No. 20-385

In The
Supreme Court of the United States

JUDY DOE,

Petitioner,

v.

MICHAEL L. PARSON,
GOVERNOR OF MISSOURI, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONSE TO THE MOTION FOR THE DISQUALIFICATION OF THE HON. AMY CONEY BARRETT, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES

ERIC SCHMITT
Missouri Attorney General
D. JOHN SAUER
Solicitor General
Counsel of Record
JESUS A. OSETE
Deputy Solicitor General
P. O. Box 899
Jefferson City, MO 65102
(573) 751-8870
Attorneys for Respondents

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INTRODUCTION

Petitioner Judy Doe, a member of The Satanic Temple, seeks to disqualify Associate Justice Amy Coney Barrett from this case on the ground that Justice Barrett has sincere religious beliefs and, before she assumed judicial office, made public statements discussing Catholic doctrine and expressing personal opposition to abortion. *See* "Motion by Petitioner for the Disqualification of The Hon. Amy Coney Barrett Pursuant to 28 U.S.C. §455(a)" (filed Oct. 30, 2020) ("Mot."). Petitioner concedes that Justice Barrett can rule impartially in this case, Mot. 6, yet Petitioner contends that her participation will create an appearance of impropriety.

This argument is meritless. Religious freedom is a bedrock principle of our Nation. Justice Barrett's life of faith and service will enrich her judicial service on this Court, not diminish it. Personal and religious beliefs on policy issues—however strong and sincerely felt—without more, provide no basis to disqualify a Justice. Petitioner accuses Justice Barrett of creating an appearance of impropriety by "openly and publicly embracing … Catholic dogma." Mot. 5. Petitioner's argument thus echoes the worst of the hostile public rhetoric and anti-religious animus opposing Justice Barrett's faith and judicial service. This Court should reject it.

Petitioner argues that this case requires the Court to "navigate a course for the Religion Clauses between the Scylla of the Missouri Tenet and the Charybdis of the Satanic Tenet." Mot. 7. Petitioner invokes the wrong infernal monsters. Petitioner's beliefs may be Stygian, but her legal arguments are chimerical. She offers no plausible basis for the recusal of Justice Barrett, and her motion should be denied.

ARGUMENT

I. Petitioner Seeks Review of an Establishment Clause Claim, Not an Undue-Burden Claim Under *Casey*.

As an initial matter, Petitioner mischaracterizes her own claims. She argues that "[t]he Petition seeks to protect the Petitioner's constitutional right to choose an abortion in Missouri," and that Missouri's informed-consent statute is "unconstitutional under … *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)." Mot. 1. On the contrary, as the Eighth Circuit held, Petitioner never raised any challenge to Missouri's statutes under *Casey* in the district court. *Doe* v. *Parson*, 960 F.3d 1115, 1116–17 (8th Cir. 2020). Rather, she attempted to "introduce a third" claim for the first time on appeal, *i.e.*, that "Missouri's informed-consent law imposes an undue burden on her right to an abortion." *Id.* Petitioner seeks to raise an undue-burden claim under *Casey* before this Court as well, *see* Pet. i–ii, but the Eighth Circuit properly rejected Petitioner's belated attempt to raise this claim for the first time on appeal. Pet. App. 3a–5a. Such an unpleaded claim is forfeited and is not properly before this Court. *Tennessee* v. *Dunlap*, 426 U.S. 312, 316 n.3 (1976). Thus, it cannot serve as a basis for Justice Barrett's disqualification.

II. Justice Barrett's Sincere Religious Beliefs Provide No Plausible Basis for Recusal in This Case or Any Other Case That Relates to Abortion.

Petitioner alleges that Justice Barrett should disqualify herself from this case because she allegedly has sincere religious beliefs that inform her personal views on abortion, and made statements opposing abortion and discussing Catholic doctrine before her elevation to this Court. Mot. 3-7. This argument has no merit. Without more, personal views on policy questions—however strong or deeply felt—do not

provide a basis for recusal of a Justice.

A Justice of this Court may disqualify herself from a proceeding in which the Justice's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This "catchall" provision focuses on the objective appearance of partiality from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. *Microsoft Corp.* v. *United States*, 530 U.S. 1301, 1302 (2000) (statement of Rehnquist, C.J.); *Liteky* v. *United States*, 510 U.S. 540, 548 (1994).

As all Justices of this Court appear to agree, Section 455(a) sets forth a high bar for recusal. For example, in *Liteky*, four Justices wrote that "§ 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings." *Liteky*, 510 U.S. at 557-58 (Kennedy, J., concurring in the judgment). As that opinion noted, "all would agree that a high threshold is required to satisfy this standard." *Id.* at 558. "Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute." *Id.*

Petitioner's allegations do not meet this "high threshold." *Id.* Petitioner does not contend that Justice Barrett is "resistant to fair and dispassionate inquiry," or that Justice Barrett "harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside." *Id.* On the contrary, Petitioner states:

> The issue here is *not* whether Justice Barrett could in fact set aside her religious beliefs to impartially rule on the Petition. Petitioner assumes

> Justice Barrett would readily recuse herself if there was any question in her mind about her ability to put her oath as a Justice of this Court to preserve, protect and defend the Constitution above her personal religious beliefs on abortion and *Roe*.

