No. 17-1566

In The
Supreme Court of the United States

ROGERS LACAZE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF OF THE ETHICS BUREAU AT YALE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. This Court's Precedents Under the Due Process Clause and the ABA Model Code of Judicial Conduct Establish an Objective Standard for Judicial Recusal 6

A. The Due Process Clause requires recusal when there is a constitutionally intolerable potential for bias 7

B. The ABA Model Code of Judicial Conduct reinforces the importance of the objective recusal standard and establishes the importance of judicial disclosure in ensuring an impartial judiciary 10

II. The Louisiana Supreme Court Misconstrued this Court's Objective Bias Standard To Require a Showing of Bias Directed at a Particular Party 12

A. Due process, as well as broader ethical principles, require recusal whenever a judge's self-interest prevents him from presiding impartially 13

B. The Louisiana Supreme Court misapplied the objective bias standard by requiring a showing of bias directed at a specific party to the litigation 16

III. Evaluating the Totality of the Circumstances Under the Objective Standard, Judge Marullo's Conduct Created an Intolerable Potential for Bias 18

IV. This Court Should Grant Certiorari To Address a Fundamental Violation of Due Process 19

V. In the Alternative, This Court Should Summarily Reverse the Decision Below 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813, 825 (1986)............................ 7, 22

Application of Gault,
387 U.S. 1 (1967).. 8

Bracy v. Gramley,
520 U.S. 899 (1997)....................................... 14

Caperton v. A.T. Massey Coal Co.,
679 S.E.2d 223 (W. Va. 2008)......................... 20

Caperton v. A.T. Massey Coal Co.,
556 U.S. 868 (2009)................................ *passim*

Ex parte McCarthy,
[1924] 1 K.B. 256, 259 (1923) 9

In re Edwards,
694 N.E.2d 701 (Ind. 1998)............................ 11

In re Frank,
753 So. 2d 1228 (Fla. 2000) 11

In re Murchison,
349 U.S. 133 (1955)................................ *passim*

Johnson v. Mississippi,
403 U.S. 212 (1971)....................................... 13

Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. 123 (1951)... 8

Lacaze v. Louisiana,
138 S. Ct. 60 (2017)... 3

Levine v. United States,
362 U.S. 610 (1960)... 8

Liljeberg v. Health Servs. Acquisition Corp.,
486 U.S. 847 (1988)................................. 11, 12

Lingenfelter v. Lingenfelter,
2017-Ohio-235, 2017 WL 277541 12

Liteky v. United States,
510 U.S. 540 (1994)... 9

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980)... 8

Mayberry v. Pennsylvania,
400 U.S. 455 (1971)... 8

Offutt v. United States,
348 U.S. 11, 14 (1954)..................................... 8

Pennsylvania v. Williams,
105 A.3d 1234 (Pa. 2014), *cert. granted,*
Williams v. Pennsylvania,
136 S. Ct. 28 (2015)....................................... 20

Potashnick v. Port City Constr. Co,
609 F.2d 1101 (5th Cir. 1980)........................ 11

Rippo v. Nevada,
368 P.3d 729 (Nev. 2016)*, cert. granted, Rippo v. Baker,*
137 S. Ct. 905 (2017)............................ *passim*

State v. LaCaze,
2016-0234
(La. 3/13/18); 239 So. 3d 807 .... *passim*

Tumey v. Ohio,
273 U.S. 510 (1927).................................. 9, 22

Wearry v. Cain,
136 S. Ct. 1002 (2016).................................. 21

Williams v. Pennsylvania,
136 S. Ct. 1899 (2016)........................... *passim*

Williams-Yulee v. Florida Bar,
135 S. Ct. 1656 (2015).................................... 9

