No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Questions Presented One And Two

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), this Court announced a new test for obtaining a new trial in cases where a juror has failed to disclose a material fact at voir dire: "[A] party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. The district court found that Petitioner had been denied his right to an impartial jury under this test. The Supreme Court of Louisiana disagreed, joining the narrow end of a deep split on how to interpret *McDonough*.

The first question presented is:

> Under *McDonough* does "a valid basis for a challenge for cause" require a showing that a correct response would have subjected the juror to mandatory or *per se* disqualification, or does it require a showing that a hypothetical reasonable judge would have granted a motion to dismiss the juror for cause?

The second question presented is:

> Does the *McDonough* test apply only in cases of deliberate dishonesty or does it apply also in cases of misleading omissions?

Question Presented Three

This Court has repeatedly recognized that to "establish an enforceable and workable framework" governing judicial recusal, the 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 v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (internal quotation marks and citation omitted). Here, the judge who presided over Petitioner's first-degree murder trial was questioned, before and during Petitioner's trial, in police investigation pertaining to the release of the potential murder weapon to Petitioner's co-defendant through a court order signed by the judge. The judge denied ordering the release of the weapon and indicated that his signature had been forged. At Petitioner's trial, the judge did not disclose his participation in the investigation or the dispute related to the potential murder weapon.

The third question presented is:

> Does a trial judge's involvement as a witness in a police investigation before and during trial, and his failure to even disclose it, create an "unconstitutional potential for bias"? *Williams*, 136 S. Ct. at 1905.

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PETITION FOR A WRIT OF CERTIORARI

Rogers Lacaze respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Louisiana in this case.

OPINION AND ORDER BELOW

The corrected opinion of the Supreme Court of Louisiana (Pet.App. 1a-24a) is published at 208 So.3d 856. The opinion of the Court of Appeal for the Fourth Circuit (Pet.App. 25a-26a) is unpublished. The opinion of the Criminal District Court for Orleans Parish (Pet.App. 27a-183a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on December 16, 2016. A timely request for reconsideration was denied on December 20, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional provisions are reprinted at Pet.App. 259a.

INTRODUCTION

The Sixth and Fourteenth Amendments guarantee an accused the right to an impartial jury and the right to an impartial judge—each among the most "basic fair trial rights." *Gomez v. United States*, 490 U.S. 858, 876 (1989). Petitioner was deprived of both. The denial of each presents independent issues that satisfy this Court's criteria for certiorari.

First, this case presents a perfect opportunity to resolve a deep split over the correct interpretation of the majority and controlling plurality concurrence in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), which announced the standard for obtaining a new trial where a juror was dishonest at voir dire.

Petitioner was convicted and sentenced to death for the murder of a New Orleans Police Department ("NOPD") officer and two civilian siblings. He was implicated in the crime by one of the shooters, who was also an NOPD officer. On the jury that voted to convict Petitioner was a twenty-year state law enforcement officer, who—based on the facts as found below—did not disclose his current or prior employment as a law enforcement officer at voir dire, even though he was asked multiple times and watched as other prospective jurors made such disclosures. On the jury was also a woman employed as a 911 dispatcher for the NOPD, whose husband was also an NOPD officer and who—based on the facts found below—failed to disclose at voir dire that she was present in the dispatch room during the 911 call reporting the murder (and may even have

assisted in certain respects). She personally attended the victim's funeral and failed to disclose that, too. Finally, on the jury was a woman whose own two siblings had been beaten to death and shot in the head. Based on the facts found below, she failed to disclose this at voir dire despite being asked three times.

The district court held that Petitioner's right to an impartial jury had been violated under *McDonough*. In disagreeing with that holding, the Louisiana Supreme Court joined the narrow end of a two-dimensional split regarding (1) what it means to show that a juror's accurate response would have provided "a valid basis for a challenge for cause," and (2) the significance of deliberate dishonesty versus a misleading omission to *McDonough*. In the thirty-three years since *McDonough*, courts have adopted conflicting interpretations of the majority and controlling plurality opinions—some of which, like the decision below, render *McDonough* superfluous. The split implicates a fundamental Constitutional right and, because *McDonough* governs all civil and criminal cases—capital and non-capital—it recurs frequently. The stark facts of this case present an ideal record to restore uniformity.

Second, this case presents a fundamental question regarding the right to an impartial tribunal. It is undisputed that the judge who presided over Petitioner's trial had been questioned, before and during Petitioner's trial, as part of the NOPD investigation into the release of a 9mm weapon to Petitioner's co-defendant. Petitioner's co-defendant

had obtained the gun from police evidence through a court order purportedly signed by the trial judge. During the post-homicide investigation the judge denied authorizing the release of the weapon and indicated that a potential accomplice of Petitioner's codefendant had forged his signature. The judge not only failed to recuse himself, but failed to disclose any of these facts at the start of trial, upon defense counsel's separate motion to recuse the judge, or upon learning the defense's theory that the codefendant had committed the murder with her brother and said she would be getting her brother a weapon from police evidence.

The court below rejected the argument that these facts gave rise to an appearance of bias in an egregious decision applying the wrong legal standard. That decision presents a critical issue: whether the Constitutional right to a trial free from the appearance of bias imposes upon judges a duty to disclose facts that give rise to an appearance of bias, even where the judge believes himself to be impartial.

The Court should grant certiorari to resolve these fundamental issues.

STATEMENT OF THE CASE

I. Background.

On March 4, 1995, NOPD officer Ronald Williams and siblings Ha Vu and Cuong Vu were shot and killed during an armed robbery of a restaurant in New Orleans. Another NOPD officer, Antoinette

Frank, was shortly identified as one of the shooters. Upon arrest, Officer Frank implicated Petitioner, who was eighteen years old at the time. All three victims were killed with a 9mm gun that was never recovered.

On April 28, 1995, both Frank and Petitioner were indicted for first degree murder. Petitioner's case was assigned to Orleans Parish Judge Frank Marullo. Judge Marullo set a deadline for motions of approximately three weeks and scheduled Petitioner's capital trial to begin less than three months later.

