No. 20-165

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

REPLY BRIEF FOR THE PETITIONER

Brandon M. Schwartz
Counsel of Record
Michael D. Schwartz
SCHWARTZ LAW FIRM
600 Inwood Avenue N.
Suite 130
Oakdale, MN 55128
(651) 528-6800
brandon@mdspalaw.com

Counsel for Petitioner

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With over 1.73 billion daily active Facebook users, over 500 million daily active Instagram users, over 166 million daily active Twitter users, and over 690 million LinkedIn users, the legal implications of this case are not rare or extreme, but rather this case will have broad nationwide impact. Denying review will have a dramatic impact on the current judges, attorneys and parties utilizing social media as well as our Nation's future judges, attorneys and parties, all of whom will be at least as connected to social media as we currently are. The Wisconsin Supreme Court Order has created confusion, not clarity, on what constitutes a Due Process Clause violation. When there were no *ex parte* communications on social media (or otherwise) between party and judge, when the judge was not subjectively bias, and when the opposing party did not assert that he was treated unfairly, the Wisconsin Supreme Court's drastic expansion of *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009) and Due Process Clause precedent warrants review by this Court.

Timothy M. Miller ("Miller") seeks to minimize the astounding implications of the Wisconsin Supreme Court's decision by arguing that *Capterton* was not expanded, but rather the facts in this case were as extreme as the facts in *Capterton*. To the contrary, the facts of this case do not rise to the level of extreme conduct and with billions of users, social media is certainly not rare. This case is an ordinary judicial recusal question that should have been decided based on state policy, not Due Process Clause precedent. This Court's precedent mandates there must be more to establish a Due Process Clause violation. Indeed, a judge: (i) having a direct, personal and substantial pecuniary interest in the case; or (ii) acting as the complainant and prosecutor; or (iii) being the benefactor of $3,000,000.00 in campaign donations present dramatically different circumstances than this ordinary and benign social media "friendship".

Review is necessary here to inform judges whether they must sign-off of all social media accounts and refrain from

having any social connections, electronically or in person. The Wisconsin Supreme Court's Opinion, given no subjective bias and no allegation of unfair treatment, is a bright-line rule not only effectively prohibiting the judicial use of social media, but also barring any social relationships by judges with anyone appearing in their courtroom. Absent becoming hermits, following the Wisconsin Supreme Court's Opinion, judges will be bombarded with Due Process Clause violations based on social media connections, attending the same church with a litigant, or participating in a continuing legal education seminar with an attorney.

This case presents a fact pattern which is being played out in social media platforms across the Country. Judges are people-people that are on social media. Social media helps judges maintain transparency with the communities they serve. Social media is a driving force (if not the leading force) in election campaigns and judges, most of whom are elected officials, most utilize this inexpensive platform in their campaigns. If a Due Process Clause violation occurs in each case in which a judge has any social media connection with a party or attorney, given the widespread use of social media, we will not have anyone left to preside over cases absent each judge logging off entirely from social media. We have long presumed that judges will follow the law regardless of their personal views. Simply being "friends" on social media should not overcome that presumption constituting a Due Process Clause violation particularly in the absence of subjective bias and the absence of any unfair treatment.

Certiorari should, respectfully, be granted.

I. CERTIORARI IS WARRANTED BY THE BROAD IMPACT THE WISCONSIN SUPREME COURT'S ORDER WILL HAVE.

Regardless of whether one agrees with the Wisconsin Supreme Court's Order, its importance to our County is undeniable. Tens of millions of Americans, judges, attorneys and litigants included, utilize social media in

their day-to-day lives. And social media is here to stay. Granting review and rendering a decision providing clarity on this important Due Process issue is necessary to guide our legal system as to whether *Caperton* is as expensive as the Wisconsin Supreme Court ruled or is truly limited to extreme circumstances as this honorable Court intended.

Miller argues that the Wisconsin Supreme Court did not expand *Caperton*, but rather applied the substantially different fact pattern of *Caperton* to this case. This argument is misplaced.

In *Caperton*, one of the parties in the case spent $3 million to help elect a justice to the Virginia Supreme Court that would determine that party's $50 million appeal. 556 U.S. at 872-73. That $3 million donation was more than all other supporters combined and had a "significant and disproportionate influence" on the justice's election in a close race. *Id*. at 873, 874. Angela L. Carroll ("Carroll") did not contribute any money to Judge Bitney's election campaign and Judge Bitney made clear that the Facebook "friendship" with Carroll had no influence, let alone a disproportionate influence, on his decision. Pet. App. at 10a-11a. Miller acknowledged the same-he did not, and could not, allege he was treated unfairly by Judge Bitney. Carroll and Judge Bitney had no private messages, there were no comments or likes on their publically available Facebook profiles regarding the case, and the record is barren that Judge Bitney ever even saw Carroll's Facebook page, pictures or comments. How likes on Judge Bitney's Facebook Bible posts by one of his more than 2,000 plus friends could possibly rise to the extreme situation of donating $3 million to help elect a judge that would decide your appeal goes without rational explanation by Miller or the Wisconsin Supreme Court.

