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ETHICS IN WASHINGTON

April 1, 2022

The Honorable John G. Roberts, Jr.
Chief Justice
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: The Need for a Supreme Court Code of Conduct and Justice Clarence Thomas's Recusal From 2020 Election Cases, Including Cases Arising from the January 6, 2021 Attack on the Capitol

Dear Chief Justice Roberts:

As Chief Justice, you exercise a "unique leadership role as the presiding officer of the Court, as the manager of the Court's overall operations, and as head of the federal judicial branch of government."[1] Since recusal is largely within the discretion of an individual Justice under the Supreme Court's limited existing ethical framework, it is incumbent that the Court under your leadership establish a Supreme Court Code of Conduct that would include formal recusal processes and meaningful enforcement mechanisms to address spousal conflicts of interest like those faced by Justice Clarence Thomas due to his spouse's active role in efforts to overturn the 2020 presidential election.

Justice Thomas should recuse himself from participating in future cases relating to the 2020 presidential election ("2020 Election Cases"), including cases arising from the January 6, 2021 attack on the Capitol. In the absence of a formal recusal, Justice Thomas's participation in 2020 Election Cases would not only irreparably compromise public trust in the integrity of the Court's decision-making process, but would likely result in an existential crisis for our democracy given the sensitivity of these cases and the Court's role under the Constitution as the final arbiter of justice.

[1] Denis Steven Rutkus and Lorraine H. Tong, "The Chief Justice of the United States: Responsibilities of the Office and Process," Congressional Research Service, Sept. 23, 2005, https://www.everycrsreport.com/reports/RL32821.html.

Despite persistent calls for Justice Thomas to recuse from 2020 Election Cases,[2] he has thus far declined to do so, which is not only unacceptable, but underscores the fundamental flaw in the Court's current ethical framework - he is the final arbiter on questions about his own impartiality in cases of national consequence in which his wife's conduct may be at issue.

Recent reporting reveals that Justice Thomas's spouse, Virginia Thomas, actively supported President Donald J. Trump in his unprecedented efforts to overturn the 2020 election by physically attending the January 6 "Stop the Steal" rally,[3] and playing a key behind-the-scenes role, strategizing with President Trump's then-chief of staff, Mark Meadows, in the days and weeks after the election.[4]

In a litany of text messages exchanged by Ms. Thomas with Mr. Meadows, including 21 from her and eight from him, Ms. Thomas characterized President Trump as the victim of the "greatest Heist of our History" and urged him to "stand firm" and "not concede," while his "army" gathered in support.[5] She rejected the notion that any "rules in war" would apply to their post-election activity, while referring to the Bidens as a "crime family" and now-President Biden's supporters as "co-conspirators" who should be "arrested & detained" for "ballot fraud," and tried for "sedition" before a military tribunal while living on a "barge" at "GITMO".[6] In later text messages, she pressured Mr. Meadows and purportedly President Trump's son-in-law and key adviser Jared Kushner, to "release the Kraken," encouraging them to appoint Sidney Powell, a controversial Trump Campaign lawyer, to "lead" the election-overthrow efforts.[7] By November 24, Ms. Thomas was threatening to withdraw her political support if Trump were to "cave to the elites."[8] One of Ms. Thomas's text messages even might suggest that she had a conversation with Justice Thomas about her concerns,

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[2] *See e.g.*, Letter to Chief Justice John G. Roberts, Jr. and Justice Clarence Thomas from Senator Elizabeth Warren et al., Mar. 28, 2022, https://bit.ly/387KoHr.
[3] Kevin Daley, Exclusive: Ginni Thomas Wants to Set the Record Straight on January 6, *Washington Free Beacon*, Mar. 14, 2022, https://freebeacon.com/courts/exclusive-ginni-thomas-sets-the-record-straight-on-january-6/.
[4] Bob Woodward and Robert Costa, Virginia Thomas urged White House chief of staff to pursue unrelenting efforts to overturn the 2020 election, texts show, *Washington Post*, Mar. 24, 2022, https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/.
[5] *Id.*
[6] *Id.* (In this particular text message, Ms. Thomas was quoting from a passage about the Bidens that had been circulating on right-wing websites.)
[7] *Id.*
[8] *Id.*

since she refers to having a conversation with her "best friend" in connection with these events.[9]

The governing statute, 28 U.S.C. § 455, requires all federal judges, including members of the Supreme Court, to recuse themselves from any judicial proceedings in which his or her impartiality might reasonably be questioned.[10] In addition, a judge must recuse when he knows that his spouse has "any … interest that could be substantially affected by the outcome of the proceeding."[11]

Ms. Thomas's unique access to, and strategic communications with, the President's then-chief of staff in the heat of President Trump's team's efforts to overturn the presidential election; her attendance at the January 6 "Stop the Steal" rally; as well as her position as a board member on a conservative political group that helped lead the "Stop the Steal" movement;[12] and signature on a letter to House Minority Leader Kevin McCarthy calling on him to punish any Republicans who participate in the U.S. House Select Committee investigating the January 6th,[13] would cause Justice Thomas's impartiality to reasonably be questioned if he were to participate in any 2020 Election Cases.

As Chief Justice, you recently noted that the Court's "decisional independence is essential to due process, promoting impartial decision-making, free from political or other extraneous influence."[14] Yet, Justice Thomas's failure to recuse from earlier Court cases relating to the 2020 election raises significant concerns about whether he may not only have compromised the Court's impartiality, but also his ethical obligations under 28 U.S.C. § 455.

