorializing his findings of fact and conclusions of law. *Id*. at 94a-111a. Judge Bitney found, "by the greater weight of the credible

evidence that Miller had engaged in a pattern of domestic abuse against" Carroll, *Id*. at 94a, and that such domestic abuse was "long-standing" and "involved manipulation, intimidation, verbal abuse (in person and by text messaging) and physical abuse directed at Carroll in an effort to control her life." *Id*. at 99a. This ruling was consistent with the finding of Judge Babler in Case Number 2016CV253 granting a 10-year restraining order against Miller protecting Carroll.

On August 21, 2017, Miller filed a motion for reconsideration alleging that his due process right to an impartial judge had been violated. *Id.* at 93a. Miller did not bring a claim for judicial disqualification pursuant to Wisconsin Statute or file an ethics complaint with Wisconsin's Office of Lawyer Regulation. *Miller's Motion to Reconsider and for Relief from Order and Supporting Brief*. Miller did not allege that Judge Bitney was subjectively bias, or that there were objective facts that Judge Bitney treated him unfairly. Instead, relying upon the Fourteenth Amendment, Miller asserted that his due process rights had been violated based on a Facebook "friendship" between Judge Bitney and Carroll. *Id*.

On June 19, 2017, after the hearing was completed, but before the parties' post-hearing briefs were submitted, Carroll sent a "friend request" to Judge Bitney's Facebook account. Judge Bitney, who had already made his decision on Carroll's motion, Pet. App. at 6a, 82a, but which decision had not yet been memorialized in writing, accepted Carroll's "friend request". During the 25-days between Judge Bitney's acceptance of Carroll's "friend request" and his written decision to grant Carrol's motion, Carroll reacted to 20 of Judge Bitney's Facebook posts. *Id*. Carroll "liked" 18 of Judge Bitney's posts, 12 of which were Bible verses, three related to Judge Bitney's knee surgery, one related to a restaurant, one related to advice for kids and grandkids, and one was a picture of the American flag. *Id*. at 6a-7a. None of Carroll's "likes" were regarding the pending motion or any of the witnesses involved in the motion. Carroll also commented on Judge Bitney's Facebook page on two occasions-both times related to Judge Bitney's knee surgery (information

which Judge Bitney had shared with all parties at the conclusion of the two-day evidentiary hearing). *Id*. at 7a.

There were no private messages between Judge Bitney and Carroll. There were no comments regarding the case or the parties. There was nothing in the record that Judge Bitney saw or even knew that Carroll "liked" his Facebook posts. And there was nothing in the record that Judge Bitney ever viewed Carroll's Facebook page, pictures, or comments. Notably, Carroll was one of Judge Bitney's 2,045 Facebook "friends" which also included the Guardian ad Litem, Riley Kummet and Amanda Delawyer (both of whom testified on behalf of Miller) and Judge Bitney was previously Facebook "friends" with Miller's sister. *Carroll's Memorandum of Law in Opposition to Miller's Motion to Reconsider and for Relief from Order*, p. 9.

Judge Bitney denied Miller's motion for reconsideration. Judge Bitney held that he had no subjective bias requiring his recusal and found that Miller failed to satisfy the objective prong of Wisconsin's judicial bias inquiry. Pet. App. at 15a, 93a.

D. Wisconsin Court of Appeals Decision.

Miller appealed to the Wisconsin Court of Appeals. Miller argued that Judge Bitney had erroneously exercised his discretion in granting Carroll's motion and that Judge Bitney was objectively biased based on the Facebook "friendship" with Carroll relying upon the Due Process Clause. *Id*. at 79a. The Court of Appeals did not reach the merits of Carroll's motion or Miller's pattern of domestic abuse (that was also found by a separate Circuit Court Judge). *Id*. at 91a.