Petitioner's defense was that, although Rogers Lacaze was a friend of Officer Frank and had been present with her restaurant earlier that night, Officer Frank returned to commit the murder with her brother, Adam Frank.

On July 20, 1995, a jury convicted Petitioner of first-degree murder and, the next day, it sentenced him to death.

II. The Jurors Who Convicted Petitioner.

Petitioner's guilt and sentence—in a case involving the murder of a New Orleans police officer and two siblings—was determined by a jury that had on it two law enforcement employees and a woman whose own two siblings were murdered. In particular, the jury included the following three people:[1]

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[1] The facts recited herein are as found by the courts below on post-conviction, or undisputed.

David Settle. Juror Settle "had a long history of employment in the field of law enforcement." Pet.App. 44a. He spent five years in the Southern Railway Police Department as a special agent with the power to arrest, at which point he became a Sergeant of Police. *Id.* He worked in that capacity for an additional 11 years, until being discharged for misappropriating property. *Id.* At the time of Petitioner's trial, Juror Settle was employed by the Louisiana State Police, New Orleans division, as a public safety officer. Pet.App. 45a.

Victoria Mushatt. At the time of trial, Juror Mushatt was employed by NOPD as a police dispatcher and had been for nearly twenty years. Pet.App. 35a. She was on duty and present in the dispatch room during the 911 call for the murder in this case. *Id.* Based on her testimony, she "may have overheard radio transmissions between various officers and the dispatchers handling the case" and "may even have helped other dispatchers search records to identify" the shooting NOPD officer. Pet.App. 43a. Juror Mushatt "testified that she may have had some professional contact with [the victim NOPD officer] prior to the night of his murder, as a result of which she felt like she knew him." Pet.App. 35a.

Juror Mushatt also attended the victim's funeral. *Id.* Attendance of the funeral—"understandably a very emotional event"—was reflective of the bond of the law enforcement community, such that it was "common practice for police department employees to attend the funeral of a fallen officer." *Id.*

Juror Mushatt was also the wife of an NOPD officer. *Id*. Her husband had worked details, as the victim was doing at the time of his murder. *Id*. As a result of her and her husband's employment by NOPD, Juror Mushatt was familiar with several of the state witnesses by name, one of whom was a dispatcher like herself. *Id.* at 36a.

Lillian Garrett. Both of Juror Garrett's brothers—like the Vu siblings—were murdered. One of her brothers was beaten to death in New Orleans. Pet.App. 49a. The other brother, just like the victims in this case, died from a gunshot wound to the head. *Id*.

III. The Jurors' Failures To Disclose At Voir Dire.

The trial court and counsel asked jurors about their connections to law enforcement and relation to victims of crime.

Juror Settle was assigned to the second panel of jurors and was seated in the audience during questioning of the first panel of jurors. When questioning the first panel of jurors, defense counsel asked if anyone was related to someone in law enforcement. Pet.App. 44a. One potential juror disclosed her nephew was a police officer; another disclosed his brother-in-law was a customs officer. When the Juror Settle's panel was called, "[t]he very first thing that happened" was a "question from the court as to whether anyone had something to volunteer based upon what they had heard with the first panel." Pet.App. *Id*. Juror Settle "did not

respond, although he should have heard defense counsel's question." *Id.*

The court then directly asked the first row of the second panel—where Juror Settle was sitting—"if anyone was related to anybody in law enforcement." *Id.* Another prospective juror (apparently seated next to Juror Settle) disclosed that his wife was a forensic pathologist. *Id.* Again, Juror Settle said nothing about his present employment and long career in law enforcement. *Id.* at 45a.

The court then asked the second row of Mr. Settle's panel if anyone was "involved or know anybody in law enforcement? – any close personal friends or anything like that?" A prospective juror asked if the court was referring specifically to New Orleans. The judge responded, "No, paint it with a wide brush. Anywhere in the world?" The juror disclosed that her son was on the Atlanta police force. Once again, Juror Settle sat silently.

Juror Settle was seated as a juror and ultimately voted to convict Petitioner of first-degree murder.

At the very beginning of voir dire, when the prosecutor was addressing the entire venire, an unnamed juror (presumably Juror Mushatt) disclosed from the audience that she was a 911 dispatcher. Pet.App. 37a-38a. The court instructed her to raise this fact in the event she was subsequently called for individual questioning on a panel. Pet.App. 38a. When Juror Mushatt was called for individual questioning, she never raised her employment as an NOPD dispatcher. *Id.* Moreover, Juror Mushatt never raised at any point

that she was present in the dispatch room at the time of (and may have assisted in certain ways with) the 911 call for the murder at issue. Juror Mushatt also never raised that she attended the funeral of the victim.

Juror Mushatt was seated as a juror and ultimately voted to convict Petitioner of first-degree murder.

Juror Garrett's panel was asked on three occasions whether anyone had been the victim of a violent crime or had someone close to them who had been the victim of a violent crime. Pet.App. 48a-49a. When the court asked the first time, other prospective jurors spoke up. Pet.App. 49a. Even though both of her brothers had been murdered, Juror Garrett said nothing. *Id.* The Court again, asked, if anyone else "had been the victim of a violent crime or a relative who has been the victim of a crime?" and defense counsel then asked for the same information. *Id.* Other jurors disclosed and, each time, Judge Garrett said nothing. *Id.*

Juror Garrett was seated as a juror and ultimately voted to convict Petitioner of first-degree murder.

IV. Post-conviction Discovery Of Judge Marullo's Participation In NOPD Investigation Into Potential Murder Weapon And His Failure To Disclose It.

Petitioner discovered on post-conviction that his trial judge, Judge Marullo, had failed to disclose that before and during trial, he had had participated in

an NOPD investigation into how Officer Frank obtained the potential murder weapon.