Withrow v. Larkin,
421 U.S. 35 (1975)............................... 7, 15, 18

STATUTES

28 U.S.C. § 455(b)(5)(iv) (2012)............................... 19

RULES

Model Code of Judicial Conduct pmbl. 1. .... 10, 14

Model Code of Judicial Conduct R. 1.2 10

Model Code of Judicial Conduct R. 2.11 11

Model Code of Judicial Conduct R. 2.11(A). 11, 19

Model Code of Judicial Conduct R. 2.11(A)(1) 11

Model Code of Judicial Conduct R. 2.2 .... 10, 14

OTHER AUTHORITIES

Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55 (2000). 10

Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 Just. Sys. J. 257 (2007).. 10

Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283 (2003) 9

INTEREST OF AMICUS CURIAE

The Ethics Bureau at Yale[1] ("Ethics Bureau") is a clinic at Yale Law School composed of fifteen law students supervised by an experienced practicing lawyer, lecturer, and ethics professor. The Ethics Bureau has drafted amicus briefs in matters involving lawyer ethics and judicial conduct, assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility, and provided assistance, counsel, and guidance on a pro bono basis to non-profit legal service providers, courts, and law schools.

Because the impending matter implicates the impartiality of the judicial process, a fundamental element of judicial ethics, *Amicus* believes that it might assist the Court in resolving the important issues presented.

STATEMENT OF FACTS

This case is about the conduct of Judge Frank Marullo both before and during Petitioner Rogers Lacaze's trial. It is about Judge Marullo's failure to recuse himself despite his extrajudicial connection to the case and his acknowledged self-interest in keeping certain facts from the public. And it is about

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[1] The views expressed herein are not necessarily those of Yale University or Yale Law School. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amicus* has made a monetary contribution to the preparation and submission of this brief. Counsel for both parties received notice of the intention to file this brief at least ten days prior to the filing and have consented to its filing.

Judge Marullo's failure to disclose this connection despite his affirmative ethical obligation to do so.

While investigating the homicide that led to Petitioner's conviction, the New Orleans Police Department (NOPD) discovered that Petitioner's codefendant had acquired the potential murder weapon from the NOPD property and evidence room. The Department's Public Integrity Bureau (PIB) subsequently discovered that the order releasing the firearm bore what appeared to be Judge Marullo's signature. Approximately three and a half weeks after the murders—before Petitioner's case was assigned to Judge Marullo—an officer from the PIB met with the judge about the release. At this point, Judge Marullo denied any involvement in the release of the possible murder weapon and claimed that someone must have forged his signature.

Judge Marullo was subsequently assigned to preside over Petitioner's case. Two weeks later, the PIB again contacted Judge Marullo. But this time, the judge refused to answer any more questions, explaining that he had been assigned Petitioner's case and could not talk about the events in question until the case had concluded.

Consistent with his postponement of any further inquiry, Judge Marullo made no mention of the PIB's investigation to Petitioner before or during the trial. Indeed, even when Petitioner's counsel made an oral motion for the judge's recusal during the trial, Judge Marullo said nothing.

After the completion of Petitioner's trial, the PIB attempted to contact Judge Marullo a third time. But once again, the judge refused to give any further statement about his role in the case. And once again, he disclosed nothing about the investigation to either party In fact, Judge Marullo did not disclose the NOPD investigation until the subsequent trial of Petitioner's codefendant, at a closed-door meeting. Even then, Petitioner's lawyers were not informed. In the end, Petitioner did not discover the full extent of Judge Marullo's involvement until almost twenty years later, during the current post-conviction proceedings.

Judge Marullo failed to disclose three key facts related to Petitioner's case. First, he did not disclose that he had learned before trial that Petitioner's codefendant had acquired the alleged murder weapon from the NOPD property and evidence room. Second, Judge Marullo did not disclose that his signature appeared to be on the order releasing the weapon. And finally, the judge did not disclose that he was part of an investigation undertaken by the same police department that had investigated Petitioner's case. In short, Judge Marullo had extrajudicial knowledge about key facts in Petitioner's case and was implicated in the case in a potentially embarrassing way.

