

**In The
Supreme Court of the United States**

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ROGERS LACAZE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

————— ◆ —————
**ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA**

————— ◆ —————
**MOTION FOR LEAVE TO FILE BRIEF OF AMICUS
CURIAE THE ETHICS BUREAU AT YALE AND
BRIEF OF AMICUS CURIAE THE ETHICS BUREAU
AT YALE IN SUPPORT OF PETITIONER**

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**MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE ETHICS BUREAU AT YALE**

This case presents an issue of considerable constitutional and ethical importance, and *amicus curiae*, the Ethics Bureau at Yale, is particularly well suited to provide additional insight into the important implications of the decision below for litigants and judges across the country. The Ethics Bureau timely notified counsel of record for both parties that it intended to submit the attached brief more than ten days prior to filing. Counsel for Petitioner consented to the filing of this brief, and that letter of consent has been filed with the Clerk of this Court. Counsel for Respondent declined to grant such consent. Therefore, pursuant to Supreme Court Rule 37.2(b), the Ethics Bureau at Yale respectfully moves this Court for leave to file the accompanying brief of *amicus curiae* in support of Petitioner.

The Ethics Bureau is a clinic at the Yale Law School and has considerable experience with questions of legal ethics in general and judicial recusal in particular. In the past two years, the clinic has submitted two briefs as *amicus curiae* on the constitutional, statutory, and ethical standards for judicial recusal. In *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), the clinic addressed the due process and ethical problems that arise when a former prosecutor presides as a judge over a case on which he had previously worked. In *In re Khadr*, 823 F.3d 92 (D.C. Cir. 2016), the clinic discussed the federal statutes and ethical rules that prohibit a judge from privately practicing law while serving in his judicial role. Likewise, in this case, Petitioner raises core

constitutional questions on judicial recusal that are grounded in the rules of ethics. The Ethics Bureau at Yale's prior work on judicial recusal has positioned it to provide the Court with unique insight on the questions presented in this case.

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INTEREST OF AMICUS CURIAE

The Ethics Bureau at Yale¹ (“Ethics Bureau”) is a clinic at Yale Law School composed of sixteen 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 not-for-profit legal service providers, courts, and law schools.

Because the impartiality of the judicial process, a fundamental element of judicial ethics, has been placed at issue by the pending matter, *amicus* believes that they might assist the Court in resolving the important issues presented.

STATEMENT OF FACTS

This case begins with a signature: the ostensible signature of the presiding judge in Petitioner’s case, a signature that appears on a judicial order releasing one of the potential murder weapons. The following discussion will show how Judge Frank Marullo, the presiding authority in Petitioner’s case, ignored this simple but critical fact.

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* have made a monetary contribution to the preparation and submission of this brief.

While investigating the homicide that led to Petitioner's conviction, the New Orleans Police Department (NOPD) discovered that Petitioner's co-defendant had acquired her weapon from the NOPD property and evidence room. The Public Integrity Bureau (PIB) of the NOPD subsequently discovered that the order releasing the firearm bore a signature that appeared to be Judge Marullo's. 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. At that time, Judge Marullo denied releasing the possible murder weapon and claimed that someone had forged his signature.

On May 1, 1995, Judge Marullo was assigned Petitioner's case. Then, just two weeks later, the PIB again contacted Judge Marullo, who at this point explained to the officer that he had been assigned Petitioner's case. On this basis, he refused to answer any more questions until the case had concluded. Despite Judge Marullo's apparent concern for preserving the propriety of his role in the case, he made no mention of the PIB's investigation to Petitioner. Indeed, even when Petitioner's counsel made an oral motion for Judge Marullo's recusal during the trial, the judge said nothing. In short, Judge Marullo failed to disclose two key facts. First, he did not disclose that his signature appeared to be on the order releasing one of the potential murder weapons. Second, he did not disclose that he was part of a closely related investigation undertaken by the same police department that had investigated Petitioner's case.

After the completion of Petitioner's trial, the PIB attempted to contact Judge Marullo one more time. Once again, however, the judge refused to give any further statement about his role in the case. He still had said nothing about the investigation to either party. Petitioner did not discover the full extent of Judge Marullo's involvement until almost twenty years later, during the current post-conviction proceedings.

