Nos. 11-393 and 11-400

In The Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, Secretary of Health & Human Services, et al.,

Respondents.

FLORIDA, et al.,

Petitioners,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE FREEDOM WATCH IN SUPPORT OF NEITHER PARTY AND ON ISSUE OF RECUSAL OR DISQUALIFICATION OF JUSTICE ELENA KAGAN

LARRY KLAYMAN, ESQ.
Chairman and General Counsel
FREEDOM WATCH
2020 Pennsylvania Ave., N.W., Suite 345
Washington, D.C. 20006
leklayman@yahoo.com
(310) 595-0800

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE AMICUS CURIAE

Freedom Watch is a public interest group dedicated to preserving freedom, pursuing individual rights and civil liberties, while fighting for ethics in government and the judicial system. As part of its goal to remain constant to the principles of the Founding Fathers, Freedom Watch is dedicated to ensuring the rights of all citizens through action, frequently with legal cases and other means. With the passage of the Patient Protection and Affordable Care Act of 2010 (the Act), the federal government ("government") is seeking to intrude into citizens' rights, regulating private and intimate aspects of an individual's life without regard to the Constitution. In doing so, the government is expanding the scope of its limited and enumerated powers to a level never before seen. With the majority of the citizens opposed to the Act, and many concerned with the size and power of the government, Freedom Watch is required to speak on behalf of those unable to do so. As such, consistent with its mission, Freedom Watch seeks to provide the means and mechanism to protect American citizens' rights in this matter of great public interest.[1]

[1] Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

SUMMARY OF ARGUMENT

This brief seeks to request the recusal and, if necessary, disqualification of Justice Elena Kagan in the decision of the constitutionality of the Patient Protection and Affordable Care Act of 2010 (the Act). Justice Kagan served in her former role as Solicitor General of the United States, whereby she participated in crafting a defense for the constitutionality of the Act. She therefore acted as counsel to the drafters in developing a strategy to defend the law. This role should disqualify Justice Kagan under 28 U.S.C. §455(a) because her "impartiality might reasonably be questioned." Unlike allegations of partiality concerning Justice Clarence Thomas, Justice Kagan's involvement is not a matter of another member of her family playing a partisan role concerning the Act. Her past involvement is personal and direct. The case to recuse or disqualify Justice Kagan is thus much stronger.

Furthermore, statements made by Justice Kagan in a series of released emails clearly demonstrate Justice Kagan's encouragement and delight at the passage of the Act. These statements, at the very least, demonstrate Justice Kagan's personal bias in favor of the Act. Personal bias is grounds for disqualification under 28 U.S.C. §455(b)(1). In addition, her involvement in crafting a defense disqualifies her since she served as "counsel, advisor, or material witness concerning the proceeding" under 28 U.S.C. §455(b)(3). Finally, the Due Process Clause of the Fifth Amendment also mandates that in cases with

extreme fact patterns such as this one the probability of actual bias rises to an unconstitutional level, requiring Justice Kagan's recusal and/or disqualification.

Recent comments by Chief Justice John Roberts in his Annual Report on the State of the Federal Judiciary, which seek to defend Justice Kagan and clearly state that she should not recuse herself, are an affront the judicial system and the American people, who depend on judges to be neutral, unbiased and independent. They underscore why the nation has lost trust in government, and why movements like the Tea Party and Occupy Wall Street have sprung up from all ends of the political spectrum. Simply put, "We the People" are fed up and have already entered into what is in effect a Second American Revolution because judges and other government officials behave as if they are "above the law," in effect nobility who can do as they please. This amicus brief, which addresses the recusal or disqualification of Justice Kagan, is even more important to preserving the ethical foundations of our Republic than the underlying issues of the constitutionality of the Act. Without a neutral, unbiased Supreme Court, there simply is no rule of law and any decision concerning the Act will be seen as illegitimate.

