

IN THE  
**Supreme Court of the United States**

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REPUBLICAN PARTY OF PENNSYLVANIA,

*Petitioner,*

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY  
AS SECRETARY OF STATE OF PENNSYLVANIA, ET AL.,

*Respondents.*

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On Petition for a Writ of Certiorari to the  
Supreme Court of Pennsylvania

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**MOTION TO RECUSE**

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JENNIFER MENICHINI  
JOYCE, CARMODY & MORAN P.C.  
9 N Main St., Ste 4  
Pittston, PA 18640  
Phone: 570-602-3560  
jm@joycecarmody.com

JOSEPH M. COSGROVE  
*Counsel of Record*  
SELINGO GUAGLIARDO LLC  
345 Market Street  
Kingston, PA 18704  
Phone: 570-287-2400  
jcosgrove@getyourselfagoodlawyer.com

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Poll conducted for CNN – Question regarding Justice Barrett recusal <https://cdn.cnn.com/cnn/2020/images/10/07/rel12c-.scotus,.aca.pdf> (last visited October 27, 2020) . . . . . 3

Respondent Luzerne County Board of Elections respectfully moves for the recusal of Justice Amy Coney Barrett from this matter pursuant to Supreme Court Rule 21. This recusal is compelled since Justice Barrett's "impartiality might reasonably be questioned," 28 U.S.C. § 455, given the circumstances of her nomination and confirmation. Likewise, the Due Process Clause of the Fifth Amendment, U.S. Const. Amend V, requires recusal under these same circumstances.

### FACTUAL BACKGROUND

Pending is the Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania ("Petition") filed by the Republican Party of Pennsylvania ("RPP") challenging that Court's decision of September 17, 2020. Notably, this decision came one day before President Donald J. Trump nominated Justice Barrett to fill the seat of Justice Ruth Bader Ginsburg who died only eight days earlier.

The facts<sup>1</sup> relevant to consideration of the Petition have been before this Court since September 28, 2020 when RPP and the President *Pro Tempore* of the Pennsylvania Senate submitted Emergency Applications to Justice Alito seeking a stay of the Pennsylvania court's mandate. *See Scarnati, et al. v. Boockvar, et al.*, 20A53, and *Republican Party of Pennsylvania, et al. v. Boockvar, et al.* 20A54.

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<sup>1</sup> Given the emergent circumstances created by the COVID-19 pandemic, the Pennsylvania Supreme Court ordered that mail-in ballots validly cast and postmarked by Election Day must be counted if received on or before 5:00 P.M. on November 6, 2020. If the envelopes containing these ballots do not contain a postmark or if the postmark is illegible, the ballots are nonetheless presumed to be valid unless a preponderance of evidence proves otherwise.

Justice Alito referred the applications to the Court, which were denied on October 19, 2020, three weeks after they were filed. Justice Thomas, Justice Alito, Justice Gorsuch and Justice Kavanaugh indicated they would grant each application.

On October 23, 2020, at 9:08 P.M., undersigned counsel was served a copy of the Petition via email. This was less than 12 hours after the Senate Judiciary Committee voted to favorably report Justice Barrett's nomination to the full Senate. After voting to limit debate on the nomination, the Senate confirmed Justice Coney Barrett on October 26, 2020. That evening, Justice Thomas administered the Constitutional oath to Justice Barrett in a special ceremony arranged and attended by President Trump at the south entrance to the White House. Upon taking the Judicial Oath today, Justice Barrett will now assume her place as the "103rd Associate Justice of the Supreme Court of the United States." <https://www.supremecourt.gov/> (last visited October 27, 2020).

The nomination and confirmation of a Supreme Court justice this close to a presidential election is unprecedented.<sup>2</sup> As concerning as that is, what is even more troubling is the language President Trump has used in consideration of this nomination, linking it directly to the electoral season at hand, with implications for his own re-election, as seen in this example:

□ Trump predicted that the Supreme Court will be called upon to determine the winner of the presidential election and that whomever he nominates on Saturday to replace the late justice Ruth Bader Ginsburg **might cast the**

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<sup>2</sup> President Eisenhower made a recess appointment of William J. Brennan to the Court shortly before the presidential election of 1956. After re-election, Eisenhower, a Republican, then nominated Justice Brennan, a Democrat, early in 1957.

**decisive vote in his favor.** ... “I think this will end up in the Supreme Court. And I think it’s very important that we have nine justices,” Trump said. “It’s better if you go before the election, because I think this scam that the Democrats are pulling — it’s a scam — the scam will be before the United States Supreme Court. And I think having a 4-4 situation is not a good situation.”

James Hohmann, *Trump says Supreme Court pick could decide election while refusing to commit to peaceful transfer of power*, Washington Post, Sept. 24, 2020, <https://www.washingtonpost.com/politics/2020/09/24/daily-202-trump-says-supreme-court-pick-could-decide-election-while-refusing-commit-peaceful-transfer-power/> (last visited October 27, 2020)(emphasis added).

Against this backdrop, and in the aftermath of Justice Barrett’s nomination, a public poll reflected significant concern with her presiding over matters related to the presidential election. The poll, conducted by research firm SSRS on behalf of CNN, asked whether Justice Barrett “should or should not promise to recuse herself from any cases which could affect the outcome of this year’s presidential election.” Of the respondents, 56% said that Justice Barrett should recuse herself from such matters, while 34% said she should not (10% had no opinion).