SUMMARY OF ARGUMENT

Judicial impartiality protects the rights of individual litigants and guards the integrity of the justice system as a whole. Accordingly, this Court has declined to rely on inherently imprecise and unreliable subjective evaluations of a judge's own personal bias. Instead, under both the ABA Model Code of Judicial Conduct (Code) and the Due Process Clause, this Court's judicial recusal standard is necessarily objective, focusing not on whether a judge is actually biased, but on whether a judge's impartiality might reasonably be questioned.

Recusal is required when "the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Furthermore, judges have a responsibility to avoid impropriety and the appearance of impropriety. See Model Code of Judicial Conduct Canon 2. In this case, the risk that Judge Marullo would actually be biased far surpassed the level that the Constitution tolerates.

The Louisiana Supreme Court failed to apply the objective recusal standard clearly mandated by this Court's precedents. Judge Marullo's role in releasing the possible murder weapon to Petitioner's codefendant, coupled with his failure to disclose the PIB's investigation into his involvement, created an unacceptable risk of bias. Whether Judge Marullo was actually biased and whether that bias was related to a material fact in dispute at trial are completely irrelevant to the objective inquiry required under the Constitution and the Code. Rather, the fact that Judge Marullo was a potential witness in Petitioner's case left him impermissibly conflicted. Moreover, Judge Marullo's subjective awareness of this conflict, as evidenced by his refusal to cooperate with PIB following his assignment to Petitioner's case, further supports a determination that his impartiality should reasonably be questioned. Under the totality of the circumstances, a reasonable judge in Judge Marullo's position would have determined that the risk of impropriety or the appearance of impropriety was constitutionally intolerable.

Judge Marullo violated his affirmative obligation to disclose information that the parties might reasonably find relevant in evaluating judicial impartiality for purposes of recusal. This duty to disclose protects judges from litigants' probing inquiries into their personal affairs, helps to ensure that litigants have an opportunity to bring timely recusal motions, and safeguards public confidence in the judiciary. In the view of *amicus*, failure to disclose reasonably relevant information should be regarded as compelling evidence that a judge is not

objectively impartial and therefore should be disqualified.

Judge Marullo’s conduct in this case gravely undermined the integrity of the judicial proceedings and trampled Petitioner’s due process rights. *Amicus* therefore petitions this Court to grant certiorari or, in the alternative, to grant, vacate, and remand the case to vindicate Petitioner’s right to an impartial tribunal and the public’s expectation that all trials—and particularly proceedings where a defendant’s life is at stake—will be fundamentally fair.

ARGUMENT

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

To ensure that judges decide cases fairly, the Due Process Clause and the Model Code of Judicial Conduct require judges to remain impartial and independent. In *Caperton, Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), and, most recently, *Rippo v. Baker*, 137 S. Ct. 905 (2017), this Court has articulated an objective standard for assessing whether due process requires recusal. Under this Court’s precedents, recusal is required when the likelihood of judicial bias “is too high to be constitutionally tolerable.” *Caperton*, 556 U.S. at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

In applying this objective standard, the Court asks “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.’” *Id.* at 883-84 (quoting *Withrow*, 421 U.S. at 47). Accordingly, as this Court has recognized, “[T]he 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)). In evaluating claims of unconstitutional judicial bias, this Court “asks 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).

This Court has explained that “[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.” *Caperton*, 556 U.S. at 883; *see also Williams*, 136 S. Ct. at 1905 (“Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, this Court’s precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present.”). Thus, an objective recusal standard is designed to protect “against a judge who simply misreads or misapprehends the real motives at work in deciding the case.” *Caperton*, 556 U.S. at 883. For, as this Court understands, a “judge’s own inquiry

into actual bias . . . is not one that the law can easily superintend or review.” *Id.*

This Court has also recognized that “[a]lmost every state . . . has adopted the American Bar Association’s objective standard: ‘A judge shall avoid impropriety and the appearance of impropriety.’” *Id.* at 888 (quoting the Model Code of Judicial Conduct Canon 2).² In writing the Code, the ABA acknowledged that the American judicial system is founded on “the principle that an independent, impartial, and competent judiciary . . . will interpret and apply the law that governs our society.” Model Code of Judicial Conduct pmbl. Critically, the Code establishes strict standards for the ethical conduct of judges and judicial candidates. *See id.* As such, the Code *requires* judges to make competent decisions in an impartial manner, untainted by personal bias or prejudice.