Last year, after the Louisiana Supreme Court dismissed Petitioner's recusal challenge, this Court granted his writ of certiorari, vacated the decision below, and remanded the case "for further consideration in light of *Rippo v. Baker*, 580 U.S. ____ (2017)." *Lacaze v. Louisiana*, 138 S. Ct. 60 (2017)

(Mem.) (parallel citations omitted). On remand, the Louisiana Supreme Court again dismissed Petitioner's challenge. The court acknowledged that "the fact that Judge Marullo had information about what was potentially the murder weapon might cause an average observer to question him sitting in a capital trial" and further conceded that "the average judge in Judge Marullo's position would have harbored some sensitivity about whether his signature was forged." *LaCaze*, 2016-0234, pp. 19-20 (La. 3/13/18); 239 So. 3d 807, 819. But it nevertheless concluded that Petitioner had not shown a "probability of actual bias." *Id.*

SUMMARY OF ARGUMENT

The decision below represents a dramatic and troubling departure from this Court's judicial recusal precedents. This Court has repeatedly maintained that the Due Process Clause requires recusal whenever, as an objective matter, there is an unconstitutional "probability" or "potential" for bias. *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). In the decision below, however, the Louisiana Supreme Court adopted a novel and onerous requirement for judicial recusal: proof that the judge was specifically biased against a particular party. Although the lower court acknowledged that Judge Marullo likely had a personal interest in the case, it still rejected Petitioner's challenge because he had not shown that it was probable that Judge Marullo harbored a specific bias against the Petitioner. *State v. LaCaze*, 239 So. 3d at 816. This ruling directly conflicts with this Court's prior cases

and broader principles of judicial ethics, both of which make clear that an unconstitutional potential for bias can occur even when a judge is not specifically biased against a particular party. Instead, the relevant inquiry—disregarded by the lower court—is whether "the average judge in his position is 'likely' to be neutral." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009).

An average judge in Judge Marullo's position could not be neutral. The circumstances surrounding Judge Marullo as he presided over Petitioner's trial gave rise to an "unconstitutional potential for bias." *Williams*, 136 S. Ct. at 1905. These circumstances included: (1) the presence of what appeared to be Judge Marullo's signature on the order releasing the potential murder weapon from the police evidence room; (2) an investigation into the release of the murder weapon, which took place before and during Petitioner's trial and which was conducted by the same police department that was investigating Petitioner's case; and (3) Judge Marullo's failure to disclose these facts to Petitioner, despite both an affirmative ethical obligation to do so and Petitioner's motion to recuse the judge on other grounds.

As the lower court acknowledged, Judge Marullo would have obvious reasons for being "sensitiv[e]" about his extrajudicial connection to Petitioner's case. *LaCaze*, 239 So. 3d at 819. There is, at the very least, a serious risk that the average judge in his position would not be neutral. Judge Marullo failed to disclose his external connection to and knowledge of Petitioner's case. This failure to disclose relevant information is compelling evidence that the

judge was not objectively impartial. *Amicus* therefore urges this Court to grant certiorari both to make clear that the Due Process Clause does not require a showing of specific bias against a party to mandate judicial recusal and to vindicate Petitioner's due process right to "[a] fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955).

In the alternative, *Amicus* urges this Court to summarily reverse the decision below for blatantly misapplying this Court's judicial recusal standard. The lower court required the Petitioner to show a "probability of actual bias," while this Court's prior decisions make clear that even a "potential for bias" can give rise to a due process violation. The decision below incorrectly required the Petitioner in effect to demonstrate proof of actual bias, a ruling so wrong as to warrant summary treatment.

ARGUMENT

I. This Court's Precedents Under the Due Process Clause and the ABA Model Code of Judicial Conduct Establish an Objective Standard for Judicial Recusal.

