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Protecting the Equal Rights
of Nonreligious Americans

The Honorable Merrick B. Garland
Office of the Attorney General
The U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland:

We write to urge you to proceed with the course of action proposed by Congressman Jamie Raskin in the May 29 *New York Times* that would force members of the Supreme Court to address the issue of judicial recusal. The Secular Coalition for America (SCA) comprises 20 large and small organizations devoted to the rule of law and church-state separation.

Congressman Raskin states that the Department of Justice can (and should) petition the other seven justices to require Justices Samuel Alito and Clarence Thomas to recuse themselves “not as a matter of grace but as a matter of law.” Raskin cites the Constitution and 28 U.S. Code § 455 - “Disqualification of justice, judge, or magistrate judge.”

Raskin also cites the precedent from a 2016 Supreme Court decision, *Williams v. Pennsylvania*, in which Justice Anthony Kennedy explained why judicial bias is a defect of constitutional magnitude and offered specific objective standards for identifying it. We also note that U.S. Code § 455(B) states that a judge must recuse himself when a spouse “is known by the judge to have an interest in a case that could be substantially affected by the outcome of the proceeding.”

Unlike every court below it, the Supreme Court has no process to determine whether a Justice should recuse himself from a case, even if that case includes major conflicts of interest. As Congressman Raskin puts it, “The highest court in the land has the lowest ethical standards — no binding ethics code or process outside of personal reflection” that would guide or compel a recusal when appropriate. Polling on the Supreme Court consistently shows that Americans have little confidence in the Court to fairly and impartially adjudicate the most important issues that face our nation. The American people need, deserve, and demand a greater level of transparency from the highest court in our nation.

Congressman Raskin goes on to cite the Supreme Court's own precedents to show that the mere appearance of partiality should lead to recusal. The Court is about to issue rulings on *Trump v. United States*, the case that will decide whether Mr. Trump enjoys absolute immunity from criminal prosecution, and *Fischer v. United States*, which will decide whether January 6 insurrectionists, and Mr. Trump, can be charged under a statute that criminalizes corruptly obstructing an official proceeding. The impartiality of two Justices is undeniably at question in the public's eye, and they should recuse themselves or be recused.


We have known for many months that Justice Thomas's wife both believes in and participated in the "Stop the Steal" movement, an organized effort to overturn the lawful results of the 2020 presidential election. More recently, we have learned that an upside down American flag flew on Justice Alito's flagpole in the days between the January 6 insurrection and the swearing in of President Biden. Flying the flag upside down was adopted by some of the January 6 rioters and by the larger Stop the Steal movement as emblematic of their "cause."

Then last month we learned that the flagpole at Justice Alito's beach house flew the "Appeal to Heaven" flag last summer. This formerly obscure Revolutionary War flag has been adopted by white Christian nationalists who also flew it on January 6. If we look for other examples of Justice Alito's lack of impartiality that don't involve flag-flying, we can start with this statement from a 2022 speech: "If we are going to win the battle to protect religious freedom in an increasingly secular society, we will need more than law." This is not the approach taken by a Justice who agrees with what Chief Justice John Roberts envisions: "Judges are like umpires. Umpires don't make the rules, they apply them.... It's my job to call balls and strikes and not to pitch or bat."

Congressman Raskin, citing the same writ used in *Marbury v. Madison*, observes that the Supreme Court can tell federal officials (including Supreme Court justices) to perform a ministerial act, which in this case is the act of judicial recusal. This would be compelled by the Supreme Court's own precedents concerning objective questions about the impartiality of a judge. What matters is not what the Justice thinks for himself or herself, it's how their behavior reasonably appears to the American public and the rest of the world.

It is imperative that members of the Supreme Court understand that when it appears to the public that they are biased, they must recuse themselves or, in the absence of an official recusal determination process, the majority of Justices can and will follow the law and require their recusal. We urge you to immediately take the steps necessary to initiate that process before the two pending cases we mentioned are decided.

Sincerely,



Steven Emmert
Executive Director

The Secular Coalition for America includes the following member organizations:

American Atheists

American Ethical Union

American Humanist Association

Association of Secular Elected Officials

Atheist Alliance of America

Black Nonbelievers

Camp Quest Center For Inquiry/Richard Dawkins Foundation for Reason and Science

Cultural & Secular Jewish Organization Ex-Muslims of North America

Freedom From Religion Foundation Freethought Society

Hispanic American Freethinkers Military Association of Atheists and Freethinkers

Recovering From Religion Secular Student Alliance

Secular Woman Society for Humanistic Judaism

The Clergy Project Unitarian Universalist Humanist Association