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February 23, 2011

Missouri Supreme Court
Office of Chief Disciplinary Counsel
3335 American Avenue
Jefferson City, MO 65109-1079

Re: Justice Clarence Thomas

NOTICE OF COMPLAINT

I, Kevin Zeese Esquire, pursuant to Rule 8.3(b)—**Reporting Professional Misconduct**, on behalf of Protect Our Elections, a group of NGOs dedicated to clean government, transparency and accountability, herein lodge a disciplinary complaint against Clarence Thomas, 1 First Street, NE Washington, DC 20543, 202-479-3000, an Associate Justice of the Supreme Court, acting in his official capacity. We ask the *Office of Disciplinary Counsel* to take immediate disciplinary action, including disbarment, against Justice Thomas for violations of the *Missouri Rules of Professional Conduct*.

SUMMARY OF COMPLAINT

Clarence Thomas breached his legal duty and violated the *Rules of Professional Conduct* by knowingly and willfully failing for 20 years to state truthfully on required AO 10 Financial Disclosure Forms that his wife Virginia earned non-investment income. Clarence Thomas further labored under a financial conflict of interest by failing to disclose $100,000 in support for his nomination by the Citizens United Foundation when he sat in judgment of a case involving Citizens United. Finally, he made rulings that his wife benefitted from financially and professionally, and by extension, that benefitted him. In short, this unethical and criminal conduct violates the Rules of Professional Conduct, and undermines the rule of law, respect for the law and confidence in the law.

SPECIFIC VIOLATIONS

1. **Filing 20 Years Of False Disclosure Forms**

Common Cause disclosed on January 21, 2011 that Clarence Thomas did not report his wife's income from 2003-2009 as required by law. http://bradblog.com/Docs/ClarenceThomas_CommonCauseLetter_012111.pdf Exhibit 1. In fact, he did not just fail to report the information, but rather, he checked the box "none" that asked if his spouse had any "non-investment" income." http://protectourelections.org/index.php?q=node/105 Exhibits 2-8. The following day, Saturday, January 22, 2011, Justice Thomas filed amended disclosure reports for 1989-2009, including his nomination disclosure reports. http://www.velvetrevolution.us/images/clarence_Thomas-FD_amendments.pdf Exhibit 9 On January 24, 2011, we wrote to the Attorney General requesting criminal prosecution. http://www.velvetrevolution.us/images/Clarence_Thomas_DOJ_Letter.pdf Exhibit 10

Virginia Thomas has received non-investment income since l989, and she worked at the Heritage Foundation from 2003 through 2009, earning at least $120,000 each year, according to the foundation's IRS Form 990s. *http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773617&ct=9039331* Exhibit 11 She then went to work for Liberty Central in a paid position. http://www.nytimes.com/2010/10/09/us/politics/09thomas.html Exhibit 12 She has now launched a new consulting service called Liberty Consulting Inc. http://www.rawstory.com/rs/2011/02/justices-wife-ambassador-tea-party/ Exhibit 13.

Each of the AO 10 Financial Disclosure forms signed by Justice Thomas from 2003 through 2007 states in Section IX that it is certified **under oath** as follows:

"I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure." (Emphasis added.) Although we do not have copies of the 1989-2002 forms, we believe them to have similar language.

In bold capital letters under the signature box that Justice Thomas signed is the following: **NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILLFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app section 104)**

According to 5 U.S.C. app section 104, people who knowingly and willfully violate this provision face up to one year in prison and a criminal fine for each false statement charge, and a civil fine of up to $50,000.

Moreover, under the catchall false statement statute, 18 U.S.C. section 1001, violators could also face a felony charge for each false statement with a sentence of five years on each. *See* United States v. Fraser Verrusio, where a former Policy Director for the U.S. House of Representatives Committee on Transportation and Infrastructure, is awaiting trial under section 1001 for not reporting income on his "United States House of Representatives Financial Disclosure Statement for Calendar Year 2003." *See also* United States v. Woodward, 469 U.S. 105 (1985), a case decided by the Supreme Court, where the defendant, after checking the "no" box on a U.S. Customs form, was punished for both the false statement (18 USC section 1001) violation and the misdemeanor charge of failing to report the currency itself --- all as a result of checking the "no" box.

Justice Thomas acted knowingly and willfully. First, judges are presumed to know the law and at least four of Justice Thomas' colleagues on the Supreme Court –Justices Breyer, Ginsberg, Kennedy and Roberts -- knew well enough to disclose their spousal income during the same time frame that Justice Thomas did not. *See e.g.,*
http://www.velvetrevolution.us/images/Kennedy_2009_FD.pdf
http://www.velvetrevolution.us/images/Roberts_2009_FD.pdf
http://www.velvetrevolution.us/images/Ginsberg_2009_FD.pdf
http://www.velvetrevolution.us/images/Breyer_2009_Disclosure.pdf Exhibits 14-17.

