

No. 17-1566

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 *AMICUS CURIAE*
PROFESSOR JED HANDELSMAN SHUGERMAN
IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Professor Jed Handelsman Shugerman is an expert on the history of judicial elections in America. He is the author of the only in-depth book on judicial elections, *The People's Courts: Pursuing Judicial Independence in America* (Harv. Univ. Press 2012).¹ See also Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 125 Harv. L. Rev. 1061 (2010).

Professor Shugerman's scholarship reveals that states adopted judicial elections to promote judicial independence, believing that an informed public would elect fair and impartial judges who could not hide their self-interests from informed voters. This Court cited Professor Shugerman's work in its discussion of judicial elections in Chief Justice Roberts's opinion for the Court in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662, 1672 (2015). See also *id.* at 1674 (Ginsburg, J., concurring in part and concurring in the judgment).

Professor Shugerman has also authored a law review article tracing the Court's precedents on due process in the context of judicial recusal and disqualification. See Jed Handelsman Shugerman,

¹ Counsel of record received timely notice of the *amicus curiae's* intent to file this brief and provided their written consent to this filing. See S. Ct. R. 37(2)(a). Additionally, no counsel for either party authored any portion of this brief, and no persons contributed any money for the preparation or submission of this brief. See S. Ct. R. 37(6).

In Defense of Appearances: What Caperton v. Massey Should Have Said, 59 DePaul L. Rev. 529 (2010). In this article, Professor Shugerman observes that the Court has demonstrated a concern for the appearance of bias throughout its precedents. He then argues that the Court should clarify that, in the due process inquiry, appearances matter.

Professor Shugerman files this brief to provide the Court with historical and jurisprudential context relevant to the Court's consideration of the *Lacaze* petition for certiorari.

SUMMARY OF THE ARGUMENT

As Justice Felix Frankfurter recognized in 1954, and this Court has repeatedly recognized since, the Due Process Clause of the Fourteenth Amendment requires “justice [to] satisfy the appearance of justice.” *See, e.g., Williams-Yulee*, 135 S. Ct. at 1666 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). In the decision below, the Louisiana Supreme Court rejected that proposition out of hand, squarely holding that “proof of an appearance of bias alone is insufficient to show a violation of federal due process.” Pet.App. 15a. The Louisiana Supreme Court's ruling contradicts this Court's recognition that the appearance of bias undermines the integrity of the judiciary and the protection of individual rights. *See infra* Argument § I.

Additionally, by concluding that a judge can constitutionally preside over a case despite a concrete self-interest, the Louisiana Supreme Court renders a decision that also conflicts with the

historical underpinnings of the states' judicial election systems. As history shows, states adopted judicial elections to foster a fair and impartial judiciary capable of protecting individual rights. They assumed a legal landscape that would allow an informed and engaged electorate, who would elect capable judges who are above political pressure. They also assumed that individual rights could be found in the federal Due Process Clause. *See infra* Argument § II.

The *Lacaze* petition presents an ideal opportunity for the Court to clarify the standard of judicial disqualification required by the Due Process Clause and to restore the assumptions underlying the states' judicial election systems. Specifically, the concrete self-interest of Judge Marullo, on this record, provides a straightforward vehicle for reaffirming that the Due Process Clause prevents a judge from presiding over a case despite an appearance of bias, and for restoring the legal protections that underpinned the adoption of state judicial elections in the first place. *See infra* Argument § III.

ARGUMENT**I. The Louisiana Supreme Court’s ruling—
that an appearance of bias alone can never
amount to a due process violation—
contradicts this Court’s precedents and
diminishes public confidence in judicial
integrity.**

The Louisiana Supreme Court’s ruling narrows the protections of due process beyond the limits previously permitted by this Court. By allowing judges to preside over cases despite a clear appearance of bias, this ruling also diminishes public confidence in the integrity of the judiciary. This Court should grant certiorari to correct the course of the Louisiana Supreme Court and to preserve public confidence in judicial integrity.