Notwithstanding that there were no allegations of subjective bias, notwithstanding that there was no allegation of the existence of any objective facts that Judge Bitney treated Miller unfairly, and notwithstanding that there were no communications between Carroll and Judge Bitney regarding the case, the Wisconsin Court of Appeals reversed the Circuit Court by holding that a violation of Miller's due process rights had

occurred based on the Facebook "friendship" between Carroll and Judge Bitney. *Id*. at 86a. The Court of Appeals went even further and held, in radically expanding the definition of *ex parte* communications, that although there was "no evidence Judge Bitney ever directly observed the third-party posts" by Carroll and there were no communications between the two regarding the case on Facebook, an "ex parte communication occurred to the extent Judge Bitney and Carroll viewed each other's Facebook posts." *Id*. at 88a.

E. Wisconsin Supreme Court Decision.

The Wisconsin Supreme Court granted Carroll's Petition for Review. In its divided 4-3 Decision, the Wisconsin Supreme Court affirmed the Court of Appeals and held, on this issue of first impression, that the Facebook "friendship" between Carroll and Judge Bitney rebutted the presumption of judicial impartiality and established a Due Process Clause violation. *Id.* at 5a. Justices Hagedorn, Bradley and Kelly dissented. *Id*. at 63a-76a.

In so holding, the Wisconsin Supreme Court noted that the bulk of Carroll's likes of Judge Bitney's posts were to prayers and Bible verses. *Id*. at 6a-7a. The Court also functionally found facts which were not in the record by embracing every negative inference from the record. Indeed, the record is barren that Judge Bitney ever viewed any posts by Carroll on Facebook. *Id*. at 71a.

Noting *Caperton*'s application that a "risk of actual bias" must be a "serious risk of actual bias – based on objective and reasonable perceptions" would be "confined to rare instances" *Id*. at 16a *citing Caperton*, 556 U.S. at 884, 890, the Wisconsin Supreme Court held that the timing of the Facebook "friend" request, the volume of Carroll's Facebook activity, the "likelihood Judge Bitney viewed her posts" (but not actually viewed), the content of the Facebook activity, and Judge Bitney's lack of disclosure made this case the "extreme case". Pet. App. at 17a.

The Wisconsin Supreme Court first considered the

timing of the Facebook "friendship". The Court held that the timing of the "friendship" request, after the hearing, but before the decision was memorialized, "implied that Carroll wanted to influence Judge Bitney's decision on her motion to modify legal custody, physical placement, and child support." *Id*. at 18a. The Court glossed over that there is nothing in the record and no allegation that Judge Bitney actually viewed Carroll's Facebook page or posts or that such posts impacted, at all, his decision. Indeed, Judge Bitney affirmatively confirmed that the Facebook "friendship" played no role in his Decision. *Id*. at 10a-11a.

Ignoring that there was not a single communication between Judge Bitney and Carroll regarding the facts of the case, the Court found that Carroll's "significant number" of "likes" to Judge Bitney's posts of prayers and bible versus was important. *Id*. at 19a. The importance, the Wisconsin Supreme Court held, was the increased likelihood that Judge Bitney may have seen (but may not have seen) Carroll's Facebook activity. *Id*. And while nothing in the record supported a conclusion that Judge Bitney ever actually saw Carroll's Facebook activity, the Wisconsin Supreme Court found this factor as increasing "the likelihood of a serious risk of actual bias." *Id*. at 20a.

The Wisconsin Supreme Court next found that the context of the litigation, a custody dispute, with Judge Bitney as the sole factor, increased the likelihood of a serious risk of actual bias. *Id*. This rationale was based on Carroll's "likes", "loves" and "shares" on Facebook providing her an opportunity to portray herself in the best light to Judge Bitney following the hearing. *Id*. There is nothing in the record that Judge Bitney actually reviewed Carroll's Facebook activity and the record is crystal clear that such Facebook activity had no actual influence on Judge Bitney's decision. *Id*. at 10a-11a.

Finally, the Court viewed the lack of disclosure by Judge Bitney regarding the Facebook "friendship" as important. *Id*. at 22a. It was reasoned that if Miller knew of the Facebook "friendship", Miller could have refuted "what Judge Bitney might have seen Carroll post or share." *Id*. at 24a. This too ignores that there were no

facts in the record that Judge Bitney indeed actually saw Carroll's Facebook activity.