Under the Code, the recusal test for appearance of impropriety is whether “reasonable minds” would perceive that the judge engaged in conduct that “reflects adversely on the judge’s

² 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).

honesty, impartiality, temperament, or fitness to serve as a judge.” Model Code of Judicial Conduct R. 1.2 cmt. 5. A judge is required to disqualify herself “in any proceeding in which the judge’s impartiality might reasonably be questioned.” Model Code of Judicial Conduct R. 2.11(A). Thus, under both the Code and the Due Process Clause, the standard for determining whether a judge is required to recuse herself is objective, focusing not on whether the judge is actually biased, but on whether the judge’s impartiality might reasonably be questioned.

In our system of justice, judges wield immense power. Accordingly, judges are obligated to maintain high standards of professional responsibility to preserve fair and impartial courts. This Court’s objective recusal standard reflects the fundamental right, guaranteed by the Due Process Clause, to present one’s case to an impartial tribunal. *Caperton*, 556 U.S. at 876; *see also In re Murchison*, 349 U.S. at 136 (“A fair trial in a fair tribunal is a basic requirement of due process.”). Few guarantees are more fundamental to the proper functioning and fairness of the judicial system than the requirement that the presiding judge be free from bias. *See* Model Code of Judicial Conduct R. 2.2 cmt. 1 (“To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.”).

Judicial impartiality not only protects litigants’ due process rights, but also works to maintain public confidence in the justice system. *See Mistretta v. United States*, 488 U.S. 361, 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and

nonpartisanship.”); *see also Caperton*, 556 U.S. at 889 (explaining that the Model Code and state codes of judicial conduct “serve to maintain the integrity of the judiciary and the rule of law”). Indeed, the mere questioning of a court’s impartiality “threatens the purity of the judicial process and its institutions.” *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). As such, maintaining the appearance of impartiality is as important as impartiality itself.

As this Court has observed, an objective standard “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 to perform its high function in the best way [justice must satisfy the appearance of justice.” *In re Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Put simply, this Court’s recusal standard is objective and exacting because judges must avoid both actual impropriety and the appearance of impropriety. This demand goes to the core of the judicial function; not only must judges decide cases fairly, but they also must conduct themselves as faithful stewards of the public’s confidence in the judiciary.

Justice is not an outcome but a process. Judges must act in a manner that protects litigants’ fundamental right to a fair trial and maintains public trust. For this reason, the United States Constitution and the Code require an objective test to assess the appearance of impropriety. In this case, Petitioner had a right to a court unburdened 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).

II. The Louisiana Supreme Court Egregiously Misapplied This Court’s Precedent to Petitioner’s Judicial Recusal Claim.

The Louisiana Supreme Court blatantly disregarded this Court’s clear precedent in evaluating Petitioner’s judicial recusal claim. First, rather than considering Judge Marullo’s objective appearance of partiality, the court focused on his supposed lack of actual or subjective bias. The court noted, for example, that “La[c]aze has pointed to no evidence that the judge harbored any bias, prejudice, or personal interest in the case.” Pet.App. 16a. Under this Court’s judicial recusal precedent, however, a defendant need not present evidence that the judge was *actually* biased against him. *See, e.g., Caperton*, 556 U.S. at 883. Instead, it is sufficient for the defendant to show that the tribunal did not “satisfy the appearance of justice.” *In re Murchison*, 349 U.S. at 136 (quoting *Offutt*, 348 U.S. at 14).