Second, according to the Department of Justice Handbook on Prosecutions, a defendant's signature on a document is strong evidence of willfulness and knowledge. *See* United States v. Tucker, 133 F.3d 1208, 1218 n. 11 (9th Cir. 1998) (noting that signature proved knowledge of contents of return); United States v. Mohney, 949 F.2d 1397, 1407 (6th Cir. 1991) (holding that signature is prima facie evidence that the signer knows the contents of the return); United States v. Drape, 668 F.2d 22, 26 (1st Cir. 1982) (finding that defendant's signature is sufficient to establish knowledge once it has been shown that the return was false).

Third, as argued below, it appears that Justice Thomas had a reason for not disclosing that his wife was working for a conservative think tank and a conservative 501c(4) group; he did not want litigants who had cases pending before the Supreme Court to have information that could be used to disqualify him from hearing those cases, and he wanted his family to benefit financially from his decisions.

Hundreds of Americans have been federally prosecuted since 1989 for various types of false statements, many involving checking or not checking a box on a form. Many of those prosecutions involved a single form, and most defendants were not given the opportunity to amend their forms before being prosecuted. Many were found guilty, fined and sent to prison. And some even appealed their cases to the Supreme Court where Justice Thomas sat in judgment of them, upholding their sentences.

2: Depriving Litigants Of Accurate Information To Disqualify Justice Thomas

One of the fundamental reasons for Judicial Financial Disclosure Statements is to provide information to litigants appearing before a judge about the judge's possible bias or

conflict of interest so they can file a motion to disqualify the judge on those grounds. However, litigants who appeared before Justice Thomas as far back as 1989 were deprived of such information, thereby denying them due process and possibly undermining the fairness of their cases. *See* Caperton v. AT Massey Coal Co., Inc., 129 S. Ct. 2252 (2009), where the Court overturned a case because the judge failed to recuse himself for financial bias. Would those litigants have moved for disqualification of Justice Thomas? We cannot answer that but we can say that without the disclosure of his wife's employers, litigants were unable to avail themselves to that fundamental due process protection.

A prime example of a case where litigants may have moved to disqualify Justice Thomas for bias and conflict of interest is the case of Citizens United v Federal Election Commission, 130 S.Ct. 876 (2010), where the Court ruled that corporations could spend unlimited amounts of money in federal elections. This case was decided by a five to four decision with Justice Thomas in the majority. On January 19, 2011, Common Cause addressed the conflict facing Justice Thomas in a six-page complaint with the Department of Justice requesting, *inter alia*, that it investigate whether Justice Thomas should have recused himself from the *Citizens United* case under 28 U.S.C. 455(b) "based on financial conflicts of interest…."

"The Supreme Court's decision in Citizens United, issued on January 21, 2010, provided a substantial benefit to Liberty Central while Ms. Thomas was its CEO by enabling it to raise and spend corporate funds directly advocating the defeat or election of political candidates for the first time in more than 60 years. According to a story in the Los Angeles Times, Ms. Thomas stated that Liberty Central 'would accept donations from various sources – including corporations – as allowed under campaign finance rules recently loosened by the Supreme Court.'

Federal law requires a justice to recuse himself when:

He knows that…his spouse…has a financial interest in the subject matter in controversy…or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(4). As CEO of Liberty Central, Ms. Thomas clearly had an interest that was substantially affected by the Supreme Court's decision in Citizens United. Although the law requires knowledge on the part of the judge, it also states that '[a] judge should…make a reasonable effort to inform himself about the personal financial interests of his spouse.' § 455(c). Given the high public profile of Ms. Thomas and Liberty Central, it would strain credulity for Justice Thomas to claim that he was not aware of this interest." See Exhibit 11.
http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773617&ct=9039331

Virginia Thomas raised money from secret donors, including over half million in seed money, to launch Liberty Central. Id. According to Liberty Central CEO Sarah Field in

a New York Times article, Ms. Thomas was paid by Liberty Central. http://www.nytimes.com/2010/10/09/us/politics/09thomas.html Exhibit12. In February 2011, Ms. Thomas announced that she was launching another group, Liberty Consulting Inc, to, *inter alia*, "offer[] advice on optimizing political investments for charitable giving in the non-profit world or political causes."

Clearly, Ms. Thomas is financially benefitting from Justice Thomas's decision in *Citizens United,* and, since they are married and filing jointly as a married couple with the IRS, Justice Thomas is also personally benefitting from his own decision.

3: Justice Thomas Labored Under A Financial Conflict Of Interest

As noted above, Justice Thomas sat in judgment of the case Citizens United v Federal Election Commission, 130 S.Ct. 876 (2010), and cast the deciding vote in the five to four decision favoring Citizens United. This case overturned a hundred years of established campaign finance law. However, Justice Thomas hid the fact that Citizens United Foundation had supported his nomination and spent at least $100,000 on commercials attacking several Senators opposed to the nomination. "The commercials, shown only in Washington at a cost of about $100,000, have reaped millions of dollars' worth of free publicity through network television and print-media reproductions that have accompanied news stories about the flap. That probably was the intent all along." http://www.time.com/time/magazine/article/0,9171,973826,00.html#ixzz1DzuvQ4Rz Exhibit 18. *See also* "The Citizens United Foundation, a group that ran commercials in 1991 supporting the nomination of Clarence Thomas to the Supreme Court" http://www.nytimes.com/2003/03/13/business/media/13ADCO.html Exhibit 19.

