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

BRIEF OF *AMICI CURIAE* FORMER STATE AND FEDERAL TRIAL COURT JUDGES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are ten former state and federal trial court judges: a former judge of the Criminal District Court of Travis County, Texas and the Texas Court of Criminal Appeals; a former judge of the California Superior Court; a former judge of the 19th Circuit Court of Fairfax County, Virginia and former chief judge of the Virginia Court of Appeals; a former judge of the First Circuit Court of Hawaii and former justice of the Hawaii Supreme Court; a former judge of the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit; a former judge of the Superior Court of the District of Columbia; a former Associate Judge and Presiding Judge of the Circuit Court of Cook County, Illinois; a former federal magistrate judge and judge of the United States District Court for the District of New Jersey; and two former New Jersey Superior Court judges who also served on the United States District Court for the District of New Jersey. A list of the *amici* follows in the attached Appendix.

These former judicial officers collectively spent decades on the bench, where they presided over criminal trials regularly—and in some cases, exclusively. During their judicial careers, *amici* were responsible for deciding whether to recuse themselves from particular criminal cases, and they

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[1] Counsel for *amici curiae* authored this brief in its entirety and no party or its counsel, nor any other person or entity other than *amici* and their counsel, made a monetary contribution intended to fund its preparation or submission. All counsel of record received at least 10 days' notice of the *amici*'s intention to file this brief; all parties consented, as reflected in the accompanying letters.

were entrusted with the responsibility of disclosing to prosecutors and to criminal defendants facts that could impact that decision or could be relevant to a possible motion for disqualification. *Amici* have particular insight into the complexities of the many day-to-day decisions made during a criminal trial, which necessarily require judges to have a broad understanding of their constitutional disclosure and recusal obligations. During their tenure on the bench, *amici* understood those responsibilities to fall within the scope of their significant duty to ensure, to the best of their ability, that the due process rights of criminal defendants were respected and that defendants were provided a fair trial in a fair tribunal.

Amici maintain an interest in preserving the legitimacy of the rule of law and the integrity of the criminal justice system. They file this brief out of concern that some courts, including those below, are straying from this Court's clear mandates by taking an overly rigid view of the standards of judicial recusal. *Amici* believe that, consistent with the requirements of due process, courts must take a flexible, practical approach to their duty to avoid potential conflicts that could undermine the legitimacy of the proceeding and the public's confidence in the courts, and to evaluate objectively whether recusal is warranted.

SUMMARY OF THE ARGUMENT

This Court's precedents on judicial recusal require intervention in egregious circumstances. As this Court has recognized, resolving the most offensive cases not only maintains the unimpeachability of the nation's criminal justice system, but also fulfills the Court's obligation to

further develop the largely unspoken law on judicial recusal. The Court followed that pattern in *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009). It did so again in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). And it did so most recently in *Rippo v. Baker*, 137 S. Ct. 905 (2017). As *amici* show, the glaring recusal issue presented by petitioner Rogers Lacaze fits comfortably within these bounds.

In light of the unknowable route along which a criminal case will wend its way toward the jury's verdict, the trial judge must, as is now well established, disclose all personal connections to the matter of which he or she is aware, regardless of whether the judge subjectively believes that the link is insignificant or immaterial. Importantly, this duty continues; during trial, as the circumstances change, the judge must assess on an ongoing basis whether he or she has a duty to disclose relevant information to the parties.

The court below did not follow these settled principles. In fact, this is not a close case. *Amici* believe that it is an extraordinary one that violates due process because of its startling facts: the judge who chose to preside over Mr. Lacaze's capital trial was implicated in the events leading up to the crime, the judge was questioned as a witness during the investigation of the crime, and the judge later, in seeking reelection to the bench, touted as badges of honor that he had presided over Mr. Lacaze's conviction and that he had sentenced Mr. Lacaze to death by lethal injection. The Louisiana Supreme Court's decision, which provides 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—threatens

the legitimacy of not just Mr. Lacaze's conviction and sentence, but of the administration of justice.