The decision below exemplifies why this Court applies an objective rather than a subjective standard in evaluating judicial bias. This Court has recognized that “psychological tendencies and human weakness” make a judge’s independent inquiry into possible biases impractical, if not impossible, for a court to review. *Caperton*, 556 U.S. at 883 (quoting *Withrow*, 421 U.S. at 47). But contrary to this Court’s express concerns about the difficulty of judges evaluating their own biases, the

Louisiana Supreme Court placed significant weight on the fact that “Judge Marullo emphatically denied any bias on his part.” Pet.App. 16a. When courts undertake a subjective inquiry, they are inevitably tempted to consider the judge’s own statements on the question. But, in fact, Judge Marullo’s subjective evaluation of his own impartiality should carry no weight in an objective assessment of whether the “likelihood of bias on the part of the judge ‘is too high to be constitutionally tolerable.’” *Williams*, 136 S. Ct. at 1903 (quoting *Caperton*, 556 U.S. at 872).

In addition to erroneously applying a subjective bias standard, the Louisiana Supreme Court further departed from this Court’s clear precedent by requiring Petitioner to show that Judge Marullo’s bias stemmed from a material fact in dispute at trial. The court reasoned that, because the source of Judge Marullo’s potential bias did not implicate an “issu[e] in dispute at trial,” it could not be a source of unconstitutional bias. Pet.App. 16a (noting that the source of the co-defendant’s weapon was “immaterial and irrelevant since it did not address any issue that needed to be proved in the case nor did it have a tendency to make the existence of any fact of consequence more or less probable” (internal quotation marks omitted)).

But this Court has never required a defendant to show that unconstitutional judicial bias involved or arose out of a specific fact at issue at trial. Indeed, this Court has previously recognized judicial-bias claims based on much more “speculative” sources of potential bias. *See, e.g., Bracy v. Gramley*, 520 U.S. 899, 905 (1997) (finding that the petitioner had

established a sufficient claim of judicial bias to warrant discovery based on the allegation that a judge under investigation for corruption in other cases would overcompensate in the petitioner's case).

This Court's recent decision in *Rippo* clearly reaffirmed that judicial bias can arise when the judge may not be biased as to any particular fact in dispute at trial. *Rippo*, 137 S. Ct. at 905 (considering judicial impartiality claim when judge was the target of separate federal bribery investigation). As Judge Posner has noted, "The issue is whether the judge was biased, regardless of how his bias may have manifested itself, or failed to manifest itself, in any defendant's case." *Cartalino v. Washington*, 122 F.3d 8, 10 (7th Cir. 1997).

III. This Court Should Grant Certiorari To Vindicate Petitioner's Due Process Right to a Fair and Impartial Tribunal.

In past cases, this Court "has not shied away from summarily deciding fact-intensive cases where . . . lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016). This Court's role in correcting misapplications of federal law is most essential in cases such as this one that involve "axiomatic" requirements of due process, *Caperton*, 556 U.S. at 876, and where the Petitioner's life is at stake. *Amicus* therefore asks this Court to grant certiorari to reverse the Louisiana Supreme Court's unacceptable error. In the alternative, *amicus* requests that this Court grant certiorari, vacate the judgment below, and remand the case so that the

Louisiana Supreme Court can “ask the question [this Court’s] precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable.” *See Rippo*, 137 S. Ct. at 907 (granting, vacating, and remanding on a judicial recusal claim where the lower court failed to apply an objective standard).

A. Evaluating the circumstances as a whole under an objective standard, Judge Marullo’s failure to recuse himself created an intolerable risk of bias.

Regardless of whether Judge Marullo was actually biased in this case, for “the average judge in his position,” *Williams*, 136 S. Ct. at 1905, the risk of bias was “too high to be constitutionally tolerable.” *Withrow*, 421 U.S. at 47.