**A. This Court has time and time again held
that the Due Process Clause prohibits
judges from presiding despite an
appearance of bias.**

By interpreting the Due Process Clause to permit the appearance of a biased judiciary, the Louisiana Supreme Court fails properly to address this Court’s concern that the appearance of bias undermines the integrity of the judiciary and the protection of individual rights—a concern that runs through nearly a century of Supreme Court precedent.

As early as 1927, the Court rejected the view that a litigant must prove actual bias to demonstrate the need for recusal. *See Tumey v. Ohio*, 273 U.S. 510,

522–23 (1927). Writing for a unanimous Court, Chief Justice William H. Taft first recognized that due process requires a judge with “a direct, personal, substantial[,] pecuniary interest” in a case to recuse himself. *Id.* at 522. But the Court explained that the standard also encompassed any interest presenting “a possible temptation to the average man”—and anything that “might lead him not to hold the balance nice, clear, and true between the state and the accused.” *Id.* at 532. Applying this standard, the Court has repeatedly found a violation of due process, including in one case based on the “possible temptation” standard, *see Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972), and in a second case involving “a likelihood of bias or an appearance of bias,” *see Taylor v. Hayes*, 418 U.S. 488, 501 (1974).

Subsequently, the Court reiterated the disqualification standard in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). Margaret Lavoie sued Aetna Life Insurance for refusing to pay her medical claims. *Id.* at 816. Ms. Lavoie won a jury award of \$3.5 million in punitive damages, which the Alabama Supreme Court affirmed in a 5–4 decision. *Id.* It was then revealed that Justice T. Eric Embry, who authored the *per curiam* opinion, *id.* at 818, had filed similar suits against other insurance companies, *id.* at 817. After affirming Ms. Lavoie’s award, Justice Embry settled his claims for a “tidy sum,” *id.* at 824, and then resigned from the bench for “health reasons,” *id.* at 822 n.2. The Court found that Justice Embry’s *per curiam* opinion had the “clear and immediate effect of enhancing both the

legal status and the settlement value of his own case.” *Id.* at 824.

Drawing language from a long line of precedent, Chief Justice Warren Burger articulated the disqualification inquiry on behalf of the Court as “whether the situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.” *Id.* at 822 (quoting *Ward*, 409 U.S. at 60). He continued to explain that due process “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,” but reiterating Justice Frankfurter’s observation that “to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’” *Id.* at 825 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Chief Justice Burger’s unequivocal reiteration of the “appearance of justice” standard in this context left little room for doubt that the Due Process Clause requires the appearance of an unbiased judiciary. The Louisiana Supreme Court’s out-of-hand rejection of that proposition conflicts with these foundational due process precedents.

This Court’s more recent cases have continued to caution against the appearance of a biased judiciary, although some lower courts, like the Louisiana Supreme Court, have incorrectly confused this Court’s language about “actual bias” or “the probability of bias” to depart from the Court’s historical standard. In *Caperton v. A.T. Massey Coal Co.*, the Court recognized that the facts gave rise to

a “risk of actual bias” too high to be constitutionally tolerable, without needing to address whether an independent appearance of bias existed. 556 U.S. 868, 884, 886 (2009). The Court nonetheless recognized that state efforts “to eliminate even the appearance of partiality” served a vital state interest of “maintain[ing] the integrity of the judiciary and the rule of law.” *Id.* at 888–89. In *Williams v. Pennsylvania*, the Court searched for an “unconstitutional potential for bias” while emphasizing that “the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part.” 136 S. Ct. 1899, 1905, 1909 (2016). These precedents recognize that the Due Process Clause prohibits judges from presiding in the face of an appearance of bias—and certainly from hiding the facts giving rise to the appearance.

This case would give the Supreme Court a chance to clarify that the traditional standard of an “appearance of bias” remains the standard for due process, along with concerns about actual bias, and that the Court’s recent language about “risk” or “probability” of bias was not intended to shed this core historical principle of due process. See Shugerman, *In Defense of Appearances*, *supra*, at 539–49.