Regrettably, and outrageously, before even considering these recusal and disqualification issues, Chief Justice Roberts prejudged these serious issues and stated in his annual report that Supreme Court

justices need not follow the recusal and disqualification ethics rules that pertain to other federal judges and that these ethics rules may be unconstitutional. Incredibly, and to add insult to injury, he added that "(t)he Supreme Court does not sit in judgment of one of its own members. . . ." This admission, among others in the report, says it all and ironically underscores why recusal or disqualification of Justice Kagan is necessary to preserve the integrity of the Supreme Court for the citizens of the United States. The Court does not belong to either Chief Justice Roberts or any other justice; it belongs to "We the People." And, if the justices cannot adhere to the rule of law, which includes judicial ethics, then the Court must be stripped clean of this lawlessness by removing and prosecuting, through whatever legal means are available, those justices who refuse and fail to play by the same rules that they hold citizens and others accountable for.

In short, the comments of Chief Justice Roberts are an affront to the high ethical standards of our Founding Fathers and amount to a subversion of our laws. They are disgraceful at best and at worst amount to obstruction of justice. They are the result of someone who became Chief Justice by first ingratiating himself to the "Washington establishment," and now seeks to act as the Chief Justice not just of the Court, but of this same establishment – which for decades has pushed the nation to the brink of revolution by representing mostly its own interests, perpetuating and consolidating its power and selling out

"We the People." This is why in large part the nation is in a deep crisis; the majority of Americans have little if any respect for either the Supreme Court or our judiciary as a whole, notwithstanding their current similar disdain for the other two branches of government.

The situation is as bad as in 1776 when "We the People" declared independence from King George III and the British Crown. In the 236 years since the start of the first American Revolution, our current ruling class, which is not of the mettle of our Founding Fathers, – who pledged their sacred honor, fortunes and risked their lives to create a free nation – has come full circle. Today, the Supreme Court and the other two branches of government have assumed the role of a "royalty" – in some ways worse than even King George III – who feel free to ignore the legitimate interests and grievances of "We the People," because they believe they are a "protected class" and above the law.

The issue of recusal and disqualification is of paramount importance to this case. The Supreme Court, the highest court of the land, must maintain a level of integrity that is beyond reproach. If Justice Kagan refuses to recuse herself in this matter, Freedom Watch demands on behalf of the American people that this Court disqualify her from the proceedings. The Supreme Court is the only court that has no mechanism or governing body to enforce ethics violations, and it is thus up to the justices themselves to ensure that there is not even the slightest hint or

appearance of partiality. If these justices will not police themselves, they have lost all ethical and legal authority to sit on the Supreme Court.

ARGUMENT

Before being appointed to the Supreme Court, President Barack Obama had nominated Justice Elena Kagan to serve as Solicitor General of the United States, a position designated with the task of supervising and conducting government litigation before the Supreme Court. Indeed, the website of the Office of Solicitor General even indicates "Virtually all such litigation is channeled through the Office of the Solicitor General and is actively conducted by the Office."

While serving as Solicitor General, Justice Kagan took significant part in health care reform issues and the crafting of the Act, participating even by her own concession in at least one meeting in which what became the Act was discussed. It is also believed that before the Act was even passed, the Department of Justice had, in fact, been meeting to develop a strategy for defending the law from constitutional attacks. Involved in these efforts was Justice Kagan.

In addition to receiving privileged internal strategy with regard to the constitutionality of the Act, Justice Kagan also expressed her favoritism towards the law's passage through several exchanges and emails.

Given her extensive participation in the passage of the Act in addition to her incriminating exchanges and emails evidencing her favoritism towards the constitutionality of the law, it is clear that Justice Kagan should recuse herself under 28 U.S.C. §455 and the Constitution of the United States, or otherwise be disqualified.