Before and during Petitioner’s trial, Judge Marullo was being investigated for releasing one of the potential murder weapons by the same police department that handled Petitioner’s homicide case. A PIB officer first met with Judge Marullo before the case was assigned to him. Initially, the judge denied that the signature was his own. *See* Pet.App. 61a-62a. Judge Marullo received Petitioner’s case on May 1, 1995, and on May 16, the PIB contacted him again, at which point Judge Marullo refused to answer any more questions until the case ended. *See Id.* at 62a. Finally, after the completion of the trial, the PIB attempted to contact Judge Marullo one more time, but the judge once again refused to

provide investigators with any further statement about his role in the case. *See id.*

Throughout the Petitioner’s trial, Judge Marullo knew that he was the subject of an NOPD investigation for his role in Petitioner’s case. In other words, Judge Marullo knew he was the subject of an investigation being directed by the same police department that had investigated Petitioner’s case. While the lower courts may have questioned the strength of any misconduct claim against the judge, *see id.* at 16a., 60a-61a, at the time of the trial, Judge Marullo could not have predicted the future outcome of the investigation. Instead, all he would have known for certain was that the NOPD was investigating his involvement in the case—based on his pre-trial conversation with the PIB—and that the investigation was continuing—based on the PIB’s request on May 16 for a follow-up conversation.

Judges are confronted with an “obvious” conflict when they face “potential prosecution by the same authorities that prosecute[] defendants in [their] courtroom every day.” *In re McFall*, 617 A.2d 707, 714 (Pa. 1992). But this Court has also recognized judicial-bias claims based on much broader and more speculative theories of bias. For example, in *Bracy*, the 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 “compensated” for his bribe-taking by favoring the prosecution in other cases. *Bracy*, 520 U.S. at 905. Here, the objective risk of bias was much more concrete and closely tied

to the facts of Petitioner’s case. Judge Marullo actually knew that he was being investigated by the NOPD and therefore had clear incentives to consciously or subconsciously favor the party that was investigating him.

A judge also faces an impermissible conflict when she is a potential witness in a case over which she is presiding. As a result, both the federal judicial recusal statute and the Model Code of Judicial Conduct—upon which almost every state judicial recusal statute is based—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) (2012); Model Code of Judicial Conduct R. 2.11(A). Admittedly, Judge Marullo was not called as a witness at trial. However, Petitioner’s failure to call Judge Marullo as a witness was not because he did not have personal knowledge of material facts. Rather, Petitioner was not aware of the judge’s involvement in the case until twenty years after his trial concluded.³

Finally, while Judge Marullo’s subjective denial of his own bias does not eliminate the need to objectively evaluate the appearance of partiality, his subjective awareness of the conflict in this case does provide further support for the conclusion that the

³ As the next section will demonstrate, Judge Marullo’s failure to disclose “information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification” impeded Petitioner’s ability to show judicial bias and further supports a finding of objective bias in this case. Model Code of Judicial Conduct R. 2.11 cmt. 5.

risk of bias in this case “is too high to be constitutionally tolerable.” *Withrow*, 421 U.S. at 47. When contacted by the PIB after being assigned Petitioner’s case, Judge Marullo refused to answer questions until after the case had ended. In refusing to cooperate further with the PIB investigation, Judge Marullo demonstrated his own awareness of the impropriety of simultaneously being a judge and being judged by the PIB. Moreover, there is no other reasonable inference to draw from Judge Marullo’s behavior than that he knew that the investigation had the potential to cause prejudice and therefore created an appearance of impropriety. Under the totality of circumstances, this awareness provides further evidence of an objective risk of constitutionally intolerable bias in this case.

B. This Court should treat Judge Marullo’s failure to disclose as further evidence of an appearance of impropriety warranting his recusal.

Judge Marullo’s failure to disclose information that was relevant to a possible recusal motion further suggests that the judge was not objectively impartial. Such information is integral to determining whether an appearance of impropriety exists and should be viewed as a significant factor in determining whether a judge should be disqualified. Here, Judge Marullo’s failure to disclose impeded Petitioner’s ability to demonstrate judicial bias and created an appearance of impropriety warranting recusal.