B. The view that the Due Process Clause permits the appearance of bias diminishes public confidence in judicial integrity.

As this Court has recognized, “public perception of judicial integrity is ‘a state interest of the highest order.’” *Williams-Yulee*, 135 S. Ct. at 1666 (quoting *Caperton*, 556 U.S. at 889). Because judges are “charged with exercising strict neutrality and independence,” *id.*, any perception that a judge is acting otherwise harms the public perception of judicial integrity. Indeed, “[b]oth the aspiration and the appearance of impartiality and nonpartisanship are crucial for the courts to work.” Shugerman, *The People’s Courts*, *supra*, at 273.

By ruling that an appearance of bias is never sufficient for a due process claim, the Louisiana Supreme Court went even further. Under this ruling, not only may a judge preside despite an appearance of bias, but he need not even disclose the facts giving rise to the appearance. This rule creates an untenable risk that parties will never even learn about facts giving rise to an improper appearance of bias.

In a judiciary that allows judges to stay silent regarding self-interests that have the potential to create an appearance of bias, the public knows less and is less assured that judges are acting with the independence, fairness, and impartiality attendant to their role. To preserve public confidence in the integrity of the judiciary, it is essential for this Court to reaffirm that the Due Process Clause requires

recusal—and certainly disclosure—in cases giving rise to an appearance of bias. In doing so, the Court can preserve public confidence in the integrity of the judiciary and create a system that allows judges to disclose potential or apparent self-interests with candor and dignity, without a confession of probable bias. *See* Shugerman, *In Defense of Appearances*, *supra* at 541.

II. History reveals that states adopted judicial elections on the assumption of a legal landscape that would allow an informed and engaged electorate.

An important underpinning of judicial elections was the assumption that an informed and engaged electorate would choose fair and impartial judges who were emboldened to protect individual rights, which reveals a second crucial assumption: that the state and federal constitutions would provide such individual rights.

A. States adopted new constitutional limitations on legislative power in the mid-nineteenth century, reflecting a concern for individual rights.

As far back as the colonial era, the people viewed an independent judiciary as a crucial feature of republican government. *See, e.g., The Declaration of Independence* para. 11 (U.S. 1776) (“[King George] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”). Once the colonies won their independence, the states sought to structure

their judiciaries to prevent judicial dependency on a central power. Early state judiciaries reflected experiments in appointment and consent, legislative elections, and limited tenures. See Evan Haynes, *The Selection and Tenure of Judges* 101–33 (2005). Despite these efforts, state judiciaries of the early nineteenth century were nonetheless beholden to the political branches of government and, by extension, the parties that controlled them.

Against this backdrop, states plunged into a severe economic depression in the 1840s, exacerbated by legislative overspending. See Shugerman, *The People's Courts*, *supra*, at 85–86. Outraged citizens demanded constitutional reforms to limit legislative power, leading New York to convene a constitutional convention in 1846. The convention produced a new constitution that limited government spending by requiring the legislature to collect taxes to cover each spending measure and to seek public approval for new debts. *N.Y. Const.* of 1846, art. VII, § 12. A new provision limiting each state statute to a single subject made it harder for legislators to insert unpopular provisions into popular bills. *Id.* art. III, § 16. The new constitution also sought to eliminate the banks' monopoly power by restricting the legislature's ability to grant special charters. *Id.* art., VIII § 4. These examples are among the numerous measures in the new constitution that curtailed government powers and expanded individual property rights.

New York's constitutional convention triggered a wave of constitutional conventions around the country. See Shugerman, *The People's Courts*, *supra*,

at 101–02. Louisiana was among the states to follow New York’s lead, amending its constitution in 1852 to limit the legislature’s power to undertake debts, to prohibit the legislature from passing a sanctions law, and to clarify the state’s power to tax property. *See La. Const.* of 1852, tit. VI, arts. 111, 119, 123. These articles represented a significant curtailment of legislative power in favor of individual property rights.

