No. 22-1127

IN THE

Supreme Court of the United States

CHRISTINE SAWICKY ,

Petitioner,

v.

TAO SYKES, MANUEL REAL BENEFICIARY, ET AL.,

Respondents,

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit

MOTION TO RECUSE

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Petitioner Christine Sawicky respectfully moves for the recusal of Justice Elena Kagan and Justice Clarence Thomas from this matter pursuant to Supreme Court Rule 21. The recusal is compelled since Justice Thomas's and Justice Kagan's "impartiality might reasonably be questioned," 28 U.S.C. § 455, given the circumstances that the ethics and the financial disclosures and bias of SCOTUS Justices and the federal judiciary in general are currently questioned by the media and the public. Likewise, the Due Process Clause of the Fifth Amendment, U.S. Const. Amend V, requires recusal under these same circumstances.

FACTUAL BACKGROUND

Pending before this court is the Petition for Writ of Certiorari filed by Christine Sawicky challenging the lower court's decision of February 22, 2023.

It is no secret that the integrity of the judicial system is in question due to a few bad apples. This circumstance unfairly tarnishes the reputation of those Justices and federal judges in compliance with the Judicial Code of ethics. In the most expansive investigation of judicial stockholdings in the United States., the Wall Street Journal in September of 2021 revealed that 131 federal judges broke the law by improperly hearing 685 court cases between 2010 and 2018 in which they or their family members owned stock shares of companies that were plaintiffs or defendants in the litigation. https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421

On the heels of that investigation, Pro Publica's findings on 4-6-2023 specifically discussed Justice Thomas's financial disclosures, or lack thereof. Pro Publica highlighted Justice Thomas's relationship with Verizon executives cementing "that the average person on the street" would question the appearance of his impartiality...he must recuse himself. https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow In addition, Petitioner's appellate judge Eric D. Miller used to clerk for Justice Thomas whom affirmed the district court's opinion that "Accordingly, judicial immunity applies even in the face of allegations of conspiracy or bribery" while denying a rehearing *en banc* posing the question to the entire appellate court "is bribery of a judge illegal?" Justice Kagan's appearance of impartiality is equally questionable to "the average person on the street" as opposing counsel for Judicial Respondents and Postmaster Respondents is Ms. Prelogar for the DOJ. Ms. Prelogar used to clerk for Justice Kagan and also was a speaker along with Respondent Watford on 3-17-2023 for Justice Ginsberg's memorial published via press release on the SCOTUS website. https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-02-23 While constitutional matters certainly cannot be governed by new articles and press releases, the aforementioned examples offer a glimpse into a concern about the "appearance" which Justice Kagan and Justice Thomas presiding in the present matter entails. All of this raises a terrible "appearance" problem which can only engulf the Supreme Court in a contaminated stew with poisonous consequences for the independence and perceived integrity of the judiciary.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRES JUSTICE THOMAS AND JUSTICE KAGAN TO RECUSE THEMSELVES FROM CONSIDERATION OF THE PRESENT CASE.

In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the Supreme Court addressed the Due Process concerns implicated in a request for judicial recusal. *Caperton* involved the election of a justice to the Supreme Court of Appeals of West Virgina in 2004. Two years earlier, a jury had returned a verdict against A.T. Massey Coal Co. in the amount of $50 million. Massey's chairman contributed more than $3 million in support of a candidate who, if successful, would likely preside over the appeal of that verdict. Indeed, the candidate was successful, and after denying a motion to recuse, joined an opinion of the Supreme Court of Appeals which overturned the verdict.

The Supreme Court granted certiorari to address the Due Process implications raised by the refusal to recuse in a matter where such significant expenditures were made in support of the now presiding justice. In reversing, the Court examined several factors which have particular relevance to the present motion. At the outset, noting "[t]he difficulties of inquiring into a [a judge's] actual bias," the Court recognized "the need for objective rules" in applying due process analysis to a recusal question. *Id.* at 884. Indeed, the Court stated that it was not "determin[ing] whether there was actual bias," as it also acknowledged that the justice in question "conducted a probing search into his actual motives and

inclinations [and] found none to be improper." *Id.* at 882. Accordingly, it was not the justice's own beliefs, nor even the presence of actual bias which mattered, but instead, the "objective risk of actual bias that required [the justice's] recusal." *Id.* at 866 (emphasis added).