Justice Thomas's lack of impartiality was particularly evident in *Trump v. Thompson*.[15] In that case, the Court rejected President Trump's attempt to block the release of documents

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[9] *Id. See* Danny Hakim, Jo Becker, and Alan Feuer, Texts Show Ginni Thomas's Embrace of Conspiracy Theories, *New York Times*, Mar. 26, 2022, https://www.nytimes.com/2022/03/26/us/politics/ginni-thomas-donald-trump.html ("The Thomases have been a fiercely close couple for decades. In his memoir, Justice Thomas wrote that they were 'one being — an amalgam' and called her his 'best friend.' She often uses similar language to describe her husband.")

[10] 28 U.S.C. § 455(a).

[11] 28 U.S.C. § 455(b)(4).

[12] Danny Hakim and Jo Becker, The Long Crusade of Clarence and Ginni Thomas, *New York Times*, Feb. 22, 2022, https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html.

[13] Letter from Conservative Action Project to House Minority Leader Kevin McCarthy, Dec. 15, 2021, http://conservativeactionproject.com/conservative-leaders-remove-cheney-and-kinzinger-from-house-republican-conference/ .

[14] Chief Justice John G. Roberts, Jr., "2021 Year-End Report on the Federal Judiciary," Dec. 31, 2021, https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx .

[15] *Trump v. Thompson*, 142 S. Ct. 680 (U.S. 2022). In another case, *Texas v. Pennsylvania,* the Court denied for lack of standing the State of Texas's motion to file a bill of complaint against four other states to prevent them from certifying their 2020 election results. Justice Thomas joined in Justice Alito's statement, who would have granted the motion to file the bill of complaint based on the Court's original jurisdiction. *Texas v. Pennsylvania*, 141 S. Ct. 1230, 208 L. Ed. 2d 487 (2020).

requested by the House Select Committee to Investigate the January 6th Attack on the United States Capitol with Justice Thomas being the single Justice on the Court who would have granted President Trump's application.[16] To the extent that any of Ms. Thomas's text messages to Mr. Meadows were included in the tranche of documents that President Trump was seeking to block from disclosure in that case, 28 U.S.C. § 455 would have mandated Justice Thomas's recusal, provided he had the requisite knowledge. Indeed, even had Justice Thomas known that there was a mere possibility that the documents at issue could have implicated his spouse, he would have faced a significant conflict of interest. Given his wife's damning connection to the January 6th insurrection and subsequent investigation that was the subject of this decision, Justice Thomas's status as the lone dissenter in this matter raises significant concerns about his ability to impartially opine on any issues related to the 2020 election or the attack on the Capitol.

Given his spouse's role in President Trump's efforts to overturn the 2020 presidential election, Justice Thomas's failure to recuse from these cases may have violated his 28 U.S.C. § 455 recusal obligations, and underscores the need for the Supreme Court to adopt its own Code of Conduct with formal recusal processes and meaningful enforcement mechanisms.

Because of the Court's heightened recusal concerns,[17] spousal conflicts of interest will continue to be a challenge for the Court unless and until they are fully addressed in a Supreme Court Code of Conduct. In particular, the Supreme Court's current ethical framework does not adequately address and resolve conflicts of interest that arise from a spouse's or significant partner's activities in pursuit of a particular political or ideological agenda. If a Justice's spouse or significant partner actively pursues such an agenda, the Justice's impartiality may reasonably be questioned and would necessarily trigger their recusal when the outcome of a case would have an impact on the spouse's political or ideological agenda.

In this regard, Justice Thomas must also recuse from the Court's upcoming affirmative action case, *Students for Fair Admissions v. President and Fellows of Harvard College*.[18] Ms. Thomas serves on the advisory board of an organization that recently filed an amicus brief in that case.[19] Unless he is recused, Justice Thomas's impartiality will reasonably be questioned and further undermine public confidence in the integrity of the Court's decision making. Similar ethical concerns would arise from Justice Thomas's participation in cases related to the upcoming 2024 presidential election, if Donald Trump runs again, in which case that election will likely be inextricably intertwined with Trump's

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[16] *Id.*
[17] *See* Chief Justice John G. Roberts, "2011 Year-End Report on the Judiciary," Dec. 31, 2011, https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.
[18] *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 20-1199 (U.S. Jan. 24, 2022).
[19] Jane Mayer, "Is Ginni Thomas a Threat to the Supreme Court," *New Yorker*, Jan. 31, 2022, https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court.

efforts to overturn the 2020 election, or if Ms. Thomas, once again, becomes actively engaged in strategy discussions with senior members of a presidential campaign.

The failure of Justice Thomas to recuse from the Court's past 2020 election cases exposes fundamental flaws in the Supreme Court's current ethical framework, which leaves recusal decisions largely within the discretion of the individual Justice - in this case, Justice Thomas - whose own "impartiality" under 28 U.S.C. § 455 is at issue. In this regard, there are existing models used by the Court that may be instructive when considering processes to include in a Supreme Court Code of Conduct to help the Court preserve its impartiality.[20]

To restore public confidence in the integrity of the Supreme Court's decision making, Justice Thomas must not only formally recuse from participation in future 2020 Election cases, but the Supreme Court must adopt a Code of Conduct that effectively implements 28 U.S.C. § 455, including by fully addressing spousal and other conflicts of interest that arise under the statute and setting forth formal recusal processes and meaningful enforcement mechanisms.

CREW greatly appreciates your prompt attention to this urgent matter of national importance.

Sincerely,

Noah Bookbinder
President

cc: Justice Clarence Thomas

[20] For example, in 1991 the Court adopted a resolution that requires a Justice who "desires to receive compensation for teaching [to] obtain the prior approval of the Chief Justice. Should the Chief Justice deny approval, the request may be renewed to the Court and granted by it. If the Chief Justice desires to receive compensation for teaching, he must obtain the prior approval of the Court." U.S. Supreme Court Resolution, Jan. 18, 1991, https://www.citizensforethics.org/wp-content/uploads/2022/03/1991_Resolution.pdf