B. Judicial elections were meant to foster a fair and impartial judiciary, relying on the wisdom of an informed and engaged electorate.

With new constitutional protections for individual rights in place, convention delegates sought to ensure a judiciary that could enforce these rights. As one writer questioned, “Why have a constitution at all, if the legislature is unrestrained and may violate its plainest provisions with impunity?” Veto, *reprinted in* Sam Medary, *The New Constitution* (1849). At the New York constitutional convention, the plain solution was to switch from a judiciary composed of appointed judges—who were seen as “puppets” in the hands of the legislature, *see, e.g., id.*—to a judiciary composed of elected judges who would assert their power on behalf of the people. *See* Shugerman, *The People’s Courts, supra*, at 95–99. Thus, reformers turned to judicial elections with the hope of fostering a less partisan, less politicized judiciary that was emboldened by popular legitimacy to act as a stronger check on the other branches. *Id.*; *see, e.g.*, Letter from Hon. Michael Hoffman, “On a Reorganization of the Judiciary of

the State of New-York” (Sept. 12, 1845), *reprinted in Constitutional Reform, in a Series of Articles Contributed to the Democratic Review, upon Constitutional Guaranties in Political Government* 58–63 (Thomas Prentice Kettell ed., 1846).

A crucial assumption underlying the adoption of judicial elections was that an informed and engaged electorate would choose candidates “based on honesty, integrity, a commitment to constitutional principles, and an understanding of the legal system.” Shugerman, *The People’s Courts*, *supra*, at 273. Reformers believed that the people—who went to the polls with no selfish bias—would create a fair and impartial judiciary, *id.* at 112, because only judges who “present themselves with clean hands and a pure life” could win the popular vote. *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New-York* 645 (William G. Bishop & William H. Attree reporters, 1846) (remarks of delegate Ira Harris).

Indeed, supporters of judicial elections warned that, while the legislature preferred partisan judges, the voters would never tolerate partisan judges.

Nothing in this country would sooner seal the political doom of any judge, by all parties and every honest man, than the attempt to bend his decisions from the line of justice to make political capital. . . . He alone can be a popular judge who is honest, impartial, decided, and fearless

Publications of the State Historical Society of Wisconsin: Collections, Volume XXVII, at 290 (Milo M. Quaife ed., 1919) (remarks of delegate Charles M. Baker). Only on this assumption—that informed voters would elect judges who would rise above political pressures—could states realize the goal of a truly fair and impartial judiciary capable of checking the other branches.

For judicial elections to produce a fair and impartial judiciary, however, the people must be informed. Thus, disclosure of self-interests by judicial candidates was a crucial component of the judicial election process. Without transparency from judicial candidates, the states feared that the public could not effectively cast their vote, undermining an important rationale for the adoption of judicial elections. “When judicial elections are quiet and under the radar, the voters are ignorant of the candidates, and the elections have problems with democratic legitimacy.” Shugerman, *The People’s Courts*, *supra*, at 273.

As discussed below, the Louisiana Supreme Court’s conclusion—that Judge Marullo was permitted to preside over Petitioner’s trial without disclosing his apparent connection to the case, *see infra* Argument § III—undermines this bedrock principle underlying judicial elections.

C. Elected judges expanded individual rights and developed substantive due process for property rights, consistent with the states' assumption that federal due process also protects such rights.

State convention delegates in the mid-nineteenth century had intended for elected judges to be more assertive in enforcing the new constitutions and their limits on government powers, and to apply judicial review more boldly. It turns out that the first generation of elected judges was aggressive, striking down state statutes as unconstitutional more than ever before. See Shugerman, *Economic Crisis, supra*, at 1115. In doing so, elected judges expanded individual rights and developed the doctrine of substantive due process for property rights. *Id.* at 1123. Ordinarily, due process allowed states to encroach on property and liberty interests if they adhered to procedural requirements. Shugerman, *The People's Courts, supra*, at 128. But substantive due process was broader, entirely restricting the state from infringing on property and liberty interests. *Id.*