Judge Marullo's conduct must be measured against the objective recusal standard imposed by the Due Process Clause and the ABA Model Code of Judicial Conduct. This objective standard not only protects the rights of individual litigants but also safeguards the integrity of the justice system as a whole. To further safeguard these interests, the Model Code also places on judges an affirmative ethical obligation to disclose any facts that might lead

to their recusal. A judge's failure to disclose such information has been viewed by this Court as creating an appearance of bias.

A. The Due Process Clause requires recusal when there is a constitutionally intolerable potential for bias.

The Due Process Clause guarantees litigants an impartial and independent judge. *See In re Murchison*, 349 U.S. at 136. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), and, most recently, *Rippo v. Baker*, 137 S. Ct. 905 (2017), this Court applied an objective standard for assessing whether the Due Process Clause requires a judge to be recused. Under these precedents, "[r]ecusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Rippo*, 137 S. Ct. at 907 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Critically, in evaluating that risk of bias, courts must "ask[] not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.'" *Williams*, 136 S. Ct. at 1905 (quoting *Caperton*, 556 U.S. at 881). Accordingly, this Court has explained that "the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias.'" *Rippo*, 137 S. Ct. at 907 (alteration in original) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)).

The objective recusal standard serves two primary purposes. First, the objective standard safeguards litigants' due process right to an impartial adjudicator by minimizing the risk that a judge may be biased. Because "[b]ias is easy to attribute to others and difficult to discern in oneself," the Due Process Clause requires courts to "apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present." *Williams*, 136 S. Ct. at 1905. This standard allows judges to avoid difficult inquiries into their own subjective motivations or into the actual biases of other judges. *See Caperton*, 556 U.S. at 883. The objective recusal standard is a "stringent rule" that "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. at 136. But this Court has viewed such a demanding rule as necessary because for a court "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).[2] Thus, the

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[2] This Court has long recognized that the "appearance of justice" is an important due process concern. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (explaining that due process "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done'" (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring))); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of evenhanded justice . . . is at the core of due process."); *Application of Gault*, 387 U.S. 1, 26 (1967) (describing the "appearance as well as the actuality of fairness, impartiality, and orderliness" as "the essentials of due process"); *Levine v. United States*, 362 U.S. 610, 616 (1960) (describing "the notion,

objective standard errs on the side of caution, protecting litigants from the risk that their arbiter will be burdened by any "possible temptation . . . not to hold the balance nice, clear, and true between the state and the accused." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

Second, the Due Process Clause's objective recusal standard also preserves the "'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'" *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (quoting *Caperton*, 556 U.S. at 889). The perception of a biased tribunal can erode public confidence in the judiciary as a whole. *See Williams*, 136 S. Ct. at 1909. Because the integrity of the judiciary can be called into question even in cases where the circumstances at issue did not change the result at trial, the Constitution requires a new trial regardless of whether the appearance of bias affected the ultimate outcome. *See Liteky v. United States*, 510 U.S. 540, 565 (1994) (Kennedy, J., concurring) ("[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done." (alteration in original) (quoting *Ex parte McCarthy*, [1924] 1 K.B. 256, 259 (1923))). The objective recusal standard is therefore necessary to uphold the authority of judges and to secure the public's compliance with their decisions.[3]

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deeply rooted in the common law, that 'justice must satisfy the appearance of justice'" (quoting *Offutt*, 348 U.S. at 14)).

[3] Empirical studies have confirmed that perceptions of judicial fairness enhance public compliance with judicial authorities. *See, e.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 298 (2003)

B. The ABA Model Code of Judicial Conduct reinforces the importance of the objective recusal standard and establishes the importance of judicial disclosure in ensuring an impartial judiciary.