During the investigation of the homicide, NOPD learned that Officer Frank had received two weapons from the NOPD property and evidence room. Pet.App. 60a.[2] The investigating Sergeant contacted Judge Marullo because his signature appeared on an order authorizing the release of a 9mm weapon, which was then given to Officer Antoinette Frank. The investigation focused on whether Officer David Talley, head of the evidence room, had lied about the circumstances surrounding the weapon's release. Pet.App. 60a-61a. During the investigation, Officer Talley admitted that he was friends with Officer Frank and had obtained the weapon for her as a favor. Pet.App. 241a, 247a. He claimed that Judge Marullo had signed the order authorizing release of the 9mm weapon. Pet.App. 61a, 240a.[3]

The investigating Sergeant contacted Judge Marullo on at least three occasions. First, before Petitioner's case had been assigned to Judge Marullo, the Sergeant met personally with him. Judge Marullo claimed that the signature on the order was not his and that he would not have signed such an order. Pet.App. 61a-62a, 238a-39a.

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[2] At the time, NOPD policy allowed weapons in the property and evidence room to be transferred to officers upon *ex parte* court order.

[3] The NOPD investigation report is included at Pet.App. 235a-256a.

Second, in light of Judge Marullo's denial and the implication that Officer Talley had forged the judge's signature, the Sergeant determined he needed a taped statement. When approached, Judge Marullo declined to provide one, stating that he had since been assigned Petitioner's trial and would provide one only when the trial was complete. Pet.App. 62a, 240a.

Following the completion of Petitioner and Officer Frank's trials, the Sergeant returned to Judge Marullo for a statement; however, Judge Marullo said he would not provide one due to appeals, which would last "for a long time." Pet.App. 62a, 242a-43a.

At the time of Petitioner's trial, Petitioner's counsel did not know any of the above details—the investigation, that a 9mm had actually been released from police evidence, Officer Talley's involvement in the release of the 9mm gun to Officer Frank (who had implicated Petitioner in the crime), or the dispute as to whether Judge Marullo signed the order or Officer Talley forged his signature. Judge Marullo never disclosed any of these facts.

On the first day of trial, defense counsel made a motion for recusal, alleging that Judge Marullo had "screamed" at him and made him feel "inadequate and incompetent," jeopardizing his ability to represent Petitioner. Notwithstanding the motion, Judge Marullo made no mention of the above facts.

At trial, Petitioner's defense was that Officer Frank had planned the murders and carried them out with her brother, Adam Frank. Petitioner took the stand and testified that Ms. Frank had told him:

"I got a friend of mine down in the property room, and I should be getting a nine millimeter soon." Despite hearing this testimony (and knowing it to be true), Judge Marullo still did not disclose his involvement as a witness in the investigation.[4]

At Officer Frank's trial (after Petitioner was convicted), the State sought to prove she obtained the 9mm gun from police evidence before committing the murder. Judge Marullo ordered an off-record conference, inviting only the prosecution. He then conducted an on-record conference in chambers, during which Judge Marullo stated that he could not recall signing the order and (contrary to his representations to the investigating Sergeant) that it would have been ordinary for him to sign it: "it would be perfectly logical and correct that I would do something like that." Judge Marullo represented that he had produced handwriting exemplars "to be analyzed by an expert" and "they came back and told me it wasn't my signature." This conflicted with the Sergeant's report, which noted that other witnesses, but not Judge Marullo, had provided handwriting exemplars, which were inconclusive. Pet.App. 248a. Judge Marullo allowed the State to present evidence that Officer Frank had access to a 9mm gun, but precluded it from introducing evidence that the 9mm gun came from the evidence room via court order.

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[4] The murder weapon was not recovered. It is undisputed that, three years after Petitioner's trial, Officer Frank's brother was arrested and had in his possession the 9mm gun that was taken from evidence.

V. Post-Conviction Proceedings.

A. Criminal District Court for Orleans Parish.

On July 23, 2015, the Criminal District Court for Orleans Parish issued a 128-page opinion granting Petitioner relief from his conviction and death sentence. The court held that Petitioner had been denied his right to an impartial jury under *McDonough* and was thus entitled to a new trial. The court also held that Petitioner's trial counsel rendered ineffective assistance at the penalty phase.

The court observed that to obtain a new trial under *McDonough*, Petitioner "must show a juror failed to answer honestly a voir dire question and show that a correct response would have provided a valid basis for a challenge for cause." Pet.App. 37a. The court concluded that Juror Settle met both prongs. First, it found it could not "fathom a legitimate reason" for his failure to disclose his present employment and long history in law enforcement, despite being asked multiple times and watching other jurors disclose more remote connections. There was "simply no excuse" and he "did not honestly answer." Pet.App. 44a-45a, 48a.

Second, Juror Settle's nondisclosure provided "provided a valid basis for a challenge for cause" because, at the time of Petitioner's trial, Louisiana had a *per se* rule that "law enforcement officers were not competent jurors." Pet.App. 45a.

The court concluded that Juror Mushatt's circumstances did not satisfy *McDonough*. It found insufficient evidence to show that Juror Mushatt had "a nefarious purpose or intent" or "'lied,'" which the court defined to mean "a false statement made with a deliberate intent to deceive." Pet.App. 41a & n.7.

Moreover, the court concluded that the facts Juror Mushatt did not disclose—that she was present in the dispatch room and may have assisted with aspects related to the 911 call, and that she attended the victim's funeral—would not have caused Juror Mushatt to be *per se* ineligible for the jury. *See* Pet.App. 37a ("knowledge of the facts of the case is not the determining factor for granting a challenge for cause"). Moreover, the court reasoned, Petitioner had not shown actual or implied bias. Pet.App. 42a-43a.

The court also concluded that Juror Garrett's circumstances did not satisfy *McDonough*. It found that she had failed to disclose that her two brothers were murdered despite being asked twice to do so. Pet.App. 48a-49a. It reasoned, however, that Petitioner could not satisfy the second prong of *McDonough* because "crime victims are not *ipso facto* subject to challenges for cause." Pet.App. 50a. Moreover, the court explained, there was no mandatory dismissal for implied bias because it could not determine that Juror Garret "lied" or

"consciously withheld the information." Pet.App. 50a.[5]

The court denied Petitioner's claim that he had been deprived of his right to an impartial tribunal based on Judge Marullo's participation in the NOPD investigation pertaining to the 9mm gun and his failure to disclose it. The court reasoned that there was no reason to believe Judge Marullo "was suspected of wrongdoing" the investigation or "had done something wrong that he needed to cover up." Pet.App. 61a, 63a. Thus, the court reasoned, it could not conclude that "the investigation engendered some animus in Judge Marullo." Pet.App. 64a.