What was most important in *Caperton*, and which is precisely relevant here, was the Court's "conclusion that there is serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case...". *Id.* at 884 (emphasis added). Accordingly, applying these objective considerations to the question posed, the Court found the justice's refusal to disqualify himself violated the Due Process Clause of the Fourteenth Amendment. U.S. Const. Amend. XIV.

Moreover, the Court observed that specific factors exacerbated the Due Process violation (namely, the timing of these factors) and sealed the requirement for recusal:

> The temporal relationship between the campaign contributions, the justice's election and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice...Although there is no allegation of a *quid pro quo* agreement, the fact remains that [the Massey executive's] extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – a man chooses the judge in his own cause.

Id. at 886

The present circumstances mirror those in *Caperton* to such a significant degree that there can be little doubt about the Due Process implications of Justice Kagan's and Justice Thomas's participation in the consideration of this matter. (while *Caperton* as a state matter, involved the 14th Amendment, the 5th Amendment's Due Process Clause offers no different analysis to the instant case). Justice Thomas and Justice Kagan have been placed in a position not of their own making but one in which disqualification is constitutionally mandated. Justice Thomas cannot evade the appearance of bias in this. case discussing federal judges breaking the law by ruling in favor of companies that they own stock in while his own personal storm contains that exact same questionable ethics. Justice Kagan cannot evaluate this case without the appearance of bias as Ms. Prelogar, on behalf of the DOJ, is representing Judical and Postmaster Resppondents claiming that bribery/kickbacks of a judge are legal while holding a personal and professional relationship with Justice Kagan.

The law has long understood "the universally recognized legal maxim, *nemo judex in causa sua*, ['no on may be his own judge']." *Criss v. Union Sec. Ins. Co.*, 26 F. Supp. 3d 1161, 1163 (N.D. Ala. 2014). *Caperton* adds an important annex: *improprium eligere vestry iudici* – "no one may choose his own judge." The present case is one of utmost importance to the integrity of the judiciary. The damaging publicity along with the corrupt judicial proceedings in the lower courts requires Justice Kagan and Justice Thomas to recuse themselves in the present matter.

Their integrity, their colleagues integrity, and the integrity of this Court cannot tolerate any other choice.

II. JUSTICE KAGAN AND JUSTICE THOMAS ARE REQUIRED BY STATUTE TO RECUSE THEMSELVES IN THIS MATTER.

The judicial Code which governs the conduct of federal judges and justices is quite clear:

> "Any justice, judge or magistrate of the United States shall disqualify himself [herself] in any proceeding in which his [or her] impartiality might be questioned."

28 U.S.C. § 455 (a).

Not unlike the analysis involved in the Due Process question, *supra,* this section of the Judicial Code:

> "Focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification out to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."

Potashnick v. Port City Const. Co., 609 F.2d 1101, 1111 (5th Cir. 1980)

Likewise, as Justice Scalia wrote in *Liteky v. United States,* 510 U.S. 540, 548 (1994), recusal questions posed under § 455 are "to be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance.

Quite simply and quite universally, recusal was required whenever "impartiality might reasonably be questioned." (emphasis in original).

In the present case, terms like "average person on the street," or "reasonable man (or woman)," or "impartiality might reasonably be questioned," are all implicated in the present motion. As noted above, editorials, news columns, and the SCOTUS's own press release can do nothing other than raise the quite "reasonabl[e] question[]" as to the "impartiality" of someone in Justice Kagan's and Justice Thomas's shoes when considering cases as essential as the one at issue here.

It is clear that the present motion comes at an inopportune time for Justice Kagan and Justice Thomas considering the negative publicity highlighting the ethics of the SCOTUS or the judiciary in general. But this motion must be made now and acted upon favorably. Aside from the merits of the underlying petition seeking certiorari, there are raw procedural considerations instantly. Any action on these which includes Justice Kagan's and Justice Thomas's participation could be catastrophic to the delicate foundation of integrity and public confidence upon which the judiciary sits. "Once a judge whose impartiality toward a particular case may reasonably be questioned presides over that case, the damage to the integrity of the system is done." *Durhan v. Neopolitan,* 875 F.2d 91, 97 (7th Cir. 1989). That must not be allowed to happen in this case. The impact would be something from which the Court would not soon recover.

CONCLUSION

For the foregoing reasons, Justice Thomas and Justice Kagan should be recused from this matter.

Respectfully submitted,

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