

**Congress of the United States**  
Washington, DC 20510

April 16, 2021

The Honorable Amy Coney Barrett  
Associate Justice  
Supreme Court of the United States  
One First St. NE  
Washington, D.C. 20543-0001

The Honorable Scott S. Harris  
Clerk of the Court  
Supreme Court of the United States  
One First St. NE  
Washington, D.C. 20543-0001

Dear Justice Barrett:

During your recent confirmation proceedings, you were asked in written questions whether you would recuse yourself from *Americans for Prosperity Foundation v. Rodriguez (Becerra)*, No. 19-251, a case then pending on the Court’s certiorari docket. You declined to do so, answering that “[a]s a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals,” and that “[s]uch questions can only be answered through the judicial process.”<sup>1</sup> Because the Supreme Court has since granted the case, these questions are no longer abstract or hypothetical, so we renew the request.

*AFPF* concerns the constitutionality of California’s requirement that certain nonprofits confidentially provide their IRS Form 990 Schedule B, which identifies their major donors, to the State’s Attorney General. Americans for Prosperity Foundation (AFPF)—the 501(c)(3) arm of Charles Koch’s right-wing political advocacy group Americans for Prosperity (AFP)—has challenged the disclosure requirement. It now seeks from the Court a broad constitutional ruling allowing it to keep its donors’ identities secret.

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<sup>1</sup> Nomination of Amy Coney Barrett to the U.S. Supreme Court, Responses to Questions for the Record from Senator Sheldon Whitehouse Nos. 30-35, <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf>.

“Just minutes after” your nomination by former President Trump last September,<sup>2</sup> when *AFPF* was pending at the Court, AFP announced that it was mounting a “Full Scale Campaign to Confirm Judge Amy Coney Barrett.”<sup>3</sup> AFP described its campaign as “a significant national ad campaign focusing on eleven key states to scale its activists’ efforts to urge their senators to confirm Judge Amy Coney Barrett to the Supreme Court.”<sup>4</sup> Its “national campaign . . . included a robust mix of targeted direct-mail, layered digital ads, and other tactics.”<sup>5</sup> Though AFP refused to disclose exactly how much it planned to spend on this campaign blitz, it confirmed that “it would be in the seven figures.”<sup>6</sup>

On January 8, 2021, just over two months after your confirmation, the Supreme Court granted *AFPF*’s cert petition.

Statute, constitutional case law, and common sense all would seem to require your recusal from *AFPF* after AFP’s “full scale campaign to confirm” your nomination. 28 U.S.C. § 455(a) provides: “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned,” and 28 U.S.C. § 453, the judicial oath of office, requires all judges to swear that they will administer justice “without respect to persons.” Critically, the standard under the federal recusal statute is an objective one. The question is not whether you believe you can be impartial in ruling on a case brought by the corporate sibling of AFP, the group that spent millions of dollars in support of your nomination to the Court. It is whether an “objective, informed” member of the public “could reasonably question” your impartiality in this case.<sup>7</sup>

*Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), considered whether the Constitution’s guarantee of due process required West Virginia Supreme Court Justice Brent Benjamin to recuse himself from an appeal of a money judgment entered against a coal company after the coal company’s chief executive spent \$3 million to help Justice Benjamin win election to the court. The U.S. Supreme Court ruled that Justice Benjamin’s participation in the case violated the Due Process Clause of the Fourteenth Amendment. *Caperton* concluded 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 . . . when the case was pending or imminent.”<sup>8</sup>

In this matter, AFP, by its own pronouncements, played a significant and disproportionate role campaigning for your confirmation to the Supreme Court while its corporate sibling’s case was

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<sup>2</sup> Americans for Prosperity, *AFP Statement on the Senate Confirmation of Justice Amy Coney Barrett* (Oct. 26, 2020), <https://americansforprosperity.org/afp-statement-on-the-senate-confirmation-of-justice-amy-coney-barrett/>.

<sup>3</sup> Americans for Prosperity, *Press Release: AFP Mounts Full Scale Campaign to Confirm Judge Amy Coney Barrett* (Sept. 26, 2020), <https://americansforprosperity.org/afp-mounts-full-scale-campaign-to-confirm-judge-amy-coney-barrett/>.

<sup>4</sup> *Id.*

<sup>5</sup> *AFP Statement*, *supra* note 2.

<sup>6</sup> Alex Gangitano, *Barrett ad war exceeds Kavanaugh fight*, THE HILL (Sept. 30, 2020), <https://thehill.com/business-a-lobbying/business-a-lobbying/518850-advocacy-groups-spend-big-on-barrett-fight>.

<sup>7</sup> Charles G. Geyh, *JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW* (2D ED.) at 18-19 (quoting *United States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000)).

<sup>8</sup> 556 U.S. at 884.

pending and imminent. “Based on objective and reasonable perceptions,” there is no reasonable difference between AFP and AFPP, and there is thus a *Caperton*-level “serious risk of actual bias.”

At a minimum, there should be a public explanation as to why you think recusal is not required under federal law, since your participation in the case on these facts would appear to both conflict with 28 U.S.C. § 455 and effectively overturn *Caperton*. Understanding this determination will also aid Congress in its ongoing consideration of judicial ethics and transparency rules.

The American people are alarmed about the seemingly dominant influence of special interests on our politics and government. And the AFP/AFPP operation’s “full scale campaign” for your confirmation makes plain that our judiciary is a target of this massive influence apparatus. Now, in *AFPP*, the Court takes up an important case that squarely implicates the power of big special interests to exercise their influence from behind veils of secrecy.<sup>9</sup>

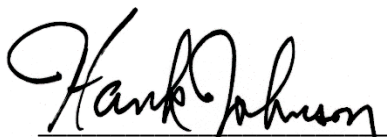
We hope you will consider seriously and address publicly the question of recusal in this case. Thank you for your attention to this.



SHELDON WHITEHOUSE  
United States Senator



RICHARD BLUMENTHAL  
United States Senator



HENRY C. “HANK” JOHNSON, JR.  
Member of Congress

CC: Hon. John G. Roberts, Chief Justice

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<sup>9</sup> See *Americans for Prosperity Foundation v. Rodriguez*, No. 19-251, Br. of Amici Curiae U.S. Senators in Support of Respondent, [https://www.supremecourt.gov/DocketPDF/19/19-251/173478/20210331123251215\\_19-251%20Brief%20of%20Amici%20Curiae.pdf](https://www.supremecourt.gov/DocketPDF/19/19-251/173478/20210331123251215_19-251%20Brief%20of%20Amici%20Curiae.pdf).