In past cases, this Court has considered the American Bar Association's standards for judicial recusal in ascertaining what due process requires. *See, e.g.*, *Caperton*, 556 U.S. at 888.[4] The ABA Model Code of Judicial Conduct makes clear that "an impartial judiciary is indispensable to our system of justice." Model Code of Judicial Conduct pmbl. 1. Judicial impartiality is necessary not only to ensure that litigants receive a fair trial, but also to preserve "public confidence in the judiciary." *See id*. R. 1.2 cmt. 3; R. 2.2 cmt. 1. Accordingly, the Code instructs judges to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." *Id*. R. 1.2. Indeed,

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(observing that "evidence of even-handedness and objectivity in decision making enhances perceived fairness," which in turn increases compliance).

[4] The 2000 Model Code of Judicial Conduct has been adopted, in relevant part, by forty-nine of the fifty state supreme courts as enforceable rules governing the conduct of each state's judges. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*,*"* 14 Geo. J. Legal Ethics 55, 55 (2000). The 2007 revision of the code, which has been adopted by a majority of states, did not change the relevant Code provisions at issue in this case—the standards for impropriety, appearance of impropriety, and disqualification. *See* Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 Just. Sys. J. 257, 261-63 (2007).

judges are to avoid even the "appearance" of impropriety. *Id.*

To protect litigants from judicial bias and to ensure the integrity of the justice system, the Model Code has adopted an objective standard for judicial recusal: judges must recuse themselves in any proceeding "in which [their] impartiality might reasonably be questioned." *Id.* R. 2.11(A). The Code identifies specific circumstances in which a judge must recuse himself, such as when he has "personal knowledge of facts that are in dispute in the proceeding." *Id.* R. 2.11(A)(1). But it also makes clear that judges must recuse themselves under a much broader array of circumstances than those explicitly listed. *Id.* R. 2.11 cmt. 1.

In addition to requiring recusal, the Code safeguards the judicial process by imposing an affirmative obligation to disclose all "information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." *Id.* R. 2.11 cmt. 5. The duty to disclose is broader than the duty to recuse but serves similar interests. *See, e.g.*, *In re Frank*, 753 So. 2d 1228, 1239 (Fla. 2000); *In re Edwards*, 694 N.E.2d 701, 711 (Ind. 1998). Without a broad disclosure obligation, litigants would be "deprived" of their opportunity to bring recusal challenges, either at trial or on appeal. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 867 (1988). And the failure to disclose information that involves impropriety or the appearance of impropriety can undermine the public's confidence in the judicial system at large. *See*

Potashnick v. Port City Constr. Co, 609 F.2d 1101, 1111 (5th Cir. 1980) ("Any question of a judge's impartiality threatens the purity of the judicial process and its institutions.").

A judge's duty to disclose information relevant to a recusal motion is so essential that a violation itself creates an appearance of bias. This Court, for example, has found that a judge's failure to disclose his membership on the board of a university that had a direct interest in the trial created an "appearance of impropriety" warranting recusal. *See Liljeberg*, 486 U.S. at 867; *see also Lingenfelter v. Lingenfelter*, 2017-Ohio-235, 2017 WL 277541, at ¶¶ 20-21 (finding an appearance of bias when a magistrate failed to disclose a relationship with one of the parties). Thus, both this Court's precedent and the Model Code endorse the principle that disclosure of potential sources of bias is necessary to prevent the risk or potential of bias.

II. The Louisiana Supreme Court Misconstrued this Court's Objective Bias Standard To Require a Showing of Bias Directed at a Particular Party.

The objective bias standard requires recusal not only in situations where the judge harbors bias directed at a particular party, but also in situations where the judge has some self-interest that affects how an average judge in that situation would rule in a particular case. The Louisiana Supreme Court has again misapplied this standard: this time, by ignoring bias resulting from Judge Marullo's self-interest, and instead requiring Petitioner to demonstrate that an

average judge in Judge Marullo's position would exhibit bias toward Petitioner in particular.

A. Due process, as well as broader ethical principles, require recusal whenever a judge's self-interest prevents him from presiding impartially.