- i. **Judges have an affirmative obligation to disclose information that the parties might reasonably find relevant for the purposes of recusal.**

A litigant's ability to bring a recusal motion significantly depends upon a judge's disclosure of information. Therefore, the ethical rules place an affirmative duty on judges to disclose all information that might call into question their impartiality. 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."). Indeed, several jurisdictions have read this duty to disclose to be more capacious than the duty to recuse. See, e.g., *In re Frank*, 753 So. 2d 1228, 1239 (Fla. 2000) ("[I]t appears that the standard for disclosure is lower. In other words, a judge should disclose information in circumstances even where disqualification may not be required. This view is supported by several decisions from other jurisdictions."); *In re Edwards*, 694 N.E.2d 701, 711 (Ind. 1998) ("[T]he Code of Judicial Conduct . . . reveals a separate obligation to disclose that is broader than the duty to disqualify."). As the ethical rules make clear, it should not be left to the judge to decide whether the information she possesses might lead to recusal; rather, the judge has an affirmative obligation to recuse or to disclose facts that might contribute to an appearance of partiality, so that the parties can then

decide whether to seek or waive disqualification. *See* Model Code of Judicial Conduct R. 2.11(C); Administrative Office of U.S. Courts, Code of Judicial Conduct for United States Judges (2014), Canon 3D.

The reasons for this affirmative obligation are manifest and operate to benefit judges, litigants, and the public at large. First, a judge's duty to disclose relieves parties of the burden of conducting probing investigations into a judge's personal life and private activities. Otherwise, the burden would fall on litigants and their lawyers to inquire into a judge's personal affairs, which would place an unreasonable burden on litigants, leave judges exposed to potentially untoward investigations, and infuse the overall judicial process with suspicion. *See, e.g.,>Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 750 (7th Cir.), *cert. dismissed*, 136 S. Ct. 581 (2015) ("It would be unreasonable, unrealistic and detrimental to our judicial system to expect litigants to investigate every potentially disqualifying piece of information about every judge before whom they appear."); *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995) ("We conclude that both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics."). Therefore, the judicial system necessarily operates under a presumption that judges will be impartial and forthright. *See Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc.*, 190 F.3d 729, 742 (6th Cir. 1999) ("We believe instead that litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore

through the judge's private affairs and financial matters.”).

Second, litigants are denied the opportunity to bring a recusal motion on direct appeal if a judge fails to disclose on the record potentially disqualifying information. *See, e.g., Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 867 (1988) (“[B]y his silence, [the judge] deprived respondent of a basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal.”). As a consequence, litigants are forced to meet a more onerous standard on collateral attack, provided that the contested information comes to light at all.

Finally, a judge's failure to disclose potentially disqualifying information not only prevents litigants from making informed decisions regarding possible recusal but also undermines the public's confidence in the judicial system at large. *See, e.g., Potashnick*, 609 F.2d at 1111 (“Any question of a judge's impartiality threatens the purity of the judicial process and its institutions.”). Judges are required to “avoid impropriety and the appearance of impropriety” at all times and must “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” Model Code of Judicial Conduct R. 1.2. As the ethical rules make clear, the public's confidence in the judicial system is “eroded” when judges engage in “improper conduct and conduct that creates the appearance of impropriety.” *Id.* cmt. 1. A judge's failure to disclose potentially disqualifying information does just that—it places an indelible

stain on the legitimacy of the judicial process and suggests an appearance of impropriety, if not outright partiality.

- ii. **A judge's failure to disclose both impairs the court's assessment of objective impartiality and suggests that a judge is not objectively impartial.**

The same difficulties presented by an inquiry into a judge's personal biases, which motivated this Court to adopt an objective standard for recusal, similarly implicate the duty to disclose. In fact, it is equally, if not more, imperative that a judge disclose any information that might be relevant to the parties. The duty to disclose and the duty to recuse operate in tandem, as "[d]isclosure is a necessary prerequisite to a waiver of disqualification." Abramson, *supra*, at 61 n.34. Disclosure is imperative if courts are to have a full record upon which to review a judge's impartiality. *See Hall v. Small Bus. Admin.*, 695 F.2d 175, 178 (5th Cir. 1983) (explaining that disqualification "focuses on what is revealed to the parties and the public").