<https://cdn.cnn.com/cnn/2020/images/10/07/rel12c-.scotus,.aca.pdf> (last visited October 27, 2020). While constitutional matters certainly cannot be governed by public polling, this example does offer a glimpse into a concern about the “appearance” which Justice Barrett’s presiding in the present matter entails. So do a variety of editorial and op-ed pieces published in the weeks since her nomination. *See, e.g.*, Mario Nicolais, *Barrett must recuse from 2020 election cases, shield Supreme Court from Trump corruption*, USA Today, Oct. 12, 2020, <https://www.usatoday.com/story/opinion/2020/10/12/barrett-protect-supreme-court-recuse-2020-election-cases-column/5915556002/> (last visited October 27, 2020);

Editorial Board, *Judge Barrett must recuse herself in any election case*, Newark Star-Ledger, Oct. 18, 2020, <https://www.nj.com/opinion/2020/10/judge-barrett-must-recuse-herself-in-any-election-case-editorial.html> (last visited October 27, 2020); Editorial Board, *Booker is right: Barrett should recuse herself on election cases*, Newark Star-Ledger, Sept. 29, 2020, <https://www.nj.com/opinion/2020/09/booker-is-right-barrett-should-recuse-herself-on-election-cases-editorial.html> (last visited October 27, 2020); Renee Knake Jefferson, *Why Amy Coney Barrett must recuse herself from election-related cases*, NY Daily News, Oct. 26, 2020, <https://www.nydailynews.com/opinion/ny-oped-why-amy-coney-barrett-must-recuse-herself-from-election-relate-20201027-7ey4bf6b2ngd7e2sjm52pwsswestory.html#nt=pf-double%20chain~unnamed-chain-1~feed-driven%20flex%20feature~automated~sub-topic-feed-0~7EY4BF6B2NGD7E2SJM52PWSSWE~1~1~2~7~art%20yes> (last visited October 27, 2020).

Professor Jonathan Adler of Case Western Reserve University School of Law, who does not believe Justice Barrett's recusal is necessary, recognizes it may nonetheless be prudent, especially in light of the President's unfortunate comments:

President Trump's own norm-breaking behavior may justify a departure from the traditional norms of recusal. His repeated comments about the role of courts in the election—and the Supreme Court and his nominee in particular—are high-profile that they might create the sort of appearance problem that the recusal rules are designed to address. Simple prudence may counsel recusal in a special case like this. After all, we've never had a justice confirmed in the midst of an election before.

Jonathan Adler, *Should Justice Barrett Recuse from 2020 Election Litigation?* The Volokh Conspiracy, Oct. 26, 2020, <https://reason.com/2020/10/26/should-justice-barrett-recuse-from-2020-election-litigation/> (last visited October 27, 2020).

All of this raises a terrible “appearance” problem which can only engulf the Supreme Court in a political 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 BARRETT TO RECUSE HERSELF 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 Virginia 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 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 886 (emphasis added).

What was most important in *Caperton*, and which is precisely relevant here, was the Court’s “conclu[sion] that there is a 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 – without the consent of the other parties – 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<sup>3</sup> implications of Justice Barrett's participation in the consideration of this matter. "The temporal relationship between [President Trump's nomination of Justice Barrett], the [J]ustice's [confirmation] and the pendency of the [present] case [which is relevant to the President's re-election campaign] is also critical." *Id.* President Trump's statements quite clearly indicate that he wanted to "choose[] the judge in his own [electoral] cause," which Justice Barrett's confirmation only eight days before the election and in the midst of this election case (with presumably others to follow) accomplishes the President's goal. It is of little importance what Justice Barrett's own searing examination of her subjective views are or may be regarding any potential bias she may or may not harbor in considering this case. She has been placed in a position not of her own making but one in which disqualification is constitutionally mandated.

The law has long understood "the universally recognized legal maxim, *nemo judex in causa sua*, [‘no one 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:

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<sup>3</sup> While *Caperton*, as a state matter, involved the Fourteenth Amendment, the Fifth Amendment's Due Process Clause offers no different analysis to the instant case.

*improprrium eligere vestri iudici* – “no one may **choose** his own judge.” The present case is one of utmost important to the President’s re-election bid. Just as President Trump has placed Justice Barrett on the Supreme Court with whatever hope or expectation he may have, he has also imposed on her the duty to recuse herself in this case. Her integrity and the integrity of this Court cannot tolerate any other choice.

## **II. JUSTICE BARRETT IS REQUIRED BY STATUTE TO RECUSE HERSELF 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 [or herself] in any proceeding in which his [or her] impartiality might reasonably 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 ought 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 that 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, public polling, editorials, news columns, and the persistent presidential expressions melding Justice Barrett’s placement on the Court with the electoral season can do nothing other than raise the quite “reasonabl[e] question[.]” as to the “impartiality” of someone in Justice Barrett’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 Barrett, this being her first day as an Associate Justice. 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 Barrett’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 Barrett should be recused from this matter.

JENNIFER MENICHINI  
JOYCE, CARMODY & MORAN P.C.  
9 N Main St., Ste 4  
Pittston, PA 18640  
Phone: 570-602-3560  
jm@joycecarmody.com

Respectfully submitted,

s/JOSEPH M. COSGROVE  
*Counsel of Record*  
SELINGO GUAGLIARDO LLC  
345 Market Street  
Kingston, PA 18704  
Phone: 570-287-2400  
jcosgrove@getyourselfagoodlawyer.com