The Decision In Caperton v Massey Required Justice Thomas To Recuse Himself

In June 2009, the Supreme Court decided the case of Caperton v. AT Massey Coal Co., Inc., 129 S. Ct. 2252 (2009), with facts eerily similar to the situation facing Justice Thomas in Citizens United. In 1998, Harman Mining Company president Hugh Caperton filed a lawsuit against A.T. Massey Coal Company alleging that Massey fraudulently canceled a coal supply contract with Harman Mining, resulting in its going out of business. In August 2002, a Boone County, West Virginia jury found in favor of Caperton and awarded $50 million in damages. http://en.wikipedia.org/wiki/Caperton_v._A.T._Massey_Coal_Co. - cite_note-Nyden-0

While the case was awaiting hearing in the West Virginia Supreme Court of Appeals, A.T. Massey's Chief Executive Officer, Don Blankenship, became involved in the election campaign pitting incumbent Supreme Court Justice Warren McGraw against Charleston lawyer Brent Benjamin. Blankenship created a non-profit corporation called "And for the Sake of the Kids" through which he contributed over $3 million dollars in Benjamin's behalf. This amounted to more than the total amount spent by all other Benjamin supporters and Benjamin's own campaign committee. *Much of the money went to an advertising campaign aimed at questioning McGraw's impartiality.*

In 2007, when the case came before the West Virginia Supreme Court, Caperton petitioned for Justice Benjamin to recuse himself because of Blankenship's contributions during the campaign. Benjamin declined and was ultimately part of the 3 to 2 majority that overturned the $50 million verdict.

Caperton filed a petition with the United States Supreme Court arguing that Blankenship's 2004 campaign expenditures on behalf of Benjamin's election raised an appearance of partiality on Benjamin's part, which required him to disqualify and, in the absence of that, denied Harman Mining due process of law. Justice Benjamin countered that he was not biased and that because there was no direct financial or other connection between him and Blankenship, there was no obligation for him to recuse himself.

The United States Supreme Court heard oral arguments in March 2009. In June 2009, the Court found for Caperton and Harman Mining, remanding the case back to the West Virginia Supreme Court. Justice Anthony M. Kennedy wrote for the majority, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Chief Justice John G. Roberts wrote the dissent and was joined by Justices Scalia, Thomas, and Alito. Justice Scalia also filed a separate dissenting opinion.

Justice Kennedy called the appearance of conflict of interest so "extreme" that Benjamin's failure to recuse himself constituted a threat to the plaintiff's constitutional right to due process under the Fourteenth Amendment. The Court also noted, "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude 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 by raising funds or directing the judge's election campaign when the case was pending or imminent." "The inquiry," Justice Kennedy wrote, "centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."

Applying that test, Justice Kennedy ruled for the Court; "Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—"' "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."' "On these extreme facts the probability of actual bias rises to an unconstitutional level."

Justice Kennedy, in holding Justice Benjamin's participation a violation of due process, made no finding of actual bias by Benjamin: "In other words, based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias."

Caperton Equals Citizens United

Applying Caperton to Citizens United, it is clear that Justice Thomas, after having been supported by an effective advertising campaign that reaped millions in free media time, labored under an actual conflict of interest that denied the FEC due process. Justice Thomas owed his spot on the Court to Citizens United Foundation. That fact undermined his ability to put aside his bias in favor of Citizens United.

Justice Thomas was required to disclose his relationship with Citizens United and sua sponte recuse himself from the case. Instead, he hid that relationship and cast the deciding vote in favor of Citizens United.

Conclusion

Missouri Rules of Professional Conduct Rule 8.4—Misconduct, states in pertinent part:
"It is professional misconduct for a lawyer to:
(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
(c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
(d) Engage in conduct that seriously interferes with the administration of justice; …."

A lawyer who commits a crime is subject to disbarment. A lawyer who fails to disclose important financial information as require by law is subject to disbarment. A lawyer who makes rulings on cases that will benefit himself and his wife is subject to disbarment. A Judge who commits 20 crimes by falsifying 20 disclosure forms in order to enrich himself and his family, as did Justice Thomas, is subject to disbarment. A lawyer who withholds information about a supporter when ruling on a case involving that support is subject to disbarment.

Justice Thomas violated the Rules of Professional Conduct: he committed crimes that carry serious jail time if prosecuted, he acted in a untrustworthy manner, his conduct involved dishonesty, deceit and misrepresentation, and he engaged in conduct that seriously interfered with the administration of justice. Therefore, he must be disciplined.

Sincerely,

Kevin Zeese
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