No. 17-1566

IN THE
Supreme Court of the United States

ROGERS LACAZE,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

REPLY FOR PETITIONER

BLYTHE TAPLIN
CECELIA KAPPEL
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 71103

GLADSTONE N. JONES, III
HARVEY S. BARTLETT III
EMMA E. ANTIN DASCHBACH
JONES, SWANSON, HUDDELL & GARRISON, LLC
601 Poydras Street, Ste. 2655
New Orleans, LA 70130

AMIR H. ALI
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Attorneys for Petitioner

TABLE OF CONTENTS

Table Of Authorities ii

Reply For Petitioner 1

I. Judge Marullo's Failure To Recuse Or Disclose His Connection To The Release Of The Weapon Violated Due Process. 1

A. The Court Should Determine Whether A Judge Must Recuse When He Has An Objectively Ascertainable Self-Interest. 1

B. Summary Reversal Is Also Appropriate. 6

II. The Court Should Resolve The Conflict Over *McDonough* And Reject Nullification Of Chief Justice Rehnquist's Majority Opinion. 7

Conclusion 13

TABLE OF AUTHORITIES

Cases

Aiken County v. BSP Div. of Envirotech Corp.,
866 F.2d 661 (4th Cir. 1989) 5
Aetna Life Insurance Co. v. Lavoie,
475 U.S. 813 (1986) 4, 7
Bracy v. Gramley, 520 U.S. 899 (1997) 7
Fitzgerald v. Greene, 150 F.3d 357 (4th Cir. 1998) 10
Jones v. Cooper, 311 F.3d 306 (4th Cir. 2002) 9
In re Manriquez,
421 P.3d 1086 (Cal. July 26, 2018) 8
In re Murchison, 349 U.S. 133 (1955) 4
Porter v. Zook,
No. 16-18, 2018 WL 3679610
(4th Cir. Aug. 3, 2018) 10
Rippo v. Baker, 137 S. Ct. 905 (2017) 7
Sampson v. United States,
724 F.3d 150 (1st Cir. 2013) 9
Smith v. Phillips, 455 U.S. 209 (1982) 8
State v. Kitts,
No. 2017-0777, 2018 WL 2172726
(La. Ct. App. May 10, 2018) 6
Tumey v. Ohio, 273 U.S. 510 (1927) 7
United States v. Carpa,
271 F.3d 962 (11th Cir. 2001) 8
United States v. Torres,
128 F.3d 38 (2d Cir. 1997) 8, 9
Verizon Commc'ns, Inc. v. F.C.C.,
535 U.S. 467 (2002) 12
Ward v. Village of Monroeville, 409 U.S. 57 (1972) 4
Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015) 5, 6

Rules

Sup. Ct. R. 10(a) 9
Sup. Ct. R. 10(b) 9
Sup. Ct. R. 10(c) 9

REPLY FOR PETITIONER

I. Judge Marullo's Failure To Recuse Or Disclose His Connection To The Release Of The Weapon Violated Due Process.

A. The Court Should Determine Whether A Judge Must Recuse When He Has An Objectively Ascertainable Self-Interest.

Respondent does not contest the pertinent facts accepted by the Louisiana Supreme Court, focusing exclusively on the merits and confirming the petition's first question is squarely presented.

1. The following key facts, accepted by the court below, remain undisputed:

- The NOPD investigation into the release of weapons to Petitioner's codefendant, Antoinette Frank, revealed that the order releasing the gun likely used in the underlying crime bore Judge Marullo's name. Pet.App. 3a.
- David Talley, the officer in charge of the NOPD gun vault, told investigators he brought the order to Judge Marullo's chambers. Pet.App. 6a.
- Investigators obtained a statement from Judge Marullo, who adamantly denied signing the order because it "did not have a description of the weapon." Pet.App. 4a, 214a.
- When investigators asked for a taped version of his statement, Judge Marullo refused on the basis he had been assigned Petitioner's trial

and taping his statement would be a conflict. Pet.App. 4a.