Moreover, the trial judge stated that it was a "logical leap" for Judge Marullo to disclose that he was a witness in the investigation upon defense counsel's motion to recuse or upon hearing Petitioner's testimony that Officer Frank intended to obtain a 9mm gun from evidence. *Id.* The court reasoned that the motion to recuse was premised on other grounds, rather than the possibility of Judge Marullo being part of an investigation. *Id.* Furthermore, Judge Marullo could not have been "aware . . . what the prosecution or defense strategies would be" at trial and should not have been required "to conduct an impromptu, but exhaustive, examination of conscience." *Id.* The

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[5] Unlike Jurors Settle and Mushatt, Juror Garrett did not testify at post-conviction, despite efforts to subpoena her. Pet.App. 48a. Her surviving sibling testified about the murder of one of their brothers, and Ms. Garrett's signed statement was introduced as an exhibit.

court further reasoned that whether Officer Frank had a 9mm gun "did not address any issue that needed to be proved in the case." Pet.App. 66a.

B. Fourth Circuit Court of Appeal.

On appeal, the State argued that the district court erred in concluding that Louisiana law provided a "per se" bar on Settle's placement on the jury.[6]

The Fourth Circuit reversed the district court's finding that Petitioner had been denied his right to an impartial jury in a one-paragraph decision. The entirety of its explanation was: "we find that the trial court erred in finding that the seating of Mr. Settle on the defendant's jury was a structural error entitling him to a new trial." Pet.App. 26a.

C. Supreme Court of Louisiana.

The Supreme Court of Louisiana affirmed. In its initial opinion, the court stated it was reinstating Petitioner's death sentence. It included a separate concurrence, which criticized Petitioner for "attempt[ing] to re-litigate the penalty phase of his trial" and expressed satisfaction that "[i]t is time for justice to be served." Upon Petitioner's explanation that his penalty phase was not at issue and the State had never appealed the district court's penalty phase ruling, the court issued a corrected opinion, removing

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[6] The state did not appeal the district court's holding of ineffective assistance at the penalty phase. Moreover, the State has represented that it does not intend to pursue a capital sentence.

all references to reinstating Petitioner's death sentence and deleting the separate concurrence.[7]

With respect to Petitioner's *McDonough* claim, the court did not dispute the district court's findings regarding the questions asked at voir dire and the jurors' respective failures to disclose information in response. The court concluded, however, that Petitioner had not satisfied *McDonough* as to any of the three jurors.

With respect to Juror Settle, the court reasoned that "it is not clear that his lack of candor can be characterized as outright dishonesty." Pet.App. 12a. It agreed, however, that "because several questions were aimed at whether panelists had any connections with law enforcement, the inquiries were sufficient to have prompted a reasonable person in Mr. Settle's position to disclose his employment experience." *Id.*

According to the court, Juror Settle's nondisclosure did not satisfy the second prong of *McDonough* because he did not have actual bias or a category for which bias "must be presumed." Pet.App. 11a. The court reasoned that Juror Settle was not covered by Louisiana's "per se bar to law enforcement personnel serving as jurors." Pet.App. 8a-9a.

The court addressed Jurors Mushatt and Garrett in a footnote, concluding that Petitioner had failed to show actual bias or a situation in which "bias must

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[7] All citations below are to the court's corrected opinion.

be presumed" as to either juror. Pet.App. 13a-14a n.2. The court reasoned that Juror Mushatt had never personally met the victim officer and had attended the funeral "only because it was 'expected' [she] would." Moreover, she did not have "prejudicial details" because she "was not the dispatcher to accept the related 911 calls." *Id.* For Juror Garrett, the court considered dispositive that there was "no evidence [she] consciously withheld the information" about her brothers being murdered, even if she failed to disclose it upon being asked. *Id.*

The court also rejected Petitioner's claim that he had been denied his right to an impartial tribunal based on Judge Marullo's participation as a witness in, and failure to disclose, the investigation into the 9mm weapon. The court reasoned that "[a]s a post-conviction witness, Judge Marullo emphatically denied any bias on his part." Pet.App. 16a. Moreover, adopting the district court's analysis, the court reasoned that evidence from the investigation was "immaterial" because "none of the issues in dispute at trial pertained to the means by which the murder weapon was procured." Pet.App. 16a.

REASONS FOR GRANTING THE PETITION

This case presents three questions which satisfy this Court's criteria for granting certiorari. The first two questions implicate a deep split regarding the correct interpretation of *McDonough*—a frequently recurring issue, which only this Court can resolve. The third question involves an important question of federal law on which the decision below conflicts

with and undermines the principles adopted by this Court. All three questions relate to a fundamental Constitutional right and, in each instance, the court below was wrong. The Court should grant certiorari in this case.

I. The Court Should Grant Certiorari To Resolve The Deep Split On How To Interpret *McDonough*.

In *McDonough*, the plaintiffs brought a civil suit for an accident involving feet caught in a lawnmower. 464 U.S. at 549. After losing, the plaintiffs moved for a new trial because a juror had failed to disclose at voir dire that his son had been injured in an accident involving the explosion of a truck tire. *Id.* at 550-51. Writing for seven judges, Justice Rehnquist articulated the following test: "To obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

Three judges whose votes were necessary to the majority authored a controlling plurality concurrence, to express that the Court's test for cases involving dishonesty does not "foreclose the normal avenue of relief" in other cases alleging juror impartiality—in particular, "whether a juror's answer is honest or dishonest," a party may still obtain a new trial by demonstrating "actual bias or, in exceptional circumstances, that the facts are such

that bias is to be inferred." *Id.* at 556-57 (Blackmun, J., concurring).

For the past 33 years, this splintered decision has governed all civil and criminal cases. As discussed below, a substantial, acknowledged split exists over its interpretation. The record in this case presents the ideal opportunity to resolve it.