I. SECTION 455(a) OF TITLE 28 REQUIRES JUSTICE KAGAN'S RECUSAL OR DISQUALIFICATION

Amicus, Freedom Watch, respectfully requests that Justice Elena Kagan recuse herself from the case pursuant to 28 U.S.C. §455, or be disqualified. §455 (a) of Title 28 United States Code mandates that "any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceedings in which his impartiality might reasonably be questioned." The significant aspect of §455(a) is not the reality of bias or prejudice but its appearance. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000), citing *Liteky v. United States*, 510 U.S. 540, 548 (1994). The recusal or disqualification inquiry must be made from the perspective of a reasonable observer who is informed of all surrounding facts and circumstances. *Cheney v. United States Dist. Court*, 541 U.S. 913, 924, citing *Microsoft Corp.*, 530 U.S. at 1302. Furthermore, as this Court has recognized,

> Subsection (a) was drafted to replace the subjective standard of the old disqualification statute with an objective test. Congress

> hoped that this objective standard would promote public confidence in the impartiality of the judicial process by instructing a judge, when confronted with circumstances in which his impartiality *could reasonably be doubted*, to disqualify himself and allow another judge to preside over the case.

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 870 (1988) (emphasis added). The appearance of Justice Kagan's participation in this case must therefore be seen objectively, from the perspective of a reasonable observer who is informed of all surrounding facts and circumstance.

Justice Kagan's employment as the Solicitor General, the person appointed specifically to represent the government in the Supreme Court, is an objective indicator of a conflict of interest within the current lawsuit. Thus, a reasonable person could reasonably question Justice Kagan's impartiality. Freedom Watch, speaking on behalf of the American people, perceives this situation as another in which there is, at the very least, an *appearance* of impartiality. This appearance of partiality should cause Justice Kagan to recuse herself or be disqualified from this decision.

II. JUSTICE KAGAN'S RECUSAL OR DISQUALIFICATION IS SIMILARLY MANDATED UNDER 28 U.S.C. §455(b)(1)

Additionally, §455(b) requires recusal whenever a judge "has a personal bias or prejudice concerning a

party, or personal knowledge of disputed evidentiary facts concerning the proceeding." This Court has further elaborated that §455(b)(1) requires recusal where the official has "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree." *Liteky*, 510 U.S. at 550. Before being appointed to the Supreme Court, Justice Kagan served as the U.S. Solicitor General. While it has long been insinuated that Justice Kagan participated in discussions regarding President Obama's health care legislation, documents have recently come to light unequivocally evidencing Justice Kagan's strong support of the Act. These incriminating documents, in pertinent part, are listed below:

- On October 13, 2009, there was an exchange between Justice Kagan and former Deputy Solicitor General Neal Katyal. Katyal informs Justice Kagan, "We just got Snowe on health care." (referring to Senator Olympia Snowe).
- On March 21, 2010, there was an email from Justice Kagan to then senior counselor for Access to Justice Laurence Tribe: "I hear they have votes Larry!! Simply amazing . . . " Tribe then responded with, "So healthcare is basically done! Remarkable."
- On March 16, 2010, there was an email from Justice Kagan to David Barron, asking if he had seen an article by Michael McConnell

> published in the Wall Street Journal that discussed a strategy by Democrats to "Deem ObamaCare into law without voting." Justice Kagan writes in the subject line "Health care q." Barron responded with, "YES, HE IS GETTING THIS GOING."

Exhibit 1. In objectively examining these statements and the circumstances surrounding this case, there is no doubt that a reasonable person would question the blatant partiality of Justice Kagan. Significantly, this case seeks to determine the constitutionality of such legislation, particularly the individual mandate provision. Moreover, the issue of severability will also be examined, deciding the survivability of the rest of the Act if the provision were to fail. Justice Kagan has not been in the least bit subtle in her opinion regarding the Act, brazenly displaying her support of the legislation. Thus, judicial fairness mandates recusal or disqualification in order to preserve impartiality and the appearance of impartiality.