An objective potential for bias may be present in a variety of different situations. Such bias, of course, exists in scenarios in which the judge favors or disfavors one of the specific parties to the litigation. For example, a judge violates due process by presiding over a case involving a party who has donated a substantial amount of money to the judge's most recent election campaign. *See Caperton*, 556 U.S. 868. This type of bias is also present where the judge was a defendant in prior litigation involving one of the parties now before him, *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971), or where the same person serves as both a one-man grand jury and the trial judge in the same criminal proceeding, *In re Murchison*, 349 U.S. 133.

These, however, are not the only scenarios in which an average judge might face a constitutionally intolerable potential for bias. A judge also faces a potential for bias when the judge has a self-interest in the outcome of the litigation, even when that self-interest does not stem from animus or favor toward one of the specific parties. Basic principles of due process and judicial ethics also require recusal of self-interested judges. The Due Process Clause guarantees litigants an impartial and independent judge. *See In re Murchison*, 349 U.S. at 136. Bias resulting from self-interest violates this requirement

because a self-interested judge is incapable of presiding over a fair trial. *See Williams*, 136 S. Ct. at 1905-06 ("[N]o man is permitted to try cases where he has an interest in the outcome." (quoting *In re Murchison*, 349 U.S. at 136)).

Likewise, the Model Code requires judges to be *impartial*. *See* Model Code of Judicial Conduct pmbl. 1; *see also id*. R. 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."). The Code explains that to preside impartially, "a judge must be objective and open-minded." *Id*. R. 2.2 cmt. 1. Any self-interest that causes the judge to favor or oppose one of the parties prevents the judge from being "objective and open-minded." And bias resulting from self-interest—just like bias resulting from a relationship with one of the parties—causes unfairness to the litigants and undermines public confidence in the judiciary.

Accordingly, this Court's precedents unambiguously demonstrate that due process requires recusal when the judge has a self-interest in the outcome of a particular case. Bias resulting from self-interest was at issue in *Rippo* itself. In that case, this Court suggested that a judge violates the Due Process Clause when he presides over a criminal trial in which the district attorney's office prosecuting the defendant is also criminally investigating the judge. 137 S. Ct. at 906-07. An average judge in that position would be biased, not because such a judge would feel any animus toward the defendant specifically, but because the judge would have a self-interest in appeasing the district attorney's office by manipulating the trial in the prosecution's favor. *See*

id. at 906. Similarly, in *Bracy v. Gramley*, 520 U.S. 899 (1997), this Court allowed further discovery into a judicial-bias claim based on the theory that a judge who was taking bribes from criminal defendants might have "compensat[ed]" for his bribe-taking by favoring the prosecution in other cases. *Id.* at 905. An average judge in this position would favor the prosecution, not because he had anything against any particular defendant, but because of his overriding self-interest in not getting caught taking bribes. *See id*. at 905.

This Court upheld another self-interest bias claim in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). There, this Court held that due process requires recusal when a justice on a state supreme court who hears an appeal of a criminal conviction had previously served, more than thirty years earlier, as a prosecutor in the same case and had chosen to seek the death penalty against the defendant. *Id.* at 1905-06. Due to the length of time that had passed between the prosecution and the appeal, an average judge in this position may not have even remembered the defendant, let alone harbored any personal animosity towards him. But this Court held that such a judge is nonetheless not "'likely' to be neutral," *id.* at 1905 (quoting *Caperton*, 556 U.S. at 881): rather, this judge would have a self-interest in guarding his legacy as a prosecutor by avoiding the appearance of having made a mistake, *see id.* at 1906 ("There is . . . a risk that the judge 'would be so psychologically wedded' to his or her previous position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'" (quoting *Withrow*, 421 U.S. at 57)).

B. The Louisiana Supreme Court misapplied the objective bias standard by requiring a showing of bias directed at a specific party to the litigation.