- This NOPD investigation "remained open through the duration of [Petitioner's] trial * * * for the purpose of obtaining a statement from Judge Marullo." *Id.*
- Judge Marullo "did not disclose" the fact of the investigation or "that he had been questioned by Bureau investigators about the release of the guns." *Id.*
- Judge Marullo continued nondisclosure "even after Defendant filed * * * a motion to recuse Judge Marullo on other grounds"; after it became apparent that "[t]he defense's theory at trial was that * * * Frank had planned and committed the murders with her brother, Adam Frank, after obtaining a 9mm gun from the police property room"; and even after Petitioner testified to that effect without the ability to corroborate it. Pet.App. 4a, 19a.
- When the prosecution called Officer Talley at Antoinette Frank's trial and the defense "raised the possibility that Judge Marullo's signature * * * was a forgery," Judge Marullo called an off-the-record conference with the prosecution then an in-chambers conference. Pet.App. 5a; Pet. 5. In chambers, Judge Marullo characterized the release of guns as "a crime" and "a scam"; falsely represented he had produced handwriting exemplars confirming his signature was forged; and claimed it would have been "perfectly logical" to release the gun to Petitioner's codefendant. Pet.App. 5a; Pet. 5-

6. Judge Marullo prevented testimony about his involvement with the release of the weapon: "You are going to dig up something and it is going to come out about this investigation." Pet. 6; Pet.App. 5a & n.6.

- NOPD investigators approached Judge Marullo again after trial and he again refused a taped statement, because appeals would last "for a long time." Pet.App. 5a; Pet. 7.
- At postconviction, Judge Marullo testified he would "never, ever" have released the gun, stating that he would never have given a gun "to one officer to give to another." Pet. 7; Pet.App. 6a-7a.

Respondent's omission and recharacterization of facts indicates its unwillingness to defend the decision below on its terms.

2. Respondent's focus on the merits of the first question-presented confirms it is squarely presented: The Louisiana Supreme Court found Judge Marullo presided over Petitioner's trial and chose not to disclose his connection to the NOPD investigation where, "[r]ealistically, the average judge would be vigilant to avoid being unjustly associated with any wrongdoing surrounding the release of the possible murder weapon" and have "sensitivity" about the association. Pet.App. 24. The court held this objective self-interest did not violate due process because it did not amount to bias specifically "for or against a party." Pet.App. 24a-25a; *see* Pet. 16-17, 21-22.

3. The bulk of Respondent's argument defends the holding below that a judicial self-interest which operates to a party's disadvantage is insufficient; the

Due Process Clause protects only against bias specifically "for or against" a party. BIO 15. Respondent urged the same below. State's Br. on Remand at 7 (arguing standard requires judge to be "distinctly inclined *for* or *against* a particular party"). But its argument overlooks half of this Court's recusal jurisprudence. Canonical recusal cases like *In re Murchison*, 349 U.S. 133 (1955), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), recognize that the historical core of due process protects against an interested adjudicator, guaranteeing "a neutral and detached judge," *Ward*, 409 U.S. at 62, or one who is "wholly disinterested," *Murchison*, 349 U.S. at 137; *see* Pet. 17-22.[1]

Respondent's omissions from this Court's jurisprudence are untenable. Respondent does not contest that Judge Marullo's interest in nondisclosure would have operated to Petitioner's disadvantage, not only because disclosure of the investigation itself would have supported Petitioner's defense and testimony, but also because nondisclosure deprived Petitioner of other evidence (including a prior fight between Adam Frank and the victim officer). Pet. 21-22; Amicus Br. of Yale Ethics Bureau at 17. The import of this Court's due process jurisprudence is that a judge may not have an interest that causes him to decide the issues

[1] Respondent suggests Petitioner improperly relied on statutory cases, BIO 13 n.14, but Petitioner cited such cases exclusively for the proposition that a judge's nondisclosure of his connection to a case is itself "a 'fact[] that might reasonably cause an objective observer to question [his] impartiality.' " Pet. 20 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)).

before him on anything but an objective analysis of the parties' arguments. *See* Amicus Br. of Former Trial Judges at 3. Respondent offers no basis grounded in the Due Process Clause that would restrict it to judges who enter a proceeding inclined specifically "for or against" a party.