III. JUSTICE KAGAN'S RECUSAL OR DISQUALIFICATION WOULD ALSO BE MANDATED UNDER 28 U.S.C. §455(b)(3)

While serving as the Solicitor General, Justice Kagan was intimately involved with health care reform issues, participating, by her own concession, in at least one meeting in which the healthcare legislation was discussed. Perhaps most damning, however, is that Justice Kagan received privileged internal strategy about the case regarding the constitutionality of

the Act, indicative of her intensive participation. This is evidenced by the Obama Administration's redacted portions of Justice Kagan's emails under the Freedom of Information Act's exemption that specifically prevents disclosure of government deliberations.

Section 455(b)(3) of Title 28 requires recusal or disqualification when a judge, justice, or magistrate previously employed as government employee served as "counsel, advisor, or material witness concerning the proceeding." Justice Kagan's position as Solicitor General clearly serves as governmental employment. In this capacity, Justice Kagan served as "counsel, advisor, or material witness" when she received privileged information and even aided in the crafting of a legal defense to the constitutionality of the Act.

This same disqualification should apply even if, as Justice Kagan contends, she had no active role in the defense of the case. Indeed, this Court has previously held that "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of laws has always endeavored to prevent *even the probability* of unfairness.'" *Withrow v. Larkin,* 421 U.S. 35, 47 (1975), citing *In re Murchison,* 349 U.S. 133, 136 (emphasis added). As this Court stated in *Withrow*, "even the probability of unfairness" was enough to disqualify a justice. Here, Justice Kagan's participation in her role as Solicitor General goes far beyond creating a simple "probability" and her personal statements during that time make it rather probable that unfairness exists if she were to rule in this matter.

As such, given her prior position as Solicitor General, the legal advisor and counsel to the President, in addition to her incriminating exchanges and emails, which evidence her strong support of the health care law, Justice Kagan's impartiality is more than questionable: her bias is clearly established. For these reasons, 28 U.S.C. §455 requires Justice Kagan's recusal in this case.

IV. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRES RECUSAL OR DISQUALIFICATION WHEN THERE IS AN UNCONSTITUTIONAL PROBABILITY OF BIAS

In addition to the claims brought under 28 U.S.C. §455, Justice Kagan's recusal is also mandated by the Due Process Clause of the Fifth Amendment because of the unconstitutional probability of bias that exists because of her involvement as Solicitor General of the United States.

Due Process disqualification is reserved for "extraordinary situation[s] when the Constitution requires recusal." *Caperton v. A. T. Massey Coal Co.,* 129 S. Ct. 2252 (2009). This Court further elaborated in *Caperton* that "[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the other parties' consent – a man chooses the judge in his own cause." *Id.* at 2256. The Patient Protection and Affordable Care Act of 2010 was President Obama's signature legislation. He

championed for the Act and signed it with great fanfare. Yet many opposed this Act and President Obama's initiatives surely suspected it may head to this Court. Thus, by nominating a justice who had been a fellow proponent of the legislation, President Obama was choosing "the judge in his own cause." This creates, at the very least, an appearance of a quid pro quo, with the public having a reasonable belief that President Obama selected Justice Kagan in exchange for her ruling on the constitutionality of the Act.

As the court noted in *Caperton*, when extreme fact situations arise the Due Process Clause of the Fourteenth Amendment acts to disqualify a biased decisionmaker. While *Caperton* arose out of a case that involved one of the states, and therefore utilized the Fourteenth Amendment, the case before the court now arises from the actions of the federal government. Thus, in the case at hand, the Fifth Amendment's Due Process Clause should serve to disqualify Justice Kagan in much the same way that the Fourteenth Amendment did in *Caperton*. The standards for judicial fairness should be the same regardless of which court is hearing the case.

President Obama's nomination of Ms. Kagan involves the president, the chief executive, and a future member of the highest court in our land. Thus, the head positions of two branches of our government are now involved. Furthermore, the Patient Protection and Affordable Care Act is poised to control one sixth of the U.S. economy and significantly alter how

healthcare is provided to a large majority of the American People.