The Louisiana Supreme Court acknowledged that an average judge in Judge Marullo's position would possess a self-interest in not having his extrajudicial connection to, and knowledge of key facts about, Petitioner's case disclosed to the public. The court admitted that "the average judge in Judge Marullo's position would have harbored some sensitivity about whether his signature was forged," and that "[r]ealistically, the average judge would be vigilant to avoid being unjustly associated with any wrongdoing surrounding the release of the possible murder weapon to [Petitioner's co-defendant] Frank." *LaCaze,* 239 So. 3d at 819-20.

The lower court did not grant relief on Petitioner's bias claim, however, because it misinterpreted this Court's objective bias standard. The lower court understood this standard to require a risk of bias for or against one of the specific parties, and therefore ignored the potential for bias resulting from a more general self-interest. *See id*. at 818 ("[N]othing in the record shows that these unusual circumstances caused Judge Marullo to favor one party."); *id.* at 820 ("[I]t does not follow that the average judge [in Judge Marullo's position] would reasonably harbor any bias for or against Defendant . . . ."); *id.* ("Defendant fails to show that Judge Marullo's disputed role in the administrative release of a 9 mm gun was objectively (and realistically) likely to cause bias for or against either party in this case.").

In reality, however, these "sensitivities" about being associated with wrongdoing would cause a typical judge in Judge Marullo's position to favor the prosecution. Even though Judge Marullo was not himself under direct investigation for wrongdoing related to the release of the potential murder weapon, the facts here still resemble those in *Rippo*. An average judge in Judge Marullo's position might fear that his alleged association with the murder weapon and his participation in the investigation into its release would damage his reputation. Accordingly, such a judge might disfavor the defendant at trial, choosing not to disclose the investigation even though it would have been helpful to the defense (as occurred here) and hoping that a rapid conviction would reduce the likelihood of reputational damage (as indicated by Judge Marullo's decision to rush this capital case to trial, *see* Pet. at 2). A judge in this position might also suspect that a conviction of petitioner would satisfy the public's appetite for justice, thus making it less likely that his own purported connection to the case would become an object of public controversy. Thus, the Louisiana Supreme Court misapplied the objective bias standard by failing to consider sources of bias resulting from self-interest, rather than those resulting from animus toward Petitioner in particular.

III. Evaluating the Totality of the Circumstances Under the Objective Standard, Judge Marullo's Conduct Created an Intolerable Potential for Bias.

Regardless of whether Judge Marullo was actually biased by his own self-interest in this case, for the "average judge in his position," *Williams*, 136 S. Ct. at 1905, the potential for bias was "too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47. Even Judge Marullo himself appears to have recognized the conflict he faced. His refusal to cooperate further with the NOPD investigation into the release of the purported murder weapon after being assigned Petitioner's case indicates that he recognized his self-interest as well as the appearance of self-interest.

Even worse, Judge Marullo failed to disclose his preexisting connection to Petitioner's case at either the trial or the sentencing, despite his affirmative ethical obligation to do so. The judge waited nearly twenty years to reveal his role in the NOPD's investigation of the release of the potential murder weapon, thereby depriving Petitioner of the opportunity to seek recusal on direct appeal. Judge Marullo's silence itself constituted an ethical violation. Accordingly, assuming the judge was aware of this violation, he would have faced an even stronger incentive to favor the prosecution at trial: an average judge in Judge Marullo's position might conclude that a conviction would not only prevent his own alleged connection to the case from coming to light, but also cover up his unethical failure to disclose. Regardless of whether Judge Marullo actually signed the order

releasing the possible murder weapon, both his connection to the underlying case and to the subsequent NOPD investigation should have been disclosed to the parties before trial. Judge Marullo's failure to disclose was, in and of itself, impropriety.

Finally, a judge also faces an impermissible potential for bias when he is a potential witness in a case over which he is presiding. Thus, both the federal recusal statute and the Model Code require judges to recuse themselves when they know that they are "likely to be a material witness" in the proceeding or have "personal knowledge" of material facts. 28 U.S.C. § 455(b)(5)(iv) (2012); Model Code of Judicial Conduct R. 2.11(A). Although Judge Marullo was not called as a witness at trial, he certainly had personal knowledge of material facts. Petitioner at the time had no basis on which to call the judge as a witness because he was not made aware of Judge Marullo's involvement until twenty years after his trial concluded.