The question presented is whether, under the extraordinary facts of this case, the trial judge's failure to recuse himself violated Mr. Lacaze's due process rights. The Court should grant certiorari and, on the merits, hold that recusal was constitutionally necessary. As in *Caperton*, *Williams*, and *Rippo*, the Court must protect the integrity of the judicial system from the grave besmirching that can occur when even a single state high court's significant, erroneous recusal decision goes uncorrected.

ARGUMENT

I. THIS COURT'S OBJECTIVE, FLEXIBLE JUDICIAL RECUSAL STANDARD WARRANTS DISQUALIFICATION ESPECIALLY IN CASES INVOLVING EXTREME FACTS

A. *The Court's Recusal Standard Has Deep Historical Roots*

"It has been said . . . that there are few characteristics of a judiciary that are more cherished than that of impartiality." Richard E. Flamm, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES, at 109 (3d ed. 2017) ("Flamm"). This idea, "that jurists should stand fair and impartial between the parties who appear before them," stretches back to ancient times. *Id.* at 3, 7 (describing edicts contained in the Babylonia Talmud and the Roman Code of Justinian).

English common law, too, has historically focused on the appearance of justice in its standards for judicial disqualification. In *R. v. Sussex Justices, Ex*

parte McCarthy, [1924] 1 K. B. 256 (1923), one of the leading English cases on the subject, the King's Bench emphasized "'a long line of cases show[ing] that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'" *Id.* at 259 (quoted in *Liteky v. United States*, 510 U.S. 540, 565 (1994) (Kennedy, J. concurring)). *McCarthy* concerned a criminal case in which a clerk to the trial justices was also a partner in a law firm that represented the defendant in a related civil matter. The question was whether, in light of the clerk's relationship to the case, the clerk was "unfit" to have retired with the justices as they considered their decision (per usual practice "in case the justices should desire to be advised upon any point of law"). *Id.* at 257, 259. The justices convicted the defendant and reached their decision without consulting the clerk, "who scrupulously abstained from referring to the case." *Id.* at 257. Regardless, on appeal, the King's Bench concluded that it mattered not "what actually was done"; instead, its analysis depended on "what might appear to be done." *Id.* at 259. The appellate court quashed the defendant's conviction, holding that "[n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." *Id.*

This Court has followed suit by holding that the Constitution requires a judge with "the impersonal authority of the law" to hear a criminal defendant's case. *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971). In *Mayberry*, for example, the Court concluded that "highly personal aspersions" by an attorney attacking a trial judge were "apt to strike at the most vulnerable and human qualities of a judge's

temperament" and due process therefore warranted the judge's recusal from the attorney's contempt proceedings. *Id.* (internal quotation marks omitted); *see also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1988) (affirming that recusal was necessary "when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances"); *Edgar v. K.L.*, 93 F.3d 256, 259-60 (7th Cir. 1996) (holding that a judge should have recused himself after he held "briefings in chambers" that "le[ft] no trace in the record," and when "the judge . . . forb[ade] any attempt at reconstruction" of those material conversations).

Indeed, it has been said that

> litigants are entitled to nothing less than the "cold neutrality of an impartial court;" that it is of primary importance that a litigant's case be decided by an impartial and unbiased court; and that the requirement of judicial impartiality is both a fundamental principle of the administration of justice, and a necessary one if the public is to maintain confidence in the judiciary.

Flamm at 109 (collecting cases). These rights, which are deeply imbedded in American jurisprudence, are considered "to be particularly important in criminal cases, in which the defendant's liberty—and perhaps even his life—may hang in the balance." *Id.* at 111.

The Court's jurisprudence has come to emphasize that "what degree or kind of interest is sufficient to

disqualify a judge from sitting cannot be defined with precision." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (internal quotation marks omitted). The end result is a flexible, objective standard intended to determine whether due process requires recusal: "The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009); *see also id.* at 882 ("We do not question . . . subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias."). The Court has also asked "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

B. *When Faced With Extraordinary Circumstances That Test the Bounds of Due Process, This Court Has Recognized the Importance of Intervening*

Judges acting in good faith cannot always identify their own subjective motives or biases when deciding a case. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("Bias is easy to attribute to others and difficult to discern in oneself."); *see also Caperton*, 556 U.S. at 883 ("The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules."). This is exactly why the Due Process Clause does not require "proof of actual

bias." *Id.* Instead, "[d]ue 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.'" *Id.* at 886 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

In three recent cases this Court has applied the constitutional recusal inquiry to novel situations. In doing so, the Court has emphasized the flexible, objective nature of the due process standard and the extraordinary nature of the facts presented.