While *Caperton* opened the door to Due Process Clause claims alleging something less than actual bias, this opening was more crevice than canyon. Having $3 million donated to your judicial election campaign is as close to actual bias as one can get. Having one of your thousands of Facebook "friends" appear before you is not on the same planet, let alone the same playing field as

Caperton. Such a conclusion is supported by the precedent leading up to this Court's *Caperton* decision establishing that *Caperton* was not intended to be the Due Process Clause canyon the Wisconsin Supreme Court has pushed it down.

In *Tumey v. Ohio*, 273 U.S. 510 (1927), the mayor, who received one-half of the share of all fines collected and paid, presided over the trial of an individual accused of violating the Prohibition Act of the State of Ohio. Because the mayor was paid from the fines he himself imposed, this Court found a Due Process Clause violation. *Id*. at 523.

In re Murchinson, 349 U.S. 133 (1955) presented the issue of whether a judge could be the "complainant, indicter and prosecutor" in a contempt case. A Due Process Clause violation was found because "no man can be a judge in his own case". *Id*. at 136.

While the judge in *Caperton* did not have a direct financial interest in the case he was presiding over, it certainly was as close as one could get. Knowing that a party appearing before you had donated $3 million dollars to your election campaign certainly creates a significant threat of actual bias or prejudgment. *Caperton*, 556 U.S. at 883-84. If you rule against the party will your campaign coffers run dry next election cycle? Having a litigant as one of thousands of Facebook "friends" is a far cry from the risk created by receiving $3 million in election campaign donations and then having to affirm or reverse a $50 million verdict against the donor.

Here, there was not a great risk of actual bias. Miller himself acknowledged that he was not treated unfairly. And there are no facts in the record that Judge Bitney knew of or even viewed any of Carroll's Facebook activity. If a party makes a $3 million donation to your election campaign you would know about it. There is not a single fact in the record that supports the argument that having one of Judge Bitney's two thousand Facebook "friends" click "like" on a few of his daily Facebook Bible verse posts had any impact on this case, let alone posed such a risk of actual bias or prejudgment that it must be forbidden pursuant to the Due Process Clause.

Chief Justice Roberts warned in *Caperton* that some might use this open door to turn routine judicial recusal question into Due Process Clause claims. 566 U.S. at 899-900. "Matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Id*. at 892 *quoting Tumey*, 273 U.S. at 523. So too should have been this common recusal issue of a "friendship with a party or lawyer". *Caperton*, 566 U.S. at 892. Instead, the Wisconsin Supreme Court drove a semi-truck through *Caperton*'s open door and took this common recusal issue and turned it into a Due Process Clause violation. Given the broad use of social media and the dramatic expansion of *Caperton* by the Wisconsin Supreme Court, granting certiorari here is imperative. Judicial recusal rules based on "friendship", social media or otherwise, should be resolved based on state policy and prudence, not the Fourteenth Amendment.

In that regard, Miller asserts that there are independent state-law grounds for disqualifying Judge Bitney. Importantly, the Wisconsin Supreme Court did not rule that Judge Bitney was disqualified under any state-law grounds, but instead on this issue of first impression held that the Facebook "friendship" constituted a Due Process Clause violation. Pet. App. at 5a. Indeed, the Wisconsin Supreme Court even noted that Miller did not bring a claim for judicial disqualification pursuant to Wis. Stat. § 757.19 or file an ethics complaint with the Office of Lawyer Regulation. Pet. App. at 10, n. 17. This matter was decided strictly on the Due Process Clause and an improper expansion of this Court's precedent. Pet. App. at 5a, 15a-17a.

The time for resolving the issue of whether a social media connection violates the Due Process Clause is now. Social media connections are not the "rare instance" and this case does not present "extreme facts".

CONCLUSION

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

Respectfully submitted,

Brandon M. Schwartz
Counsel of Record
SCHWARTZ LAW FIRM
600 Inwood Avenue N.
Suite 130
Oakdale, MN 55128
(651) 528-6800
brandon@mdspalaw.com

Michael D. Schwartz
SCHWARTZ LAW FIRM
600 Inwood Avenue N.
Suite 130
Oakdale, MN 55128
(651) 528-6800
brandon@mdspalaw.com

Counsel for Petitioner

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