Based on the "extreme facts of this case" (the Facebook "friendship"), the Wisconsin Supreme Court held that the presumption of judicial impartiality had been rebutted and a due process violation occurred. *Id*.

Justices Hagedorn, Bradley and Kelly dissented stating that the "decision continues the march away from the original public meaning of our Constitution, and greatly risks merging ordinary judicial recusal questions with the narrow proscriptions of the Due Process Clause." *Id*. at 63a. "The very concept of an impartial judiciary depends upon the belief that judges can manage through their biases, news feeds, political supporters, former co-workers, and neighbors to render decisions without fear or favor to any party." *Id*. at 73a. Therefore the dissent reasoned, that:

> Although this court must follow Caperton, it has no constitutional warrant to expand it. The more this court takes ordinary recusal questions and turns them into constitutional questions, the more we will see these claims. And the more we see these claims, the more recusal will become a litigation weapon (after all, a due process violation is structural error). And the more recusal becomes a litigation weapon, the more damage it does to the judiciary as a whole. The presumption that judges will follow the law regardless of their personal views and regardless of their associations is quickly being replaced by the presumption that judges are frail, impressionable, and not to be trusted. Make no mistake, today's decision will invite ever more Constitution-based recusal claims. And with it, faith in the judiciary will be undermined, not strengthened. With each new blessing of a new "just as bad as Caperton" recusal claim, the judiciary continues its constitutional takeover of new areas of law that the people, through

their written Constitution, left to themselves.

Id. at 75a.

REASONS FOR GRANTING THE PETITION

The case presents an exceptionally important question of federal law on a matter of first impression. There are over 1.59 billion daily active Facebook users and over 2.41 billion monthly active Facebook users. And that is just Facebook. Judges, attorneys, and parties alike participate on multiple social media platforms. Judges utilize social media to openly connect with the communities they serve. The Wisconsin Supreme Court took the holding of *Caperton* and dramatically and improperly expanded it thereby implementing a bright-line rule effectively prohibiting the judicial use of social media. Now, ordinary recusal questions will be turned into constitutional weapons. But a "friendship" on social media, just as in person, is a judicial recusal question to be resolved based on state regulation and oversight, not the Constitution. If the Wisconsin Supreme Court's decision is permitted to stand, the Constitution will be deployed as an unintended means to right all recusal wrongs. *See Caperton*, 556 U.S. at 903 (Scalia, J., dissenting) ("Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution."). This Court should grant review to damn the floodgates that will soon flow with Due Process Clause judicial recusal claims if this Court does not settle this important question of constitutional law.

I. THE WISCONSIN SUPREME COURT'S DECISION TO GRANT JUDICIAL DISQUALIFICATION UNDER THE DUE PROCESS CLAUSE FOR A SOCIAL MEDIA "FRIENDSHIP" WAS THE FIRST OF ITS KIND PRESENTING AN IMPORTANT QUESTION UNDER THE CONSTITUTION REQUIRING RESOLUTION BY THIS COURT.

This case presents the Court with a matter of first impression. Does a Facebook "friendship" between a judge and a party constitute a Due Process Clause violation? Carroll respectfully requests that this Court grant her Petition for a Writ of Certiorari on this important question and answer in the negative. Absent this Court's intervention, substantial judicial resources will be consumed with allegations of Due Process Clause violations based on social media connections.

This case presents a relatively normal appearance of bias case that was hijacked into a Constitutional violation because of its intersection with modern social media. The presiding judge was Facebook "friends" with the party appearing before him. The two did not have any private messages regarding the case. In fact, the two did not have any messages or posts or "likes" regarding the substance of the case at all. And there was nothing private about the "friendship"-each of their respective other social media connections could see the "friendship" and view any of their respective posts, comments or "likes". For the vast majority of American history, the Constitution would not have been the battleground to seek recusal of the judge in this case. Indeed, there were few extremely narrow exceptions which implicated the Due Process Clause with respect to judicial recusal-a "friendship" between judge and litigant was not one of those exceptions. Until now, and with a social media "friendship" no less. The Wisconsin Supreme Court pried open the narrow Due Process Clause precedent and

created a gaping hole for constitutional recusal claims to flood through.