Respondent instead refers to a "new standard" for the Due Process Clause, requiring recusal where partiality is "self-evident." BIO 13, 19. Respondent's resort to this know-it-when-you-see-it constitutional standard to defend the decision below, in contrast to Petitioner's objective inquiry into self-interest, is a siren for this Court's intervention.

4. Respondent endorses the Louisiana Supreme Court's broad conclusion that "an appearance of bias" cannot violate due process. BIO 13-14. Respondent never acknowledges the many cases in which this Court has explicitly stated that " 'justice must satisfy the appearance of justice.' " *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015); *see also* Pet. 23 (citing seven cases in which this Court held the Due Process Clause insists on the appearance of impartiality). Moreover, Respondent does not contest that the pronouncement below conflicts with many lower courts, which hold "[t]he due process clause protects not only against express judicial improprieties but also against conduct that threatens the 'appearance of justice.' " *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 678 (4th Cir. 1989) (quoting *Lavoie*, 475 U.S. at 825); Pet. 24 (collecting cases).

4. This Court has recognized "the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges,' " *Williams-Yulee*, 135 S. Ct. at 1666 (citation omitted);

see Amicus Br. of Former Trial Judges at 3-4 (warning that the decision below "threatens * * * the administration of justice" by "provid[ing] license not simply to preside over a capital murder case despite personal connections to the underlying facts—but to withhold disclosure of those connections entirely"). As in past recusal cases, the Court should intervene in these exceptional circumstances.

B. Summary Reversal Is Also Appropriate.

Summary reversal is appropriate given the Louisiana Supreme Court's continued focus on whether Judge Marullo actually did something wrong by signing the order releasing the weapon (which is beside the point) and its *Brady*-like prejudice analysis of whether knowledge of Judge Marullo's relation to the case would have "exculpate[d]" Petitioner "in light of the abundant evidence of his guilt." Pet. 27.

But the court committed an additional blatant error when it purported to distill this Court's jurisprudence into nine specific circumstances warranting recusal. *Id*. In response, Respondent offers the weak assertion "there is no indication" the court considered its list exhaustive. BIO 16-17. But the court's language was unambiguous: "The jurisprudence reveals that an unconstitutional probability of bias exists when" one of the nine listed circumstances is present, and then concluding that "[n]one of these risks is present in this case." Pet.App. 16a-18a. That's how Louisiana's lower courts understand the Constitution now, too. *See State v. Kitts*, No. 2017-0777, 2018 WL 2172726, at *26-27 (La. Ct. App. May 10, 2018) ("In *LaCaze II*, the Supreme Court identified [nine] instances in which an unconstitutional probability of

bias exists under the jurisprudence" and "stressed that none of those risks were present in the case before it."); *id.* at *27 (no due process violation because "[n]one of the risks of an unconstitutional probability of bias identified by [*LaCaze II*] are present in this case"). That flouts this Court's repeated directive "that what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.' " *Lavoie*, 475 U.S. at 822 (quoting *Murchison*, 349 U.S. at 136).

Finally, the Louisiana Supreme Court's division of this Court's recusal standard into two separate showings—which no other court in the country has done—sets an impermissibly high threshold that conflicts with this Court's decisions. Pet. 27-28. Respondent responds only that cases like *Tumey v. Ohio*, 273 U.S. 510 (1927), and *Bracy v. Gramley*, 520 U.S. 899 (1997), are no longer relevant to the Court's recusal test and "addressed a different standard." BIO 17 & n.16. That is astonishing. This Court's recent recusal cases *derive* their principles from cases like *Tumey* and *Bracy*. Moreover, application of *Bracy* was the principal basis for summary reversal in *Rippo v. Baker*, 137 S. Ct. 905, 906-07 (2017), the decision that warranted remand here in the first place.

These patent misapplications of this Court's case-law warrant summary reversal.

II. The Court Should Resolve The Conflict Over *McDonough* And Reject Nullification Of Chief Justice Rehnquist's Majority Opinion.