A. There Is A Three-Way Split On What It Means To Show "A Valid Basis For A Challenge For Cause."

The second part of the *McDonough* test asks whether correct information at voir dire "would have provided a valid basis for a challenge for cause." 464 U.S. at 556. Federal circuits and state high courts are divided in their interpretations of this language and apply three different tests.

1. In The First And Second Circuits, "Valid Basis For A Challenge For Cause" Means That A Hypothetical Reasonable Judge Would Grant A Motion To Strike For Cause.

First Circuit. The First Circuit interprets the second prong of *McDonough* to ask "whether a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason behind the juror's dishonesty, would conclude under the totality of the circumstances that the juror lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed)." *Sampson v.*

United States, 724 F.3d 150, 165-66 (1st Cir. 2013). The court considers "[a] number of factors," which "may include (but [are] not limited to) the juror's interpersonal relationships, the juror's ability to separate her emotions from her duties, the similarity between the juror's experiences and important facts presented at trial, the scope and severity of the juror's dishonesty, and the juror's motive for lying." *Id.* at 166 (citations omitted).

Second Circuit. The Second Circuit similarly evaluates the second prong of *McDonough* by asking whether it "would have granted the hypothetical challenge." *United States v. Stewart*, 433 F.3d 273, 304 (2d Cir. 2006) (citation omitted); *see also United States v. Greer*, 285 F.3d 158, 171 (2d Cir. 2002) (*McDonough* requires "a basis for arguing that the district court is required to sustain his challenge for cause" (citation omitted)).

The Second Circuit has been clear that this test does not require a showing that the juror would have been subject to *per se* or mandatory dismissal. It is satisfied "when there is actual bias, implied bias, or inferable bias." *United States v. Parse*, 789 F.3d 83, 99-100 (2d Cir. 2015). While for actual or implied bias "disqualification of that juror is mandatory," the third category, "inferred bias," covers circumstances "sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause, but not so great as to make mandatory a presumption of bias." *Id.* at 100 (citation omitted); *see also United States v. Fell*, No. 2:01-CR-12, 2014 WL 3697810, at *15 (D. Vt. July 24, 2014) (in the Second Circuit, "the

test is not whether the true facts would compel the Court to remove a juror for cause, but rather whether a truthful response 'would have provided a valid basis for a challenge for cause.'" (citation omitted)).

2. In The Third, Sixth, And Eleventh Circuits, "A Valid Basis For A Challenge For Cause" Means *Per Se* Disqualification Based On Actual Bias Or Implied Bias.

In conflict with the legal test applied by the First and Second Circuits, the Third, Sixth, and Eleventh Circuits hold "a valid basis for a challenge for cause," *McDonough*, 464 U.S. at 556, entails proving the juror would have been subject to mandatory dismissal based on actual or implied bias.

Third Circuit. The Third Circuit has repeatedly held that *McDonough*'s second prong requires actual or implied bias, where the latter "is a limited doctrine, one reserved for exceptional circumstances" and a "narrowly-drawn classes of jurors." *United States v. Flanders*, 635 F. App'x 74, 78 (3d Cir. 2015) (quoting *United States v. Mitchell*, 690 F.3d 137, 142-44 (3d Cir. 2012)).

Sixth Circuit. The Sixth Circuit has acknowledged the Second Circuit's "inferred bias" approach, but, similar to the Third Circuit, has interpreted *McDonough* to be limited to instances of actual or implied bias. *Johnson v. Luoma*, 425 F.3d 318, 326-27 (6th Cir. 2005); *Baker v. Craven*, 82 F. App'x 423, 429-30 (6th Cir. 2003).

Eleventh Circuit. The Eleventh Circuit holds that satisfying *McDonough*'s second prong requires a showing of bias that would "disqualify the juror." *United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001) (citation omitted). Similar to the Third and Sixth Circuits, this requires either an "express admission" of bias or a circumstance from which "bias must be presumed." *Id.* at 967; *see also Jackson v. State of Alabama State Tenure Comm'n*, 405 F.3d 1276, 1288 (11th Cir. 2005) (new trial required where juror failed to disclose felony, which would have made him *per se* ineligible).

As described above, the courts below adopted the same limited interpretation of *McDonough*. *See, e.g.*, Pet.App. 8a, 11a, 13a-14a n.2 (asking whether there is actual or implied bias or a basis for per se disqualification under Louisiana law); Pet.App. 45a, 47a, 49a-50a (same).

3. In The Fourth, Eighth, And D.C. Circuits, Even *Per Se* Disqualification Is Not Enough.

Fourth Circuit. The Fourth Circuit has expressly rejected the interpretation of *McDonough* adopted by the First and Second Circuit, that a petitioner need "establish only that the trial court had a valid reason to dismiss the dishonest juror, not that the trial court would have been required to dismiss the juror." *United States v. Blackwell*, 436 F. App'x 192, 196 (4th Cir. 2011) (citing *United States v. Fulks*, 454 F.3d 410, 432 (4th Cir. 2006)). Rather, like the Third, Sixth, and Eleventh Circuits, the

Fourth Circuit requires that "a per se rule of disqualification applies." *Fulks*, 454 F.3d at 432.

In the Fourth Circuit, however, a petitioner must additionally establish a "third prong": that "the juror's 'motives for concealing information' or the 'reasons that affect [the] juror's impartiality can truly be said to affect the fairness of [the] trial." *McNeill v. Polk*, 476 F.3d 206, 224 n.8 (4th Cir. 2007) (King, J., concurring in part and concurring in the judgment) (quoting *Conaway v. Polk*, 453 F.3d 567, 585 (4th Cir. 2006)).

Eighth Circuit. Like the Fourth Circuit, the Eighth Circuit holds that *per se* disqualification is not enough; *McDonough* requires a third prong: "that the juror was motivated by partiality." *United States v. Hawkins*, 796 F.3d 843, 863-64 (8th Cir. 2015); *Manuel v. MDOW Ins. Co.*, 791 F.3d 838, 842 (8th Cir. 2015); *cf. also Bennett v. Lockhart*, 39 F.3d 848, 852-53 (8th Cir. 1994) (proof that a juror would have been statutorily barred from serving insufficient absent showing of actual bias).