1. In *Caperton v. A.T. Massey Coal Company*, a jury sitting in a West Virginia trial court found A.T. Massey Coal Company ("Massey") liable for fraudulent misrepresentation, concealment, and tortious interference with contractual relations, and awarded $50 million in damages to Hugh Caperton, among others. 556 U.S. at 872. Don Blankenship, the chairman, CEO, and president of Massey, knew that the state Supreme Court of Appeals would consider the case on appeal, and he sought to influence the next judicial election in Massey's favor. *Id.* at 873.

After the jury verdict, but before the appeal, West Virginia held its judicial elections. *Id.* Blankenship donated $3 million to an attorney campaigning for a seat on the appellate court. *Id.* The attorney won, and when the adverse jury verdict against Massey went up on appeal, Caperton moved to disqualify the new justice from the case. *Id.* at 873-74. The new justice denied Caperton's motion, and the court, in a decision joined by the new justice, subsequently reversed the verdict against Massey. *Id.* at 874-75.

This Court concluded that the "extreme facts" of the case warranted intervention. *Id.* at 886-87. It held 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.

Id. at 884. "Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case" created a probability of actual bias that rose to an unconstitutional level. *Id.* at 886.

In reaching its decision, the Court acknowledged that "extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong." *Id.* at 887. Yet, the Court also emphasized that "extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards." *Id.* To be sure, each of the recusal cases on which the Court relied in *Caperton* "dealt with extreme facts that created an unconstitutional probability of bias that cannot be defined with precision." *Id.* (internal quotation marks omitted).

2. More recently, *Williams v. Pennsylvania* held that due process compelled the recusal of an appellate judge who, decades before in his role as district attorney, authorized the death penalty in the

defendant's case. 136 S. Ct. at 1903-04. Terrance Williams was convicted of murder and sentenced to death; finding that the prosecution had suppressed material, exculpatory evidence at trial, a post-conviction court stayed Williams's execution and ordered a new sentencing hearing. *Id.* at 1904. The Commonwealth of Pennsylvania sought from the Pennsylvania Supreme Court, to which the former district attorney had by then been elected, an order vacating the stay of execution. *Id.* Williams filed a motion for recusal. *Id.* The judge denied the motion, and the Pennsylvania Supreme Court ultimately reinstated Williams's death sentence. *Id.* at 1904-05.

As in *Caperton*, the Court again noted that its due process precedents did not set forth a specific test for recusal in this particular situation, which the Court described as "when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id.* at 1905. The Court explained, however, that the principles on which its precedents rest required recusal because there was "an impermissible risk of actual bias"—regardless of "whether actual bias is present." *Id.* As the Court emphasized, harkening to *In re Murchison*, 349 U.S. 133 (1955), "[t]he due process guarantee that 'no man can be a judge in his own case' would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision." *Williams*, 136 S. Ct. at 1906 (citing *In re Murchison*, 349 U.S. at 136-37).

The Court found there was "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." *Id.* at 1906 (internal quotation marks omitted). Noting that "[t]he involvement of other actors and the passage of time are consequences of a complex criminal justice system," the Court concluded that "[t]his context only heighten[ed] the need for objective rules preventing the operation of bias that might otherwise be obscured." *Id.* at 1906-07.

The Court also highlighted the judge's "own comments while running for judicial office," to include his statement that he "sent 45 people to death row[] as district attorney." *Id.* at 1907 (internal quotation marks omitted). The judge's "willingness to take personal responsibility for the death sentences obtained during his tenure as district attorney" indicated to the Court that "in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office." *Id.* at 1908.

Further, the Court "had little trouble" determining that a due process violation arising from the judge's failure to recuse himself was not amenable to harmless error review. *Id.* at 1909-10. In short, the judge's participation in Williams's case "was an error that affected the State Supreme Court's whole adjudicatory framework." *Id.* at 1910. Under the circumstances, Williams had to be "granted an opportunity to present his claims to a court unburdened by any 'possible temptation not to hold the balance nice, clear and true between the State and the accused.'" *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)) (ellipses omitted).