IV. This Court Should Grant Certiorari To Address a Fundamental Violation of Due Process.

This Court has an important role to play in ensuring that lower courts comply with "axiomatic" requirements of due process. *Caperton*, 556 U.S. at 876. Without further review, lower courts may not only flout the due process rights of individual litigants but also undermine the public's confidence in the judiciary as a whole. *See Williams*, 136 S. Ct. at 1909-10. In a number of past cases, this Court has granted certiorari specifically to address the failure of

individual judges to recuse themselves. *See Rippo v. Nevada*, 368 P.3d 729 (Nev. 2016), *cert. granted, Rippo v. Baker,* 137 S. Ct. 905 (2017); *Pennsylvania v. Williams*, 105 A.3d 1234 (Pa. 2014), *cert. granted, Williams v. Pennsylvania*, 136 S. Ct. 28 (2015); *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008), *cert. granted,* 555 U.S. 1028 (2008). In each case, the Court intervened to vindicate a petitioner's basic right to "[a] fair trial in a fair tribunal." *In re Murchison*, 349 U.S. at 136.

Indeed, certiorari is all the more important where, as here, a lower court has decided an important constitutional question in a way that disregards the past decisions of this Court. The Louisiana Supreme Court misapplied the rule this Court most recently articulated in *Rippo* by ignoring potential bias resulting from a judge's general self-interest, rather than from a judge's animus toward a particular party. This narrow reading of the objective bias standard has no support in this Court's prior judicial recusal cases and is in fundamental tension with the Due Process Clause. Just as in *Caperton*, *Williams*, and *Rippo*, this Court should grant certiorari to vindicate petitioner's right to a fair trial and to clarify that the objective bias standard includes bias resulting from a judge's self-interest.

V. In the Alternative, This Court Should Summarily Reverse the Decision Below.

This Court "has not shied away from summarily deciding" cases where the "lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016). The decision below "egregiously misapplied settled law" in two ways, each of which provides grounds for a summary reversal.

First, the lower court required a separate showing of a "probability of actual bias" and a showing that this probability "is too high to be constitutionally tolerable." *LaCaze*, 239 So. 3d at 816. The lower court repeatedly implied that the probability of bias must reach a particular threshold, perhaps fifty-one percent, before the likelihood of bias becomes unconstitutionally high. *See id.* at 815-16. Nothing in this Court's prior decisions, however, indicates that this is true. Indeed, even a small potential for bias threatens the rights of defendants and undermines public confidence in the judiciary.

Second, the Louisiana Supreme Court treated a "probability of actual bias" as the same as an "unconstitutional potential for bias." *See id.* In other words, under that court's standard, a petitioner can only establish a judicial recusal violation by showing that it is more probable than not that the judge was actually biased. That would be the requisite showing if this Court's standard were limited to actual bias. But this Court has said again and again that due process may demand recusal "even when a judge 'ha[s] no actual bias.'" *E.g.*, *Rippo*, 137 S. Ct. at 907

(alteration in original) (quoting *Aetna Life Ins. Co.*, 475 U.S. at 825). This Court has never required litigants to show "that a judge was actually biased in [the litigant's] case." *Id.* (internal quotation marks omitted) (alteration in original). Instead, this Court has recognized that even a "potential for bias," *Williams*, 136 S. Ct. at 1905, or a "possible temptation," *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), can be unconstitutional. Yet the decision below disregarded this clear standard by requiring the Petitioner to show a probability of actual bias. This standard is effectively the same as requiring a showing of actual bias and, thus, is an error warranting summary reversal.

CONCLUSION

For the foregoing reasons, *Amicus* petitions this Court to grant certiorari to reverse the decision below.

Respectfully Submitted,

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