D.C. Circuit. The D.C. Circuit has also rejected the First and Second Circuits' interpretation that *McDonough* is satisfied by showing a hypothetical reasonable judge would have granted a motion for cause—rather, "[u]nder *McDonough*, . . . a 'valid basis for a challenge for cause' absent a showing of actual bias, is insufficient." *United States v. North*, 910 F.2d 843, 904 (D.C. Cir.), *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990); *cf. also United States v. Boney*, 977 F.2d 624, 633-34 (D.C.

Cir. 1992) (showing of *per se* disqualification insufficient absent actual bias).[8]

B. The Three-Way Split Above Is Compounded By A Split On Whether The *McDonough* Test Applies To All Misleading Nondisclosure Or Requires Deliberate Concealment.

The split described above is compounded by an additional split over whether *McDonough*'s first prong—"that a juror failed to answer honestly a material question on voir dire," 464 U.S. at 548—should be interpreted to limit *McDonough* to deliberate concealment, or whether the *McDonough* test applies to all misleading nondisclosure.

The First, Second, Fourth, Fifth, and Sixth Circuits, and several states, have held that "regardless of whether [a juror's] failure to respond was intentional or unintentional, the first element [of *McDonough*] is satisfied." *Baker*, 82 F. App'x at 429 (citation omitted)); *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir. 1992) ("[W]e read [*McDonough*] to require a further determination on the question of juror bias even where a juror is found to have been honest."); *Greer*, 285 F.3d at 170 (*McDonough* applies to "juror nondisclosure or misstatements"); *Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir. 2002) ("the test applies equally to deliberate

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[8] *See also State v. Myers*, 711 A.2d 704, 706 (Conn. 1998) (not even "bias that is implied" suffices*); Young v. United States*, 694 A.2d 891, 894-95 (D.C. 1997) (same); *State v. Pierce*, 788 P.2d 352, 356 (N.M. 1990) (same).

concealment and to innocent non-disclosure"); *United States v. Scott*, 854 F.2d 697, 698-700 (5th Cir. 1988) (rejecting argument that *McDonough* turns on honesty); *see also, e.g., State v. Dye*, 784 N.E.2d 469, 473 (Ind. 2003) ("the test applies equally to deliberate concealment and to innocent non-disclosure"); *Schwan v. State*, 65 A.3d 582, 591 (Del. 2013) (applies to "inadvertent nondisclosure"); *State v. Thomas*, 830 P.2d 243, 246 (Utah 1992) ("intent or lack of intent is irrelevant").

The Eighth, Eleventh, and D.C. Circuits, and several other states, hold that *McDonough* applies only in the case of deliberate dishonesty. *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1473 (11th Cir. 1992) ("the *McDonough* test requires a determination of . . . whether [the juror] was aware of the fact that his answers were false" (quotation marks omitted)); *Hawkins*, 796 F.3d at 863-64; *United States v. White*, 116 F.3d 903, 930 (D.C. Cir. 1997); *see also, e.g.*, *Sanchez v. State*, 253 P.3d 136, 146 (Wyo. 2011) ("party must show that the juror intentionally gave an incorrect answer"); *Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 765 S.W.2d 924, 930 (Ark. 1989) (must have "deliberately concealed").

C. The Court Should Take This Case To Resolve The Conflicting Interpretations Of *McDonough*.

The above difficulty in interpreting *McDonough* is acknowledged. *See, e.g.*, *Sampson*, 724 F.3d at 160 (exercising mandamus, in part, because *McDonough*'s "framework . . . is not well-defined");

Greer, 285 F.3d at 172 (elements of *McDonough* test "unclear"); *Zerka v. Green*, 49 F.3d 1181, 1185 (6th Cir. 1995) (recognizing "confusion surrounding *McDonough*"); *United States v. Tucker*, 243 F.3d 499, 508 (8th Cir. 2001) (difficult "[t]o divine the law" on whether dishonesty required). The Court should resolve it now because this is an important issue and this is the perfect record.

1. This Conflict Concerns A Fundamental Issue.

The right to an impartial jury is a fundamental Constitutional right, protected by the Sixth and Seventh Amendments, and "a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). The test announced in *McDonough*, combined with the gloss of the three-judge plurality concurrence, has led to non-uniform standards effectuating that right. As discussed below, had Petitioner been tried by this jury in a different court—even some courts that have adopted narrow interpretations of *McDonough*—his basic right to an impartial jury would have been vindicated.

This question recurs frequently. The *McDonough* standard presently governs all civil and criminal (capital and noncapital) cases. Thirty-three years have produced the above disparity in interpreting the *McDonough* test/plurality, so there is no need for additional percolation. *See also Sampson*, 724 F.3d at 159-160 (clarifying *McDonough* fits "snugly within the[] narrow confines" of mandamus jurisdiction because it has caused "an unsettled question of systemic significance," because "the right at stake . . .

deserves great respect," and because "[t]he specter of juror dishonesty presents a recurring danger in all cases, civil and criminal, capital and non-capital"). Only this Court can resolve the conflict.

2. This Case Is The Perfect Vehicle To Resolve The Conflicting Interpretations Of *McDonough*.

This case offers the perfect record to resolve the conflicting interpretations of *McDonough*. Louisiana courts have made all of the predicate factual findings with regards to (1) the backgrounds of the three jurors that went undisclosed at voir dire and (2) each juror's respective failures to speak up at voir dire. Those facts, as found and analyzed by the courts below, squarely present both the meaning of "valid basis for a challenge for cause, *see supra* Part I.A, and the significance of dishonesty to *McDonough*, *see supra* Part I.B.

As described above, in conflict with the First and Second Circuits, the Louisiana Supreme Court interpreted the second prong of *McDonough* to require Petitioner to categories for mandatory dismissal, *i.e.* actual bias, implied bias, or a *per se* rule of ineligibility under state law. *See* Pet.App. 8a, 11a, 13a-14a n.2.