3. Just last year, the Court decided *Rippo v. Baker*, 137 S. Ct. 905 (2017), a *per curiam* decision vacating the Nevada Supreme Court's judgment in

another death penalty case. Michael Damon Rippo was convicted of first-degree murder and other offenses and sentenced to death. *Id.* at 906. During his trial, Rippo came to believe that the trial judge had been targeted in a federal bribery probe; Rippo surmised that the district attorney's office, which was prosecuting him, was involved in the bribery investigation. *Id.* "[C]ontending that a judge could not impartially adjudicate a case in which one of the parties was criminally investigating him," Rippo moved to disqualify the judge, who refused to recuse himself. *Id.* After that judge's indictment on federal charges, "a different judge later denied Rippo's motion for a new trial," and the Nevada Supreme Court affirmed. *Id.*

During post-conviction proceedings, Rippo presented evidence that the district attorney's office had, in fact, participated in the investigation of the trial judge. *Id.* The Nevada Supreme Court affirmed the state post-conviction court's denial of relief because the evidence did not show that the judge was actually biased. *Id.* at 906-07. Rippo sought a writ of certiorari from this Court, which granted Rippo's petition, vacated the judgment below, and remanded. *Id.* at 907. Holding that the Nevada Supreme Court "applied the wrong legal standard," this Court reiterated that "the Due Process Clause may sometimes demand recusal even when a judge has no actual bias." *Id.* (internal quotations omitted). Once again, the Court noted that its precedents require recusal when, objectively speaking, "the *risk* of bias [is] too high to be constitutionally tolerable." *Id.* (emphasis added).

II. THE EXTRAORDINARY FACTS OF THIS CASE WARRANT THE COURT'S INTERVENTION

Although the Louisiana Supreme Court recited some of the foregoing legal principles in its March 2018 decision, *see* Pet.App. 11a, it nonetheless diverged from them in several ways that pose serious concerns for the legitimacy of judicial integrity and impartiality. In this exceptional case, those departures from this Court's precedents warrant review.

A. *The Louisiana Supreme Court Applied an Artificial Rule Limiting Recusal to a Handful of Strict Categories*

The circumstances of this case are, frankly, astonishing, as the summary points below establish:

- Three murder victims—New Orleans Police Department ("NOPD") Officer Ronald Williams and civilian siblings Ha and Cuong Vu—were shot in the head with a 9mm gun (Pet. 2).
- NOPD Officer Antoinette Frank and petitioner Rogers Lacaze were both indicted on charges of first-degree murder (*Id.*).
- The triple murder quickly became infamous in the city of New Orleans (Pet.App. 160a (describing the "weeks of intense media coverage that followed this notorious crime")).
- During its investigation of the case, the NOPD learned that Officer Frank had obtained a 9mm gun from the NOPD's gun vault using an *ex parte* court order bearing the signature of Judge Frank Marullo (Pet. 3).

- The NOPD questioned Judge Marullo, who insisted the signature on the order was not his; he said "he would not have signed the order" because it "did not have a description of the weapon to be released" (Pet.App.214a).
- Judge Marullo was subsequently assigned to preside over both defendants' trials, with Mr. Lacaze scheduled to go first, and chose to preside despite his involvement in the NOPD's investigation (Pet. 4).
- An NOPD investigator thereafter approached Judge Marullo for a second time, to obtain a taped statement; the judge declined to do so until after the two trials ended (*Id.*).
- Despite the potential for the death penalty, Judge Marullo scheduled Mr. Lacaze's capital trial to begin less than three months after indictment, and made clear that the proceedings would continue apace (Pet. 2).
- The defense theory at trial was that Officer Frank had planned and committed the murders with her brother after obtaining a 9mm gun from the police property room to use in the crime (Pet. 2, 5).
- Consistent with that theory, Mr. Lacaze testified that Officer Frank told him she would be getting a gun from a friend "'down in the Property Room'" (Pet. 2).
- Mr. Lacaze had no other evidence to corroborate this testimony, and it later proved to be true that Officer Frank had, in fact, obtained a 9mm gun from the property room

that was found in her brother's possession three years later (Pet. 2-3, 5).