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Court has held, on very limited occasions, a Due Process Clause violation occurred when: (1) the judge had "a direct, personal, substantial pecuniary interest" in the outcome of a case, *Tumey*, 273 U.S. at 523; (2) the "judge who was at the same time the complainant, indicter and prosecutor", *In re Murchinson*, 349 U.S. at 135; and (3) the "rare instance" and "extreme facts" in which "under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 556 U.S. at 883-84 *quoting Withrow*, 421 U.S. at 47. Otherwise, "[m]atters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Caperton*, 556 U.S. at 892.

Facebook is a social media and social networking service with 1.73 billion daily active users and 2.60 billion monthly active users. *See* Press Release, Facebook, Facebook Reports First Quarter 2020 Results (Apr. 29, 2020). Facebook "members develop personalized web profiles". *Lane v. Facebook, Inc.*, 696 F.3d 811, 816 (9th Cir. 2012). "The type of information members share varies considerably, and it can include news headlines, photographs, videos, personal stories, and activity updates." *Id.*

After creating a profile, a user establishes connections by sending other users a "friend" request. *See Law Offices of Herseein & Herssein, P.A. v. United Servs. Auto Ass'n*, 271 So. 3d 889, 895 (Fla. 2018). The "friended" user must affirmatively accept the request for the two users to become Facebook "friends". *Id.* "Friends" have the ability to view and interact with each other's Facebook profiles. *See State v. Eleck*, 23 A.3d 818, 820 n. 1 (Conn. Ct. App. 2011).

Facebook categorizes every social connection of a user

as a "friend." "Some [Facebook users] may be friends in the traditional sense, but others are no more than acquaintances or in some cases may even be complete strangers." *United States v. Tsarnaev*, 157 F. Supp. 3d 57, 67 n. 16 (D. Mass. 2016); *see also Chace v. Loisel*, 170 So. 3d 802, 803 (Fla. Dist. Ct. App. 2014) ("The word 'friend' on Facebook is a term of art."). "[T]he use of the word 'friend' on social media is different from the traditional meaning of the word. The same is true for the word "like." New Mexico Advisory Committee on the Code of Judicial Conduct, *Advisory Opinion Concerning Social Media.*

The use of social media platforms "can benefit judges in both their personal and professional lives." ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 13-462 at 4 (2013). Participation in social media is one way for judges to remain active in the community and "can prevent [judges] from being thought of as isolated or out of touch." *Id*. at 1. Facebook and other social media platforms are also important campaign tools for judges to deliver campaign messages to voters. *See* Susan Criss, *Use of Social Media By Judges*, The, 60 Advocate (Texas) 18 ("Few judicial campaigns can realistically afford to refrain from using social media to deliver their message to the voting public."). (Judge Bitney, as a Wisconsin judge, is an elected official.).

Here, Carroll and Judge Bitney were "friends" on Facebook. Their exchanges on Facebook were unrelated to the pending case. Carroll "liked" Judge Bitney's posts, primarily Bible verses. Judge Bitney and Carroll had no private messages. While Facebook classified this relationship as a "friendship", it was undisputed that the Facebook "friendship" had no actual impact on Judge Bitney's Order.

There can be no doubt that this case does not fit within the narrow Due Process Clause proscriptions of the *Murchinson* nor *Tumey* holdings. This case also was not the "extreme" situation warranting disqualification under the Due Process Clause following *Caperton*, but rather an ordinary, and generally unproblematic, life interaction that undergirds the strong presumption that judges are impartial. If a Facebook "friendship" now rises to the

level of a Due Process Clause violation, does traditional friendship between a party and judge too? Must it be a good friendship, a long lasting friendship, a close friendship? Are judges now Constitutionally prohibited from talking, at all, to parties and attorneys outside of the courtroom? Does saying 'hi' to a judge in the courtroom hallways or at a coffee shop now implicate the Fourteenth Amendment? Are judges banned from all social media? After the Wisconsin Supreme Court's decision, each of these rhetorical questions would be affirmatively answered with a Due Process Clause violation finding-highlighting the need to reverse the Wisconsin Supreme Court as the decision in this case creates conflict, not clarity, on Constitutional questions of judicial bias and dramatically expands this Court's limited Due Process Clause precedent.