1. Respondent claims there is no meaningful disagreement among the circuits over what it means

to show a "valid basis for a challenge for cause" under *McDonough*. Respondent terms its prior acknowledgement of the three-way split among the circuits as "unconscious[]." BIO 22 & n.18. Respondent's prior acknowledgement of the split was explicit, dedicating three pages of its prior BIO to the "three separate tests" adopted by the circuits. *See* Prior BIO 25-27.

Regardless, Respondent's claim that there is no conflict is not credible. Just two weeks before Respondent filed its BIO, yet another state high court recognized *McDonough* has "produced a three-way split on the standard to be used." *In re Manriquez*, 421 P.3d 1086, 1110 n.1 (Cal. July 26, 2018); *see also* Pet. 30-32; Amicus Br. of National Jury Project at 6-9.

2. Respondent does not contest that the second question-presented is preserved or that the facts the jurors withheld would have given rise to a valid challenge for cause, even if they fell short of "actual bias" or the special relationships of "implied bias" that mandate dismissal. *United States v. Torres*, 128 F.3d 38, 46-47 (2d Cir. 1997) (Calabresi, J.). Respondent only retorts that the Louisiana Supreme Court did not limit itself to mandatory dismissal because it spoke of "relationships or experience which affected or must be presumed to have affected his view of the evidence in this case." Pet.App. 38a-39a. But that *is* the language used to define actual or implied bias. *See United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001) (*McDonough* requires showing that would "disqualify the juror," which is either actual bias or a relationship from which "bias must be presumed"); *Smith v. Phillips*, 455 U.S. 209, 222-23 (1982) (O'Connor, J., concurring). The Louisiana Supreme Court did not ask whether "a reasonable judge" would conclude that

"a valid basis for excusal for cause existed," *Sampson v. United States*, 724 F.3d 150, 165-66 (1st Cir. 2013), or, in the language of the Second Circuit, whether the facts gave rise to a third category of "inferred bias," *Torres*, 128 F.3d at 47-48.

3. Restricting *McDonough* to actual or implied bias renders Justice Rehnquist's majority opinion superfluous. Pet. 34-35. Respondent does not argue otherwise. If a deep, three-way conflict were not enough, *see* Sup. Ct. R. 10(a) & (b), Respondent effectively concedes the interpretation below cannot be reconciled with a decision of this Court. *See* Sup. Ct. R. 10(c).

4. Respondent also claims no conflict over whether *McDonough* requires deliberate dishonesty; all courts hold it does. BIO 24-25. That representation is, again, easily belied. Respondent ignores the cases Petitioner cited that expressly hold *McDonough* applies "equally to deliberate concealment and to innocent nondisclosure," *Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir. 2002), and "read the majority vote in [*McDonough*]" to apply "even where a juror is found to have been honest," Pet. 33 (quoting *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir. 1992)). Instead, Respondent cites cases that, by their terms, "do not explore * * * the effect of honest but mistaken voir dire responses," *Sampson*, 724 F.3d at 164 n. 8, or refer to "dishonesty," without addressing whether it includes misleading omissions, BIO 26.[2]

Indeed, days before Respondent filed its BIO, the Fourth Circuit issued an opinion holding Respond-

[2] At best, Respondent has found an earlier case indicating intra-circuit inconsistency in the Second Circuit. BIO 26; Pet. 33.

ent's interpretation of *McDonough*—excluding "failures to disclose"—is not just wrong, but contravenes this Court's *clearly established* law, *see Porter v. Zook*, No. 16-18, 2018 WL 3679610, at *15 (4th Cir. Aug. 3, 2018), and even the dissenting judge agreed *McDonough* "applies 'equally to deliberate concealment and to innocent nondisclosure,' " *id.* at *26 (Shedd, J., concurring in part and dissenting in part) (citation omitted). The conflict of authority as to whether *McDonough*'s reference to "dishonesty" requires deliberate deception or includes misleading omissions is well acknowledged. *E.g.*, *Fitzgerald v. Greene*, 150 F.3d 357, 364 n.3 (4th Cir. 1998); *see also* Amicus Br. of National Jury Project at 9-10.