Moreover, similar to the Eighth, Eleventh, and D.C. Circuits, the courts below appeared to assume a requirement of deliberate dishonesty. *Compare* Pet.App. 48a (Juror Settle's failure to respond despite multiple questions about his connections to law enforcement showed he "did not honestly answer

the question") *with* Pet.App. 12a ("it is not clear that [Juror Settle's] lack of candor can fairly be characterized as outright dishonesty"); *see also* Pet.App. 41a & n.7 (Juror Mushatt's failure to disclose employment as a 911 operator upon being selected for a panel (despite being told to), that she was present in dispatch room during 911 call, and that she attended the victim's funeral insufficient to show that she "lied," *i.e.* made "a false statement made with a deliberate intent to deceive"); Pet.App. 13a n.2, 50a (not clear Juror Garrett "lied" or "consciously withheld the information"). The case thus also begs the question of the significance of "outright dishonesty" or "lying" to *McDonough*.

The present posture allows the court to squarely address these questions, unlike if they were to arise following a federal habeas petition. *See* 28 U.S.C. § 2254(d).

D. The Louisiana Supreme Court's Interpretation Of *McDonough* Was Wrong.

This Court has long recognized that the right to an impartial jury guarantees a jury free of bias, and that "[t]he bias of a prospective juror may be actual or implied." *United States v. Wood*, 299 U.S. 123, 133 (1936). Indeed, that guarantee derives from Blackstone and Chief Justice Marshall's opinion in the trial of Aaron Burr. *United States v. Torres*, 128 F.3d 38, 46 (2d Cir. 1997) (Calabrese, J.).

Actual bias is "bias in fact," while implied bias is bias "conclusively presumed as a matter of law."

Wood, 299 U.S. at 133. The latter exists in "extreme situations," such as "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction," *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring). Where a juror is actually or impliedly bias, disqualification is mandatory. *Id.* at 223; *Torres*, 128 F.3d at 5.

In *McDonough*, the majority opinion written by Justice Rehnquist, announced a new test where a juror has given inaccurate responses at voir dire: "[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." 464 U.S at 556. Three Justices concurred separately in a controlling opinion to clarify that "the Court's holding [does not] foreclose the normal avenue of relief available to a party who is asserting that he did not have the benefit of an impartial jury." *Id.* at 556 (Blackmun, J., concurring)). "[R]egardless of whether a juror's answer is honest or dishonest," the plurality stated, it remained an alternative avenue to show "actual bias or . . . that the facts are such that bias is to be inferred." *Id.* at 556-57.

With this backdrop, the Louisiana Supreme Court's decision in this case was obviously wrong. If, as it and multiple circuits have concluded, *McDonough* requires actual or implied bias in

addition to proof of a juror's failure to disclose, it would render Justice Rehnquist's test a nullity. Under longstanding precedent preserved by the plurality, any party that proved actual or implied bias would be entitled to a new trial without regard to whether he also proved nondisclosure. Thus, the only way to give Justice Rehnquist's opinion meaning is to—like the First and Second Circuits—interpret it to require something different from actual or implied bias, upon a showing of nondisclosure. "Valid basis for a challenge for cause" should mean what it says: whether the fact of a juror's nondisclosure and the truthful answer provides basis upon which a judge would have struck the juror for cause.

The extreme facts of each juror in this case—(1) a juror who spent twenty years as a law enforcement officer and failed to disclose it with no "legitimate reason," in a case involving the murder of a law enforcement officer (in which Petitioner was implicated by another law enforcement officer), (2) a juror who was in the NOPD dispatch room at the time of the 911 call and attended the victim's funeral, and (3) a juror who did not disclose that her two siblings were murdered in a case involving the murder of two siblings—would plainly satisfy that standard. *See, e.g.*, *Sampson*, 724 F.3d at 167 (reasonable judge standard satisfied where juror failed to disclose she had been victim of domestic violence, indicating "she would rather lie to the court than discuss these painful life experiences" and given "the similarity between her distress-inducing life experiences and the evidence presented"); *United*

States v. Colombo, 869 F.2d 149, 150 (2d Cir. 1989) (same where a juror failed to disclose that her brother-in-law was a government attorney).

Indeed, at least some circuits would hold that the circumstances of this case amounted to implied bias. *See, e.g.*, *Scott*, 854 F.2d at 698-99 (implied bias where juror's brother was deputy sheriff of police agency involved in investigation); *Porter v. Zook*, 803 F.3d 694, 698 (4th Cir. 2015) ("relationship with a family member in law enforcement" can give rise to implied bias); *Dyer v. Calderon*, 151 F.3d 970, 981-82 (9th Cir. 1998) (en banc) (implied bias where juror failed to disclose her brother had been shot and killed in case involving a shooting); *Burton v. Johnson*, 948 F.2d 1150, 1158-59 (10th Cir. 1991) (collecting cases, and finding implied bias where juror was victim of domestic violence in case related to domestic violence).

The Court should grant certiorari to resolve the split on *McDonough* and correct the court below.

II. This Court Should Grant Certiorari To Resolve The Fundamental Issue Of When Due Process Requires Disclosure Of Facts That Give Rise To An Appearance Of Bias.

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *Murchison*, 349 U.S. at 136). Because bias is "difficult to discern in oneself," the 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 v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (quoting *Caperton*, 556 U.S. at 881).

As discussed below, the Louisiana Supreme Court's decision—which sanctioned a Judge's decision not to disclose facts giving rise to an appearance of bias based on his evaluation that he remained impartial and that the undisclosed evidence was not material—undermines these core principles and presents a necessary follow up to *Williams* and *Caperton* that warrants plenary review.

However, the Louisiana Supreme Court's decision so blatantly conflicts with this Court's appearance of bias standard that, in the alternative to plenary review of the questions presented, the Court should summarily reverse.

A. In Prior Cases Involving Blatant Application Of The Wrong Legal Standard To Extraordinary Circumstances, This Court Has Summarily Reversed.