Justice Kagan's involvement in her role as Solicitor General, as well as her statements championing the passage of the Act are clearly more than sufficient to give rise to a recusal or disqualification. These facts surely arise to the level of "extraordinary situation" that was required in order for the Constitution to require recusal. The stakes of this case are so high that there should not be even the slightest hint of partiality. The American people will not stand for a biased ruling in a case of such magnitude.

V. THIS COURT SHOULD SEEK TO DISQUALIFY JUSTICE KAGAN IF SHE DOES NOT RECUSE HERSELF FROM THE PROCEEDINGS

The integrity of this and every other court must be protected. The Congress has provided multiple means to ensure mechanisms exist to uphold such a task. The first of these is 28 U.S.C. §144, which on its face *requires* disqualification once a party files a timely and sufficient affidavit, and certifies that the motion is filed in good faith. Specifically, §144 states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed

> no further therein, but another judge shall be assigned to hear such proceedings.

28 U.S.C. §144. Indeed, district court judges are to automatically "proceed no further" as soon as this low threshold of a good faith affidavit is met. By requiring such a low threshold, Congress made the disqualification of a biased judge easily obtainable for even the ordinary citizen.

This was not Congress' only actions in hoping to preserve the integrity and utmost fairness in our courts of law. Section 455 of Title 28, discussed thoroughly above, was revised in 1974 to broaden the powers of the law as to ensure fairness in all levels of our court system. The revised §455 expanded upon Section 144 as it was made "applicable to *all* justices, judges, and magistrates (and not just district judges)" and "placed the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit." *Liteky v. United States*, 510 U.S. at 548.

Unlike every other court in this land, the Supreme Court is the only one that does not have an ethics mechanism to ensure the integrity of the Court. It is this integrity that the justices of this court must serve to protect, and in the absence of an ethics mechanism the justices themselves must be the ones to ensure that there is no question as to the impartiality of the court.

The issue of impartiality in this case is just as important, if not more so, than the issues actually

being heard. The strength of this Court's rulings all stem from the high regard that the citizens of the country hold in our judicial system. If the partiality of this Court comes into contention on this or any other decision, it is the Supreme Court as an institution that will suffer. Thus, in order to prevent further erosion of the integrity of the Court, this Court must seek to disqualify Justice Kagan if she does not recuse herself.

These days, the great majority of American people – well over 80 percent according to recent New York Times and USA Today Polling – have expressed a deep distrust of government, including the judicial system. The Supreme Court, by disqualifying Justice Kagan from the case, will help restore the people's trust in our institutions. And, if the justice is not disqualified, the Act, if held constitutional, will always be seen by "We the People" as a compromised and illegitimate piece of legislation.

CONCLUSION

For all of the reasons set forth above, Justice Kagan has demonstrated an extra-judicial bias and prejudice and must respectfully recuse herself or be disqualified. The people must not lose faith in its judicial institutions, which were meant in large part to protect them from the tyranny of the other two branches of government. Justice Kagan's recusal in this matter is required under 28 U.S.C. §455(a)

because her impartiality might reasonably be questioned. Furthermore, §455(b)(1) requires Justice Kagan's recusal or disqualification because of the personal bias demonstrated in her emails. In addition, §455(b)(3) requires Justice Kagan's recusal or disqualification because her role as Solicitor General made her an employee of the government, in which capacity she served as "counsel, adviser or material witness" to the Act which is now being heard in this Court.

Finally, the Due Process Clause of the Fifth Amendment requires the recusal or disqualification of Justice Kagan since her involvement in such a significant case creates the extreme fact pattern that is required for recusal or disqualification.

Since the Supreme Court is the highest court of this land, and is not answerable to a "higher authority," Freedom Watch submits that the Court itself must disqualify Justice Kagan if she does not recuse herself. The United States boasts that our court system is the greatest in the world. In order to maintain the integrity that is required to keep this Court above all reproach, Justice Kagan must not sit for this decision particularly in these difficult times. To do so would risk irreparably compromising this institution devised and crafted by our Founding Fathers to protect "We the People."

Freedom Watch respectfully requests ten (10) minutes of Oral Argument.