The New York Court of Appeals established a major precedent for substantive due process for property rights when it struck down a liquor prohibition act in 1856. See *Wynehamer v. People*, 13 N.Y. 378 (1856). Speaking to the innovative grounds of substantive due process, the court observed that legislation is sometimes the result of mistaken “theories of public good or public necessity . . . [that] command popular majorities,” *id.* at 387, and that the judiciary must protect the “vital principles” of

“free republican governments” against popular abuses, *id.* at 390. A judge on the Ohio Supreme Court similarly sought to protect individual property rights in 1851. Condemning local referenda, he described the “taking [of] private property, or subjecting it to unusual burdens without the consent of the owner, as a great stride toward despotic power.” *Griffith v. Comm’rs of Crawford Cty.*, 20 Ohio 609, 623 (1851). Many other courts echoed similar sentiments when striking down state statutes that encroached on individual property rights. See Shugerman, *Economic Crisis, supra*, at 1125–29.

With the explosion of decisions striking down state statutes, the elected judiciary established a more widespread practice of judicial review in America. *Id.* at 1115. To justify the exercise of judicial review, one might expect judges elected by the people to rely on the theory that the courts must defend the people and their constitution against abuses of power by the ruling elites (a majoritarian theory of judicial review). *Id.* at 1124–25. Surprisingly—and perhaps counterintuitively—elected judges tended to rely on the theory that the courts must defend individuals and minority communities against abuses of power by the majority (a countermajoritarian theory of judicial review). *Id.*

Notably, the widespread practice of judicial review and development of substantive due process realized another underlying commitment in the adoption of judicial elections. States had turned to judicial elections as part of a commitment to limited

government powers and the protection of individual rights.

D. Today, states continue to strive for fairness and impartiality in the judiciary by requiring judges to avoid even the appearance of impropriety.

A fair and impartial judiciary is no less important today than it was in the mid-nineteenth century. The states' continued concern for fairness and impartiality is reflected in widespread rules requiring judges to avoid the appearance of impropriety and recuse themselves in the face of potential self-interests.

The American Bar Association's Model Code of Judicial Conduct directs judges to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary," as well as to "avoid impropriety and the appearance of impropriety." *Model Code of Judicial Conduct* r. 1.2 (*Am. Bar. Ass'n* 2010). Any conduct that "undermines a judge's independence, integrity, or impartiality" would be improper. *Id.* at *Terminology*. Accordingly, the Model Code directs judges to disqualify themselves "in any proceeding in which the judge's impartiality might reasonably be questioned." *Id.* at r. 2.11. Under this rule, a "personal bias or prejudice concerning a party or a party's lawyer" would suffice. *Id.*

Twenty-nine states have adopted language similar to the language of the Model Code, demonstrating a national consensus that broad

rules requiring the disclosure of potential self-interests are necessary to ensure an informed public and protect the sanctity of the judiciary. *See Comparison of ABA Model Judicial Code and State Variations – Rule 2:11: Disqualification*, Am. Bar Ass’n Ctr. for Prof’l Responsibility Pol’y Implementation Comm. (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.pdf.

III. The facts of this case provide a straightforward vehicle for this Court to reaffirm that the Due Process Clause does not allow a judge to hide potential self-interests.

The facts of this case make it an ideal candidate for certiorari. The relevant facts begin with a 9 mm gun in the New Orleans Police Department’s evidence room. Shortly before the murders in this case, the gun was released from police custody pursuant to a release order apparently bearing the signature of Judge Frank Marullo. Pet.App. 3a. When the gun came under suspicion as the murder weapon, the police department began to investigate the circumstances surrounding its release. Pet.App. 3a. Judge Marullo was questioned as part of the investigation. Pet.App. 4a. After Petitioner’s case was assigned to Judge Marullo, he declined to participate further in the investigation until the end of trial. Pet.App. 4a. This led the police department to keep its investigation open, throughout Petitioner’s trial, so it could obtain a statement from Judge Marullo at the close of trial. Pet.App. 4a.