- Mr. Lacaze was convicted of first-degree murder and sentenced to death (Pet. 3).
- Judge Marullo faced reelection a few months after Mr. Lacaze's conviction and sentencing, and he ultimately prevailed in a very tight race by a slim 2% margin of victory (Pet. 7).
- Judge Marullo's campaign materials promoted that he was "tough on crime" and that he had sentenced "Lacaze to die by lethal injection" (Pet. 7).

In essence, Judge Marullo recused himself from an investigation in which he was alleged to have released the weapon likely used in a scandalous triple homicide—seemingly acknowledging that there was a conflict between being a witness in an investigation and presiding over the related murder trial—but chose not to recuse himself from the related trial or even disclose the pertinent facts to the parties. In direct contravention of this Court's precedents, the Louisiana Supreme Court held that these facts did not require recusal because they do not fit neatly within a list of nine specific circumstances in which courts have previously found "an unconstitutional probability of bias." Pet.App. 16a-18a. The court concluded, for example, that Judge Marullo's "initial cooperation" in the NOPD's investigation into the release of the gun "was not adversarial or accusatory" toward Mr. Lacaze, and that Judge Marullo was not "under investigation himself for any of these events." Pet.App. 18a-19a. The Louisiana Supreme Court therefore reasoned that Mr. Lacaze's due process rights could not have

been violated when Judge Marullo presided over his capital murder trial and sentenced him to die by lethal injection even though the judge had been embroiled in the NOPD's investigation of the very crime for which Mr. Lacaze stood trial. Pet.App. 19a.

This Court has adopted a contrary approach in *Caperton*, *Williams*, and *Rippo*, each of which recognized a more holistic understanding of the Due Process Clause. This broader concept is likewise reflected in earlier cases recognizing that a judge must not preside in a case when he or she has a concrete self-interest in how the matter unfolds.

"It would not be possible for Congress or a state legislature," or this Court, "to list all of the factors that could conceivably provide a genuine reason for questioning a judge's impartiality." *Flamm* at 15.[2] Again, "what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision," *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *In re Murchison*, 349 U.S. at 136), and, as the Court explained in *Caperton*, "sometimes no administrable standard may be available to address the perceived wrong." 556 U.S. at 887; *see also Williams*, 136 S. Ct. at 1905

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[2] The thousands of published court decisions on the topic of recusal nationwide "tend to reflect an accumulating mound of reasons for *denying* disqualification motions." *Flamm* at 15 (internal quotation marks omitted, emphasis added). "This is so because, while jurists often recuse themselves—sometimes without even notifying the parties—and while motions to disqualify judges who do not voluntarily recuse are sometimes, albeit rarely, granted, a judge who recuses herself does not usually issue an opinion explaining why she did so." *Id.* at 14-15. On the other hand, judges who decline to recuse themselves often write "lengthy opinions" justifying their decisions. *Id.* at 15.

("This Court's due process precedents do not set forth a specific test governing recusal when, as here, a judge had prior involvement in a case as a prosecutor"). It is in the exceptional cases where the Court must formulate objective standards that fit the facts at hand. Thus, at a minimum, the Louisiana Supreme Court's creation of an artificial rule—pursuant to which recusal is required only when a judge harbors certain biases on a specific checklist—warrants this Court's review.

B. *The Louisiana Supreme Court Incorrectly Required Evidence of Bias For or Against a Party*

The Louisiana Supreme Court acknowledged that Judge Marullo had "some sensitivity about whether his signature was forged" on the *ex parte* order releasing the potential murder weapon to Officer Frank. Pet.App. 24a. The court nonetheless required Mr. Lacaze to show that those sensitivities were "objectively (and realistically) likely to cause bias for or against either party in this case." *See* Pet.App. 25a.

This Court has never held that due process requires recusal only when the judge harbors bias for or against a party. Rather, the Court has emphasized that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). At the core of this Court's due process jurisprudence is the recognition that self-interest on the part of the judge is incompatible with due process. *See Williams*, 136 S. Ct. at 1905-06 ("This objective risk of bias is reflected in the due process maxim that no man can be a judge in his own case and no man is permitted to try cases

where he has an interest in the outcome") (internal quotation marks omitted); *see also Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972) (holding that a "neutral and detached judge" is an essential component of due process).