Respectfully submitted,

LARRY KLAYMAN, ESQ.
Chairman and General Counsel
FREEDOM WATCH
2020 Pennsylvania Ave., N.W., Suite 345
Washington, D.C. 20006
leklayman@yahoo.com
(310) 595-0800

Counsel for Amicus Curiae January 6, 2012

EXHIBIT 1

[redacted]

From: Katyal, Neal
Sent: Tuesday, October 13, 2009 1:06 PM
To: Kagan, Elena
Subject: RE: At some point soon

we just got snowe on health care

From: Kagan, Elena
Sent: Tuesday, October 13, 2009 12:55 PM
To: Katyal, Neal
Subject: RE: At some point soon

In person. I'll call a meeting when I return.

From: Katyal, Neal
To: Kagan, Elena
Sent: Tue Oct 13 12:43:00 2009
Subject: At some point soon

We should talk also about whether to extend the offer to [redacted]. I'm definitely in favor of this, and doing it sooner will be good so that we don't have much of a gap. I also worry that he might be looking elsewhere since he seemed ready to leave his current position during the interviews. If you are in agreement, we could probably do this conversation over email with the other deputies to make sure they are on board (it sure sounded like they were in our August hiring meeting), or we can do it in person at a future meeting of us all.

N

From: Barron, David
Sent: Tuesday, March 16, 2010 1:40 PM
To: Kagan, Elena
Subject: RE: Health care q

YES – HE IS GETTING THIS GOING.

From: Kagan, Elena
Sent: Tuesday, March 16, 2010 1:06 PM
To: Barron, David
Subject: Health care q

Did you seee michael mcconnell's piece in the wsj?

[redacted]

From: Elena Kagan [redacted]
Sent: Sunday, March 21, 2010 11:04 PM
To: [redacted]; Larry Tribe; Elena Kagan
Cc: [redacted]; Henthorne, Betsy L. (SMO)
Subject: Re: fingers and toes crossed today!

I can do April 12

From: [redacted]
Date: Sun, 21 Mar 2010 23:00:58 -0400
To: Larry Tribe[redacted] ; [redacted]
Cc: [redacted]
Subject: RE: fingers and toes crossed today!

[redacted] would be available on April 7 or 12. Look forward to hearing from you regarding what works best for the rest of the group.

Best,
[redacted]

[redacted]

From: Larry Tribe [mailto[redacted]]
Sent: Sunday, March 21, 2010 5:06 PM
To: ekagan[redacted]
Cc: [redacted]
Subject: RE: fingers and toes crossed today!

So health care is basically done! Remarkable. And with the Stupak group accepting the magic of what amounts to a signing statement on steroids!

Re dinner, I now remember the place you'd suggested back in December: Founding Farmers. I still like the name and don't recall why I'd thought the place in the Mandarin would be worth trying. So how about our going to Founding Farmers with you and [redacted]? I'd suggest April 4, 7, 9, 12 and 23 as possible dates. I don't have [redacted] [redacted] email but I'm hoping the [redacted] email will reach her indirectly and am also copying her assistant [redacted] just in case.

From: Elena Kagan [redacted]
Sent: Sunday, March 21, 2010 11:39 AM
To: Larry Tribe
Subject: Re: fingers and toes crossed today!

I hear they have the votes, Larry!! Simply amazing. Let's go wherever you want; I think you mentioned a place in the Mandarin, which would be great. Give me any dates you want after March 31. [redacted] [redacted] expressed an interest in joining as well.

From: Larry Tribe [redacted]
Date: Sun, 21 Mar 2010 13:02:09 +0000
To: elena.kagan@usdoj.gov<elena.kagan@usdoj.gov>;
[redacted]
Subject: fingers and toes crossed today!

Also: [redacted] and I haven't forgotten that dinner with you that we had to postpone. Where were we going to meet? I recall that it was someplace you'd not yet visited but wanted to try out. Let's find a date to get together there before too long. . . . Larry

---