Case No. S20M1012

IN THE SUPREME COURT
STATE OF GEORGIA

JOHN BARROW,

Appellant/Petitioner,

v.

BRAD RAFFENSPERGER, in his official capacity as Georgia Secretary of State,

Appellee/Respondent.

CASE NO.: S20M1012

COURT OF APPEALS
CASE NO.: A20E0039

APPEAL TAKEN FROM CIVIL ACTION CASE NO.: 2020CV334031

MOTION FOR RECONSIDERATION

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Comes now Appellant/Petitioner John J. Barrow ("Barrow"), and files this Motion for Reconsideration and states as follows:

INTRODUCTION

In 174 years of reported decisions by the Georgia Supreme Court, Petitioners have found only two instances where the entire Georgia Supreme Court recused itself from deciding a case. Both of those cases involved issues relating to a fellow sitting Justice. In both cases EACH AND EVERY Justice recused, fully understanding that the cases before them required reviewing the status or conduct of someone who worked beside them daily and with whom they jointly sat in judgment of others. These Justices recused because to do otherwise created an appearance of impropriety—regardless of whether there was actual impropriety—that would sully any decision that they rendered.

Earlier this week, five Justices of this Court—enough to constitute a majority in any ordinary case—followed this long tradition of placing the reputation of the Court beyond any shadow of politics or partisanship. Incredibly, three members of this Court chose to discard the Court's long-held tradition and refused to recuse, despite being respectfully asked to do so by a litigant who sought to run for a seat occupied by one of their fellow Justices and who, in his petition, raises substantial issues relating to the actions of that current member of the Court. Worse yet, these three Justices who refused to recuse did so in contravention of well-established

guidelines, and without any explanation to the public they serve for this drastic departure from precedent.

Moving to recuse a sitting Justice of the State's highest court is not a pleasant task for any lawyer. Having to move to reconsider the refusal of three Justices to recuse and point out the great departure which they have taken from the traditions of the Court is even more unpleasant. This, however, is the duty of counsel: to assure that this case is fairly decided without fear, favor, or even the appearance of impropriety. As the great British barrister Thomas Erskine once noted, the advocate must "forever and at all hazards assert the dignity, independence and integrity of the…Bar; without which, impartial justice, the most valuable part of our…Constitution can have no existence." Accordingly, counsel feels compelled to file this Motion for Reconsideration and, again, ask that the entire Court recuse from this case.

As grounds for the Motion for Reconsideration Appellant/Petitioner Barrow shows as follows:

1.

On March 19, 2020, Appellant/Petitioner Barrow filed a Motion to Disqualify or Recuse All Justices of the Supreme Court of Georgia from participating in or considering Barrow's appeal, pursuant to Supreme Court Rule 26 and the Code of Judicial Conduct.

2.

In the Court's Opinion issued on March 23, 2020, Chief Justice Melton, Presiding Justice Nahmias, and Justice Warren denied the motion without offering any justification, explanation, or support.

3.

The Justices' refusal to recuse themselves goes against clear Supreme Court precedent. There have been at least two circumstances in which all of the members of this Court have recused or disqualified themselves at the same time. In *Smith v. Miller*, 261 Ga. 560, 561 (1991),[1] all of the seated justices of this Court declined to participate because one of the litigants was the then-serving Presiding Justice, and "the three current officers and the four immediate past presidents of the Council of Superior Court Judges of Georgia were designated to hear and dispose of all matters" raised therein. In *Banks v. Benham*, 270 Ga. 91 (1999), all seven then-current members of this Court disqualified themselves and were replaced by a number of Superior Court judges.

4.

Moreover, as the United States Supreme Court has held, due process may require recusal, "Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker

[1] Some may consider this a judicial irony, but this case involved a judicial pension.

is too high to be constitutionally tolerable.'" *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 72 (2009) (*citing Withrow v. Larkin*, 421 U.S. 35, 47, (1975)).[2]

5.

In the past, this Court has vigorously defended the independence of the judiciary as it relates to the recusal of Superior Court judges. In *Mayor & Alderman of City of Savannah v. Batson-Cook Co.*, 291 Ga. 114, 114 (2012), the Court stressed the importance of judicial impartiality:

> 'All parties before the court have the right to an impartial judicial officer.' *Stephens v. Stephens*, 249 Ga. 700, 702, 292 S.E.2d 689 (1982). The issue of judicial disqualification can rise to a constitutional level since '[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 (1955). *See also Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 129 S.Ct. 2252 (2009). Judicial integrity is 'a state interest of the highest order' because the power and prerogative of a court to resolve disputes rests upon the respect accorded by citizens to a court's judgments which, in turn, depends upon the issuing court's absolute probity. *Id.* at 889, 129 S.Ct. 2252. 'If the public lacks confidence in the impartiality of judges, or worse, refuses to comply with judicial decisions voluntarily, the notion that 'we are a government of laws' would necessarily collapse.' Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 B.Y.U. L. Rev. 943, 968. It is vital to the functioning of the courts that the public believe in the absolute integrity and impartiality of its judges (*see Smith v. Guest Pond Club*, 277 Ga. 143, 146, 586 S.E.2d 623 (2003)), and judicial recusal serves as a linchpin for the underlying proposition that a court should be fair and impartial. 2011 B.Y.U. L. Rev., *supra* at 949.