In each of the courts below, Petitioner argued that Judge Marullo's participation as a witness in the NOPD investigation followed by his failure to disclose it gave rise to an obvious appearance of bias, in violation of his right to an impartial tribunal. The facts giving rise to the objectively impermissible risk of bias are undisputed and extraordinary:

(i) Judge Marullo participated as a witness in the police investigation pertaining to the release of a 9mm gun to Officer Frank (the codefendant who had implicated Petitioner in the murder);

(ii) The investigation involved a dispute as to whether Officer Talley, a potential accomplice of Petitioner's codefendant, forged an order to release the weapon or Judge Marullo signed it himself;

(iii) Defense counsel had no knowledge of the investigation, release of the weapon, Officer Talley, or Judge Marullo's involvement; and

(iv) Judge Marullo did not disclose any of these facts at any point during trial—even upon learning of the defense theory that Officer Frank's brother was the second shooter, and hearing Petitioner's (otherwise unsupported) trial testimony that Officer Frank had planned to get a 9mm gun from police evidence.

The courts below disposed of Petitioner's claim on two bases, each of which conflicts with this Court's judicial recusal standard. First, the courts focused on the fact that Judge Marullo "emphatically denied any bias on his part" and that the investigation had not shown that Judge Marullo himself had engaged in "wrongdoing" or "something illegal, subjecting him to a police investigation." Pet.App. 16a, 61a, 63a.

Second, the courts applied a *Brady*-like "prejudice" standard, concluding that "means by which the murder weapon was procured" was "immaterial" because it "did not address any issue that needed to be proved in the case." Pet.App. 16a, 66a. This reasoning flatly contradicts this Court's legal standard.

To begin with, the appearance of bias here arises independent of any wrongdoing on the part of Judge Marullo, and independent of whether Judge Marullo signed the order or not. Before and while presiding over Petitioner's first-degree murder trial, Judge Marullo was involved in the NOPD investigation, in which he had accused another person of forging his signature to release the potential murder weapon to Petitioner's codefendant. That other person, Officer Talley, was thus a potential accomplice of Petitioner's codefendant. The integrity of the judicial system was further degraded when Judge Marullo failed to disclose any of this, even upon defense counsel's motion to recuse, or upon hearing the defense theory that Officer Frank planned and carried out the murders with her brother, and told Petitioner she planned to get a 9mm gun from the police evidence room. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 856 (1988) ("To determine whether [a judge's impartiality] 'might reasonably be questioned,' it is appropriate to consider the state of his 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 conflict] in the litigation."). The implications for the appearance of justice are

just as bad if Judge Marullo did not sign the order, in which case he knowingly chose to deprive the defense of knowledge of a potential accomplice of his codefendant and facts consistent with the defense's theory.

Furthermore, the court below's analysis of whether the "means by which the murder weapon was procured" was material at trial is a blatant misapplication of the appearance of bias test. Where an appearance of bias exists, it is structural error—no consideration is given to whether the impermissible risk was prejudicial. *Williams*, 136 S. Ct. at 1909.

This Court "has not shied away from summarily deciding" cases arising from a state court judgment when the "lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases). The Court should grant plenary review of the fundamental issues presented in this case; however, in the alternative it should summarily reverse or, at the least, GVR, the egregious misapplication of law in the decision below. *Rippo v. Baker*, No. 16-6316, 2017 WL 855913, at *1 (U.S. Mar. 6, 2017) (GVR where court below appeared to apply the wrong legal standard in evaluating judicial recusal argument).

B. This Case Presents A Fundamental Issue Regarding The Duty To Disclose Facts That Give Rise To An Appearance Of Bias.

The courts below rejected Petitioner's argument that he had been denied an impartial tribunal based on the conclusion that Judge Marullo had no obligation to disclose his involvement in the police investigation. As described above, the courts reasoned that he "emphatically denied any bias on his part" and should not have been required "to conduct an impromptu, but exhaustive, examination of conscience." Pet.App. 16a, 64a. This reasoning directly undermines this Court's objective appearance of bias standard and presents a fundamental issue regarding the Constitutional dimensions of judicial disclosure.

If the right to a trial free from the appearance of bias is to be of any consequence, it must be the case that a judge has a duty to disclose facts that potentially give rise to an appearance of bias, *independent of whether the judge himself believes he can remain impartial*. *See Caperton*, 556 U.S. at 886 (A judge's "search for actual bias . . . is just one step in the judicial process."); *see also* ABA Model Code of Judicial Conduct, Canon 2.11, Comment 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").

In cases that have set forth the Due Process requirements for judicial recusal, the appearance of bias has generally arisen from facts known to defense counsel without reliance upon judicial disclosure. In *Caperton*, for instance, the campaign expenditures that gave rise to the appearance of bias were discovered pursuant to state campaign disclosure law. *See* JA 184a-88a, *Caperton*, 556 U.S. 868, 2008 WL 5784213. In the more common instance, however, this will not be the case—only the judge will be aware of the facts giving rise to an appearance of bias. This case, thus, presents a necessary next step to effectuate the right recognized in *Caperton* and *Williams*.

In cases interpreting federal disqualification statutes, this Court has recognized the critical nature of judicial disclosure—and that failure to disclose can itself create an appearance of bias. *See Liljeberg*, 486 U.S. at 866, 869 ("remarkable" and "inexcusable" that, upon learning of a potential conflict, judge did not provide "[a] full disclosure" to the parties, which would have quelled a "basis for questioning the judge's impartiality"); *see also Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149-50 (1968) (arbitrator must disclose facts that "might create an impression of possible bias" and nondisclosure of such facts creates evident partiality, even when no actual bias is present). Moreover, the Court has recognized that a clear message regarding disclosure is critical to avoid "injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864-69 (finding vacatur

"eminently sound and wise" for this reason, even absent any express statutory remedy).

The very nature of nondisclosure cases means that it will be the rare instance in which a record allows this Court to address the issue. Here, however, the relevant facts regarding Judge Marullo's participation in the investigation and his nondisclosure are undisputed. The Court has recognized it is "extreme cases" like this that "cross constitutional limits and require this Court's intervention and formulation of objective standards" and "[t]his is particularly true when due process is violated." *Caperton*, at 556 U.S. at 887.

Moreover, as cases like *Murchison*, *Caperton* and *Williams* reflect, due to the federal disqualification statutes mentioned above, the "constitutional dimensions" of judicial nondisclosure are unlikely to reach the Court in any posture other than this—direct review from a state high court. *Liljeberg*, 486 U.S. at 865 n.12.

The Court should grant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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