Mot. 6 (emphasis added). Thus, Petitioner concedes that Justice Barrett can rule fairly and impartially in this case, or in any other case involving abortion, however directly or tangentially. There is no objective basis for disqualification.

Instead, Petitioner argues that Justices with strong and sincere religious beliefs, such as those she attributes to Justice Barrett, should recuse from cases that involve "profound Constitutional and theological questions," whose answers have important "political consequences." Mot. 6; *see also id.* at 7 (urging Justice Barrett's recusal because the case involves "contentious social and Constitutional issues"). This argument contradicts overwhelming, well-reasoned authority holding that a jurist's strong personal beliefs (including religious beliefs) on policy issues, without more, do not provide a basis for recusal.

First, the recusal "inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp.*, 530 U.S. at 1302. "The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported." *Cheney*, 541 U.S. at 914. Here, the "surrounding facts and circumstances" include the fact that, as Petitioner concedes, there is no objective basis to conclude that Justice Barrett cannot rule impartially in this case. Mot. 6. As Chief Justice Rehnquist concluded in *Microsoft*, a "reasonable observer" who is aware of this fact would not conclude that recusal is appropriate. *Id.* at 1302.

"Giving such a broad sweep to § 455(a) seems contrary to the 'reasonable person' standard which it embraces." *Id.* at 1303.

For this very reason, Justices of this Court have not recused themselves merely on the basis that they are alleged to have strong personal beliefs on policy questions before the Court. "[N]either the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law." *Laird v. Tatum*, 409 U.S. 824, 838–39 (1972) (memorandum of Rehnquist, J.). A Justice's "mind at the time [s]he joined the Court" is never, and cannot be expected to be, "a complete tabula rasa." *Id.* at 835.

As then-Justice Rehnquist noted in *Laird*, this Court's Justices have regularly participated in cases where the Justices may have harbored strong personal views on the underlying policy questions. *See id.* at 831-35. For example, Justice Black did not recuse in *United States v. Darby*, 312 U.S. 100 (1941), which upheld the constitutionality of the Fair Labor Standards Act, even though he was one of the principal authors of the legislation in the Senate. *Laird*, 409 U.S. at 831. Nor did Justice Frankfurter recuse in *United States v. Hutcheson*, 312 U.S. 219 (1941), which was one of the leading cases interpreting the scope of the Norris-LaGuardia Act, even though he had co-authored a book that criticized the purported abuse by the federal courts of their injunctive powers in labor disputes, and played a significant role in drafting the very Act that addressed such issues. *Laird*, 409 U.S. at 832.

Justice Jackson did not recuse in *McGrath v. Kristensen*, 340 U.S. 162 (1950), which raised exactly the same issue which he had decided as Attorney General. *Laird*, 409 U.S. at 832. "Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice." *Id.* And Chief Justice Hughes did not recuse in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1922), even though he wrote a book criticizing the Court's holding in *Adkins*. *Laird*, 409 U.S. at 833.

Furthermore, Justice Barrett's public statements opposing abortion and discussing Catholic doctrine before she assumed judicial office add nothing to Petitioner's argument. Petitioner does not identify any statement made by Justice Barrett since she joined this Court to support her recusal motion. Instead, Petitioner relies entirely on statements that Justice Barrett made before she held any judicial office. But the prior expression of public views on policy questions does not necessarily disqualify a member of this Court from participating in cases related to that policy question. *Id.* at 830. On the contrary, "[t]he oath prescribed by 28 U.S.C. § 453 which is taken by each person upon becoming a member of the federal judiciary requires that he 'administer justice without respect to persons, and do equal right to the poor and to the rich,' that he 'faithfully and impartially discharge and perform all the duties incumbent upon (him) … agreeably to the Constitution and laws of the United States.'" *Id.* at 838. Justice Barrett has taken this oath, like every other member of this Court, and she undoubtedly has personal views on policy questions, like every

member of this Court. Petitioner offers no plausible reason to believe that Justice Barrett will not follow her oath in this case.

For all these reasons, Petitioner's speculation that Justice Barrett's personal religious beliefs might create an appearance of impropriety here is baseless. In essence, Petitioner contends that any Justice with strong personal or religious views on abortion cannot participate in a case related to abortion. "The implications of this argument are staggering." *Cheney*, 541 U.S. at 923. Every Justice undoubtedly has strong personal views on many policy issues—none is "a complete tabula rasa." *Laird*, 409 U.S. at 835. "Even one unnecessary recusal impairs the functioning of the Court." *Cheney*, 541 U.S. at 916. To require routine recusals of members of this Court in innumerable cases would undermine the Court's ability to function. Petitioner cites no authority supporting this "intolerable" proposal. *Id.* at 927.

CONCLUSION

The motion for disqualification should be denied.

Respectfully submitted,

ERIC SCHMITT
Attorney General

D. JOHN SAUER
Solicitor General
Counsel of Record
JESUS A. OSETE
Deputy Solicitor General
P. O. Box 899
Jefferson City, MO 65102
john.sauer@ago.mo.gov
Tel.: (573) 751-8870
Attorneys for Respondents

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