[2] This case served as the basis for John Grisham's novel, *The Appeal*.

6.

Surely the Canons and Rules of the Georgia Code of Judicial Conduct apply with equal weight to Supreme Court Justices as they do Superior Court judges.

7.

Canon 2 of the Georgia Code of Judicial Conduct expressly requires, "Judges shall perform the duties of judicial office impartially, competently, and diligently."

8.

Rule 2.11 clearly states:

> (A) Judges shall disqualify themselves in any proceeding in which their *impartiality* might reasonably be questioned, or in which:
>
> > 1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal *knowledge* of disputed evidentiary facts concerning an *impending matter* or a *pending proceeding.*

9.

Commentary 1 to Rule 2.11 explains, "Judges are subject to disqualification whenever their impartiality might reasonably be questioned, regardless of whether any of the specific items in Rule 2.11(A) apply."

10.

As thoroughly detailed in Appellant/Petitioner Barrow's Motion, several factors raise questions about the appearance of impartiality in this case:

- Given the significant legal issues underlying this case, there is a high likelihood that further litigation may arise in federal court. In that circumstance, it is foreseeable that Justices may be called to testify about their conversations regarding Justice Blackwell's notification of his intent to resign with: Justice Blackwell (who himself stated that the timing of his intended resignation related to preserving the order of the Court); Governor Kemp or his staff; or Secretary Raffensperger or his staff. This constitutes personal knowledge of disputed facts concerning an impending proceeding as described in Rule 2.11(A).

- The fact that Justice Blackwell continues to occupy the position of Associate Justice of the Supreme Court alongside the other Justices raises the likelihood that their "impartiality might be reasonably questioned."

- The Court's Order specifically raises the question of whether Justice Blackwell's intended resignation could be "lawfully withdrawn, rescinded, or revoked." It is, therefore, reasonable to question whether the Justices can be impartial as their decision impacts their current colleague.

- The Court has already issued a press release stating as fact, "Governor Brian Kemp will appoint [Justice Blackwell's] replacement." *See* Press Release, Justice Blackwell to Resign in November, Ga. Sup. Ct., Feb. 28, 2020. The press release constitutes a prior determination or a pre-judgment of this case by the Court and reflects a "bias in favor of" Secretary Raffensperger.

- The Attorney General's Office represents one Justice of this Court in the ongoing proceeding where the Justice is not named individually. The Attorney General likewise represents the other Justices in such proceedings. Therefore, a basis for disqualification exists due to the other Justices' affiliation with counsel for the adverse party, Secretary Raffensperger.

11.

Commentary 2 to Rule 2.11 adds, "Judges should disclose on the record, or in open court, information the court believes the parties or their lawyers might consider relevant to the question of disqualification, even if they believe there is no legal basis for disqualification."

12.

If the facts are such that Chief Justice Melton, Presiding Justice Nahmias, or Justice Warren believes no appearance of impartiality exists, the Court should likewise disclose these on the record.

13.

Not only has this Court reversed Superior Court judges' failure to recuse themselves, the Court has also required reassignment of this important decision to *different* judges. In *Mayor & Alderman of City of Savannah*, the Court directed that the case be remanded to the Superior Court of Troup County for disposition of the motion to recuse by a *different* judge.

14.

Similarly, in *Post v. State*, 298 Ga. 241 (2015), the Court held that a Superior Court Judge "erred in failing to refer their recusal motions for reassignment to another judge."

15.

Again, the same rules that apply to Superior Court judges' ability to judge their appearances of impartiality should apply here. To preserve the public's confidence in the impartiality of the decision in this case, Chief Justice Melton, Presiding Justice Nahmias, and Justice Warren should recuse.

16.

Finally, as is apparent by the decision of a majority of the Court, including Justices Boggs, Peterson, Bethel, and Ellington, not to participate in this case and the selection of substitute judges to hear and decide the case, "the rule of necessity" referenced in Commentary 3 to Rule 2.11 that might otherwise override the rule of disqualification is obviously not an issue in this case.

CONCLUSION

Wherefore, for the reasons stated herein, Appellant/Petitioner John J. Barrow respectfully requests reconsideration of the recusals of Chief Justice Melton, Presiding Justice Nahmias, and Justice Warren.

Respectfully submitted this 24th day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2020, I have served the foregoing **MOTION FOR RECONSIDERATION** upon the following counsel of record by filing a copy thereof with the Clerk of the Court using the Court's electronic filing system, as permitted by Supreme Court of Georgia Rule 13, as well as by emailing a copy to:

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