Here, an objective observer would believe, based on Judge Marullo's own statements, that he harbored resentment for being in some manner associated with what had become a notorious crime. After it was revealed during Officer Frank's later trial that Judge Marullo's signature was on the *ex parte* order, he prohibited any testimony about his involvement in the release of the 9mm gun, stating: "'You are going to dig up something and it is going to come out about this investigation about the guns coming out of that room.'" Pet. 6. "'*I'm not going to get involved in all of that—about the guns*.'" *Id.* (emphasis added); *see also* Pet.App. 4a-7a (describing Judge Marullo's shifting versions of events).

Moreover, Judge Marullo appears, from an objective perspective, not only to have had "sensitivit[ies]" about being connected to the release of the potential murder weapon, but also to have affirmatively wanted to preside over this high-profile case. *See* Pet.App. 25a. Again, the case involved a sensational triple homicide, with one police officer accused of murdering another police officer, and was widely publicized. And Mr. Lacaze's trial came at a time when Judge Marullo was heading into a highly competitive judicial election. His own campaign materials promoted that he had sentenced "Lacaze to die by lethal injection." *See* Pet. 7. These factors indicate that Judge Marullo would have an interest, whether conscious or not, in keeping quiet when it came to his involvement in the release of the

potential murder weapon. *See Republican Party v. White*, 536 U.S. 765, 788-89 (2002) (O'Connor, J., concurring) ("[I]f judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case.").

A judge's constitutional duty to make disclosures and recuse in the event of an apparent conflict is, of course, ongoing. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 856 (1988) ("[I]t is appropriate to consider the state of [a judge's] knowledge immediately before the lawsuit was filed, what happened while the case was pending before him, and what he did when he learned of the [potential conflict] in the litigation"). Here, Judge Marullo had multiple opportunities to disclose his involvement in the police investigation, including: the moment at which the case was assigned to him, by which point he had already been interviewed (Pet.App. 4a); after he had been approached to provide a taped statement (*id.*); on the first day of trial, when the defense moved to recuse him on unrelated grounds (*id.*); after learning the defense theory that Officer Frank obtained a 9mm gun from the NOPD property room to use in the murders (Pet.App. 19a); and after Mr. Lacaze testified at trial about the conversation he had with Officer Frank, who told him about her plan to do just that (*id.*). Judge Marullo never informed the parties that the NOPD had investigated the release of the 9mm gun, much less that he had been questioned by the NOPD during that very investigation about his own role in events that were at issue at trial. Pet. 4-5.

The Louisiana Supreme Court's own findings contradict its conclusion that the circumstances do

not rise to the level of a due process violation. The court concluded that "the inquiry into the authenticity of Judge Marullo's signature [on the *ex parte* order] was technically related to Defendant's case and may, therefore, have *prompted an average judge to disclose this information*." Pet.App. 24a (emphasis added). *Amici* wholeheartedly agree. "[U]nder a realistic appraisal of psychological tendencies and human weakness," *see Caperton*, 556 U.S. at 883-84 (internal quotation marks omitted), and, as the Louisiana Supreme Court itself stated, "the average judge would be *vigilant to avoid being unjustly associated with any wrongdoing surrounding the release of the possible murder weapon* to Frank." Pet.App. 24a (emphasis added). This is akin to the disqualifying risk in *Williams* "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." 136 S. Ct. at 1906.

At the very least, Judge Marullo was obligated to disclose his involvement in the release of the 9mm gun and in the NOPD investigation, and give the parties an opportunity to explore the potential ramifications. Judges have an affirmative duty to disclose any information that might be relevant to his or her possible disqualification. *See* Model Code of Judicial Conduct R. 2.11 cmt. 5 ("A judge should disclose on the record 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."). Judge Marullo had numerous opportunities to disclose the pertinent facts and never did so. In a "system of law [that] has

always endeavored to prevent even the *probability of unfairness*," *In re Murchison*, 349 U.S. at 136 (emphasis added), the importance of disclosure cannot be overstated.