This Court has never held that the Due Process Clause requires recusal based on a "probability" or "appearance" of bias stemming from a friendship between a judge and party (or lawyer). *Caperton*, 556 U.S. at 892-93 (Roberts, C.J., dissenting). This case should not be the first. Requiring disqualification based on the Due Process Clause in every case involving a Facebook acquaintance would not reflect the true nature of a Facebook "friendship" and would "cast[] a large net in an effort to catch a minnow." *Chace*, 170 So. 3d at 804; *Law Offices of Herssein & Herseein, P.A.*, 271 So. 3d at 897 ("No reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are Facebook 'friends' with a relationship of an indeterminate nature.")' ABA Formal Op. 13-462 at 2-3 ("Simple designation as an [electronic social media] connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person."). The Wisconsin Supreme Court's Decision, unless reversed, promotes gamesmanship among parties and weaponizes social media while ignoring the often shallow nature of a Facebook "friendship".

While Facebook was the social media platform at issue in this litigation, there are many forms of social

media, such as Instagram, Twitter and LinkedIn implicated by the Wisconsin Supreme Court's Opinion. Instagram has over 1 billion active monthly users and over 500 million daily active users. *See* https://business.instagram.com (last visited July 22, 2020). Twitter has over 166 million daily active users. *See* Q1 2020 Letter to Shareholders, https://s22.q4cdn.com/826641620/files/doc_financials/2020/q1/Q1-2020-Shareholder-Letter.pdf (last visited July 22, 2020). LinkedIn has over 690 million users. *See* https://about.linkedin.com (last visited July 22, 2020). These numbers evidence the critical importance of this Court granting this Petition and ruling on this issue. There is now a generation that has never known life without social media and our judges, attorneys and parties need clarity, not confusion, on whether simply being connected on social media constitutes a Due Process Clause violation.

Further evidencing the critical need for ruling from this Court, Twitter does not require the user's approval to be "tagged" in someone else's "tweet". Utilizing the Wisconsin Supreme Court's recent ruling, a Twitter user could tag a judge in a "tweet" without the judge's knowledge or consent as a means to assert a Due Process Clause recusal. The user, for instance, could "tweet": "@JudgeJaneSmith is amazing – so thankful for our friendship!" Judge Jane Smith, based on this alleged social media "friendship" and the Wisconsin Supreme Court's Opinion would now be constitutionally disqualified irrespective of whether the judge had ever met the individual, let alone been friends with the individual. The presumption that judges are impartial would have been abolished and judge shopping would flourish. This is highly dangerous precedent.

Social media is now, fortunately or unfortunately, a part of life in America. Judges, attorneys, and parties utilize social media for many different reasons and with varying frequency. A social media connection alone should not rise to the level of a Due Process Clause violation. The Wisconsin Supreme Court's Opinion, effectively prohibiting the judicial use of social media for

fear of never ending Due Process Clause claims, condemns judges of this Country to the life of a hermit and will lessen the effectiveness of the judicial officers. *Younkers v. State*, 400 S.W.2d 200, 205 (Tex. Ct. App. 2013) *quoting* Comm. On Jud. Ethics, State Bar of Tex., Op. 39 (1978) ("Allowing judges to use Facebook and other social media is also consistent with the premise that judges do not "forfeit [their] right to associate with [their] friends and acquaintances nor [are they] condemned to live the life of a hermit. In fact, such a regime would…lessen the effectiveness of the judicial officer.").

This case presents this Court with the vehicle to clarify that the Due Process Clause is neither shield nor sword in resolving ordinary judicial recusal questions based on "friendship"-state law and policy should govern. This case also provides the Court with the opportunity to ensure that *Caperton* remains as intended-limited to the "rare instance" and "extreme facts". A social media "friendship" is neither.

CONCLUSION

Carroll respectfully requests the honorable United States Supreme Court grant this petition for a writ of certiorari.

Respectfully submitted,

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July 31, 2020