While presiding over Petitioner's case, Judge Marullo failed to disclose these facts. Pet.App. 4a. He did not inform the parties that an order apparently bearing his signature made it possible for the suspected murder weapon to travel from the police evidence room to the scene of the crimes. He did not mention that the police department was investigating the release of the gun. And he did not reveal his involvement in the investigation.

Judge Marullo's potential involvement in the release of the gun and the subsequent investigation create a clear appearance of bias, further supported by several additional factors. Notably, at the time of Petitioner's trial, Judge Marullo was facing uncertain reelection. Disclosure of a personal connection to the high profile murders² in this case could have had the potential to devastate his chances for reelection. A looming reelection and a trio of high profile murders also created an incentive to remain on the case. As noted above, Judge Marullo was able to use his involvement in the case to avoid further police questioning related to the

² The murders in this case garnered significant media attention partly due to numerous ties to law enforcement. A police officer was murdered, a police officer was tried for the murder, and a police officer obtained the suspected murder weapon from police evidence. Pet.App. 2a–3a; see Rick Bragg, *Killings That Broke the Spirit Of a Murder-Besieged City*, N.Y. Times, May 13, 1995, at 1, 6 <http://www.nytimes.com/1995/05/13/us/killings-that-broke-the-spirit-of-a-murder-besieged-city.html>; Michael Perlstein & Calvin Baker, *New Orleans Police Officer Charged with Killing Cop, 2 Others*, Times-Picayune, Mar. 5, 1995, http://www.nola.com/crime/index.ssf/1995/03/new-orleans_police_officer_cha.html).

release of the suspected murder weapon. Moreover, Judge Marullo’s insistence on rushing Petitioner’s case to trial in three months—a pace nearly unheard of in capital murder cases—demonstrates a potentially improper eagerness to remain on the case and end the case quickly to avoid the need to disclose any connection to the high profile murders. *See Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (recognizing that a trial attorney—and former colleague of the judge—may have rushed a capital case to trial to “deflect any suspicion” of the judge’s bias). And as shown by Judge Marullo’s reelection campaign literature, “presid[ing] over many of New Orleans’ most complicated and high profile cases” allows a judge to tell voters that he is “tough on crime.” Writ.App. 443. The trials of Petitioner and his codefendant topped the list of high profile cases in Judge Marullo’s campaign literature, which even touted that Petitioner and his codefendant had been sentenced “to die by lethal injection.” *Id.*³

In the decision below, the Louisiana Supreme Court even acknowledged that Judge Marullo had an objectively ascertainable self-interest in keeping silent. The court recognized that, “[r]ealistically, the

³ Further supporting an appearance of bias, Judge Marullo became enraged with defense counsel at the start of trial for speaking with the media in violation of a gag order. *See* Trial R. Supp. Vol. 6 at 3–5 (July 17, 1995); Trial R. Vol. 3 at 527. This type of behavior, as the Court has recognized, threatens “the fair administration of justice.” *Offutt*, 348 U.S. at 12, 17 (1954) (“The judge again and again admonished petitioner for what he deemed disregard of rulings and other behavior outside the allowable limits of aggressive advocacy . . . hardly reflect[ing] the restraints of conventional judicial demeanor.”).

average judge would be vigilant to avoid being unjustly associated with any wrongdoing surrounding the release of the possible murder weapon” and would “harbor[] some sensitivity” about any such disclosure. Pet.App. 24a. The appearance of bias in this case is further supported by Judge Marullo’s atypical insistence on rushing Petitioner’s capital case to trial and his outraged behavior towards defense counsel at trial—both behaviors that this Court has recognized as supporting an appearance of bias.

Judge Marullo’s concrete self-interest in this case provides the Court with a straightforward vehicle for reaffirming that, under the Due Process Clause, a judge cannot preside over a case while harboring—and hiding—facts giving rise to an appearance of bias.

CONCLUSION

For the reasons above, this Court should grant certiorari to clarify its standard for judicial disqualification under the Due Process Clause.

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