5. Based on the settled findings, Juror Mushatt was a dispatcher for the NOPD for 20 years—the same police force that employed the victim officer, codefendant, and over twenty witnesses. Pet. 9-10. She never brought this to the court's attention after being called for individual questioning, despite being specifically instructed to do so. *Id.* She also never disclosed she was in the dispatch room for the 911 call pertaining to the murder at issue and attended the victim police officer's funeral. *Id.*

Based on the settled findings, Juror Settle "had a long history of employment in the field of law enforcement," including five years as a special agent, 11 years as a Sergeant, and two years as an officer for the Louisiana State Police. Pet.App. 70a-71a. Settle was asked three times about any relations to law enforcement, yet sat silently as others disclosed their substantially more remote connections to law enforcement. Pet. 8.

And based on the settled findings, Juror Garrett's two siblings were, like the Vu siblings in this case,

victims of a New Orleans murder. Pet. 10. Despite being asked three times whether she had relatives who were victims of violent crime and seeing prospective jurors around her disclose such details, she remained silent. *Id.*

A record with settled findings as to three jurors provides an ideal opportunity for this Court to clarify the meaning and application of *McDonough*. Respondent raises two arguments against review. First, it argues, for the first time, that Settle and Mushatt were not asked to disclose their relevant connections to law enforcement and that Petitioner's argument would have required them "to volunteer information." BIO 27. But the Louisiana Supreme Court specifically found the opposite—that the "several questions * * * aimed at whether panelists had any connections with law enforcement" were "sufficient" to require disclosure of such relations. Pet.App. 38a.[3] Moreover, Respondent does not contest that Garrett was asked squarely for any connections to victims of violent crime and never disclosed that her brothers had been murdered. Pet. 10.

Second, Respondent claims the *McDonough* issue was not raised below, selectively quoting a passage from Petitioner's briefing. BIO 22-23. The district court specifically found that Settle had "no excuse" and "did not honestly answer" questions at voir dire.

---

[3] Respondent similarly contends the second question-presented—the meaning of "valid basis for a challenge for cause"—is not independently presented because the court below "applied both" prongs of *McDonough* to Settle and Mushatt. Respondent's argument misses the mark. The point is that, upon applying both prongs of *McDonough*, the court concluded the second question-presented was dispositive. *See* Pet. 13-14, 35-36.

Pet. 11; Pet.App. 74a. Petitioner argued below that this finding was correct. *See* LASC Application for Supervisory Writs 11. He also argued that courts may "infer bias from the juror's omission of a material fact about his or her background." *Id.* at 10 (citing *State v. Scott*, 854 F.2d 697 (5th Cir. 1988), which rejected the argument that *McDonough* turns on dishonesty). And he explained that although a juror's "intentional concealment" will almost always violate *McDonough*, "mistaken, although honest, answers" may also. *Id.* Moreover, Respondent does not contest that the Louisiana Supreme Court interpreted *McDonough* to apply only to a juror who has "lied" or "consciously withheld" information, squarely presenting the issue. *See Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002).

Respondent does not contend the Court would benefit from further percolation of the disagreement over *McDonough*, nor could it, given the numerous lower court opinions airing both sides of each conflict. As the defense associations of 32 states and D.C., and NACDL, have urged "[t]he stakes in criminal cases are simply too high to permit these multi-faceted circuit splits and their attendant divergent outcomes to continue." *See* Amicus Br. of Defender Ass'ns of 32 States, D.C., and NACDL at 17.

The Court should grant certiorari to resolve the conflict and restore meaning to Chief Justice Rehnquist's majority opinion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BLYTHE TAPLIN
CECELIA KAPPEL
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 71103

GLADSTONE N. JONES, III
HARVEY S. BARTLETT III
EMMA E. ANTIN DASCHBACH
JONES, SWANSON, HUDDELL & GARRISON, LLC
601 Poydras Street, Ste. 2655
New Orleans, LA 70130

AMIR H. ALI
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Attorneys for Petitioner