C. *The Louisiana Supreme Court Improperly Concluded That Recusal Was Not Required Due to Evidence of "Guilt"*

Finally, the Louisiana Supreme Court held that "[t]he fact that Frank got a 9mm gun from the property room does not exculpate Defendant, especially in light of the abundant evidence of his guilt." Pet.App. 20a. Inherent in the court's conclusion is the notion that any error on the part of Judge Marullo, in terms of not recusing himself from the case, is subject to harmless error review. The Louisiana Supreme Court was incorrect.

In *Williams*, this Court had "little trouble" determining that "an unconstitutional failure to recuse constitutes structural error" and that "a due process violation arising from the participation of an interested judge is a defect not amenable to harmless-error review." 136 S. Ct. at 1909 (internal quotation marks omitted). The Court explained:

> An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.

Id. at 1909.

The error in the *Williams* case—an appellate judge adjudicating a case in which he had served as an advocate for the State (solely in a purportedly "ministerial" role)—constituted a due process violation that "affected the State Supreme Court's whole adjudicatory framework." *Id.* at 1910. It therefore stands to reason that the circumstances of this case—in which a trial judge who allegedly authorized the release of the weapon used in a sensational, highly publicized triple homicide, presided over the defendant's capital trial at a time when the judge faced a reelection battle—likewise violate the Constitution and require a new trial that comports with the fundamental concepts of due process. *See id.*; *see also Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.").

III. REVIEW WILL HELP ENSURE THE INTEGRITY OF THE NATION'S CRIMINAL JUSTICE SYSTEM

Whether Judge Marullo in fact had a subjective self-interest in presiding over Mr. Lacaze's capital trial while he was also embroiled in the facts of the case, the judge's actions have an objective appearance of self-interest. In light of the "vital state interest" in promoting public confidence in the fairness and integrity of the nation's elected judges, *see Caperton*, 556 U.S. at 889, the Court should grant Mr. Lacaze's petition.

In our nation's legal system, courts "elaborate principles of law in the course of resolving disputes." *Id.* "The power and the prerogative of a court to

perform this function rest, in the end, upon the respect accorded to its judgments," and "[t]he citizen's respect for judgments depends in turn upon the issuing court's absolute probity." *Id.* For these reasons, judicial integrity is "a state interest of the highest order." *Id.*

Courts have recognized the "need for an unimpeachable judicial system in which the public has unwavering respect and confidence." *Flamm* at 218. Irrespective of a judge's subjective impartiality, "public perceptions of partiality can undermine public confidence in the courts." *Id.* Justice, as this Court has held, "must satisfy the appearance of justice." *In re Murchison*, 349 U.S. at 136; *see also Williams*, 136 S. Ct. at 1909 ("Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.").

The Louisiana Supreme Court was correct in saying that, "at first blush," Judge Marullo's possession of information about both the potential murder weapon and its release to Officer Frank "might cause an average observer to question him sitting in a capital trial." Pet.App. 22a-23a. That such objective partiality and self-interest jumps out from the facts of this case is, however, precisely the problem. The integrity of the judicial system calls for review.

CONCLUSION

Amici respectfully urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,
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APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

Charles Baird, former Judge, Travis County (Texas) Criminal District Court, and former Judge, Texas Court of Criminal Appeals.

William Bassler, former Judge, New Jersey Superior Court, and former Judge, the United States District Court for the District of New Jersey.

George Eskin, former Judge, California Superior Court.

Johanna Fitzpatrick, former Judge, 19th Circuit Court of Fairfax County, Virginia, and former Chief Judge of the Virginia Court of Appeals.

Steven Levinson, former Judge, Hawaii First Circuit Court, and former Justice, Hawaii Supreme Court.

Timothy Lewis, former Judge, United States District Court for the Western District of Pennsylvania, and former Judge, the United States Court of Appeals for the Third Circuit.

Stephen G. Milliken, former Associate Judge of the Superior Court of the District of Columbia

Sheila Murphy, former Presiding Judge and former Associate Judge, Circuit Court of Cook County, Illinois.

Stephen M. Orlofsky, former Judge and former Magistrate Judge, the United States District Court for the District of New Jersey.

Alfred Wolin, former Judge, Union County (New Jersey) District Court, former Judge, New Jersey Superior Court, and former Judge, the United States District Court for the District of New Jersey.