A failure to disclose can and should be viewed as compelling evidence that a judge is not objectively impartial and therefore should be disqualified. A failure to disclose not only blinds parties to a judge's potential improprieties, thereby preventing timely direct review, but also suggests that a judge is incapable of "hold[ing] the balance nice, clear, and true." *Tumey*, 273 U.S. at 532. Indeed, courts have

found a judge's failure to disclose as suggestive of bias or an appearance of bias. *See, e.g., Liljeberg*, 486 U.S. at 867-69 (finding that the judge failed to disclose his membership on the board of a university that had a direct interest in the trial, thereby creating the "appearance of impropriety"); *Lingenfelter v. Lingenfelter*, 2017-Ohio-235, ¶¶ 20-21, 2017 WL 277541, at *6 (finding an appearance of bias when a magistrate failed to disclose a relationship with one of the parties).

Conversely, if a judge affirmatively discloses potentially disqualifying information, courts have found that such disclosure can operate in a judge's favor. In these cases, courts have reasoned that a judge's disclosure can even imply *impartiality*, as the judge has thereby openly addressed her potential biases and allowed the parties to adjudge whether disqualification is still in order. *See, e.g., Carr v. State*, 799 N.E.2d 1096, 1098 (Ind. Ct. App. 2003) (finding that, since the trial judge disclosed that he had represented the defendant in a prior domestic relations matter and the parties both agreed to continue the proceedings, there was no error); *State v. Jacobson*, 2008 ND 73, ¶ 25, 747 N.W.2d 481, 490 ("He had the option to disclose and did disclose on the record information relevant to the question of disqualification. . . . The parties agreed to proceed, thus remitting [the judge's] disqualification.").

The duty to disclose serves dual purposes: it both seeks to bring information to light early in the proceedings so that parties have the opportunity to consider intelligently a motion to disqualify, and it allows judges to potentially avoid disqualification

later on. The duty to disclose is therefore critical to assuring judicial impartiality. When a judge fails to disclose facts that might reasonably raise a question about her impartiality, she excludes information from the record that is integral to the recusal analysis. Thus, adequate disclosure is essential to the operation of this Court's judicial recusal standard.

iii. Judge Marullo's failure to disclose created an appearance of impropriety warranting recusal.

Judge Marullo's failure to disclose the NOPD's investigation undoubtedly created an appearance of impropriety warranting his recusal. Judge Marullo was questioned by the PIB before, during, and after the State of Louisiana's capital case against Petitioner; however, Judge Marullo chose to conceal his improper involvement behind the scenes, even as Petitioner's life hung in the balance. Instead, Judge Marullo waited nearly twenty years, until Petitioner's post-conviction proceedings, to reveal his full connection to the possible murder weapon, thereby depriving Petitioner of the opportunity to seek recusal on direct appeal.

Judge Marullo's refusal to cooperate with the NOPD investigation because, as he told investigators, he was trying Petitioner's case, did not relieve Judge Marullo of his duty to disclose. Quite to the contrary, Judge Marullo had a duty to disclose his relationship to the investigation because there is little question that the parties "might reasonably

consider [the information] relevant to a possible motion for disqualification.” Model Code of Judicial Conduct R. 2.11 cmt. 5. Moreover, Judge Marullo’s refusal to speak with the NOPD suggests that he understood that his involvement in the pending investigation created an appearance of impropriety, if not impropriety itself.

Judge Marullo’s silence obstructed Petitioner’s right to make an informed decision about recusal. This was not Judge Marullo’s decision to make. Judge Marullo had an obligation to inform the parties that he was part of an NOPD investigation closely related to Petitioner’s case. His decision to conceal this information would cause a reasonable observer to question whether he was able serve as an impartial arbiter. *See* Model Code of Judicial Conduct R. 1.2 cmt. 5. Regardless of whether Judge Marullo actually signed the order releasing the alleged murder weapon, both his alleged role in the underlying case and the subsequent NOPD investigation should have been disclosed. Judge Marullo’s failure to disclose created an appearance of impropriety that was too great to be countenanced.

CONCLUSION

For the foregoing reasons, *amicus* petitions this Court to grant certiorari to reverse the decision below. In the alternative, *amicus* asks that this Court grant, vacate, and remand the case so that the Louisiana Supreme Court can apply the correct, objective standard to Petitioner’s claim.

Respectfully submitted,

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