No.

IN THE SUPREME COURT OF THE UNITED STATES

JURIJUS KADAMOVAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

BARBARA E. O'CONNOR
O'CONNOR & KIRBY P.C.
P.O. Box 4356
Burlington, Vermont 05406
Telephone (802) 863-0112
barbara@kirbyoconnor.com

BENJAMIN L. COLEMAN
Counsel of Record
COLEMAN & BALOGH LLP
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@colemanbalogh.com

MARGARET HILLS O'DONNELL
Attorney at Law
P.O. Box 4815
Frankfort, Kentucky 40604
Telephone (502) 320-1837
mod@dcr.net

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

(1) Whether 18 U.S.C. § 1203 should be interpreted in accordance with its underlying treaty and the principles in *Bond v. United States*, 572 U.S. 844 (2014) as applying to hostage taking related to international terrorism, and, if not, whether the statute and underlying treaty violate the Treaty Power and the Constitution's structural limits on federal authority, questions avoided in *Bond*.

(2) Whether a recusal claim, under both 28 U.S.C. § 455 and the Due Process Clause, has a timeliness requirement and, if so, what is the appropriate timeliness standard and standard of review for such claims; and whether recusal is required when a judge presiding over a federal capital trial simultaneously applies to become the United States Attorney for the same office prosecuting the case.

PARTIES TO THE PROCEEDING

As listed on the cover, petitioner is Jurijus Kadamovas, and respondent is the United States of America. Codefendant Iouri Mikhel was a party in the proceedings before the United States Court of Appeals for the Ninth Circuit and at trial in the United States District Court for the Central District of California. Mikhel's petition for a writ of *certiorari* is currently due on February 4, 2019.

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The opinion below is reported at *United States v. Mikhel*, 889 F.3d 1003 (9th Cir. 2018).

JURISDICTION

The Ninth Circuit filed its decision on May 9, 2018 and denied rehearing on September 7, 2018. Justice Kagan granted an extension to file a petition for a writ of *certiorari* to February 4, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions are included in the Appendix.

STATEMENT OF THE CASE

A. The hostage taking convictions and death sentence

This capital case arises from the kidnapping of five individuals in the Los Angeles area, attempts to collect ransom, and the victims' resulting deaths. *Mikhel*, 889 F.3d at 1016. At the time of the offenses, the federal kidnapping statute, 18 U.S.C. § 1201, required interstate asportation, but the victims were never moved outside of California. The State of California brought kidnapping and homicide charges, but the federal government chose to prosecute petitioner for hostage taking resulting in death under 18 U.S.C. § 1203 even though international terrorism or related activity was not involved.

Congress enacted § 1203 as a joint resolution in 1984 to implement the United States' obligations under a United Nations treaty called the International Convention Against the Taking of Hostages ("the Treaty"). *Mikhel*, 889 F.3d at 1021-22. The Treaty was adopted by the United Nations General Assembly in 1979, entered into force in 1983, and entered into force in the United States on January 6, 1985, also when § 1203 became effective. The Treaty's preamble states that it was created because the signatory countries believed that it was "necessary to develop international cooperation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages *as manifestations of international terrorism* . . . ."

The statute, entitled "hostage taking," provides: "[W]hoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life *and, if the death of any person results, shall be punished by death or* life imprisonment." 18 U.S.C. § 1203(a) (emphasis added). Congress added the emphasized language in 1994. The statute further provides that "[i]t is not an offense under this section

if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States." 18 U.S.C. § 1203(b)(2).[1] To satisfy this requirement, the government proved that petitioner is Lithuanian. *Mikhel*, 889 F.3d at 1016.

A jury convicted petitioner of conspiratorial and substantive violations of § 1203 resulting in death, and he was sentenced to death. Petitioner challenged his convictions and death sentence, contending that § 1203 and its underlying treaty require hostage taking related to international terrorism; he further contended that, without a limiting construction, the statute and its underlying treaty violate the Constitution's restrictions on federal power. *Id.* at 1021-25. The Ninth Circuit disagreed. With respect to statutory construction, the court found that it was bound by its opinion in *United States v. Lopez-Flores*, 63 F.3d 1468 (9th Cir. 1995), which had relied on purported legislative history to give the statute a broad reach. *Mikhel*, 889 F.3d at 1022. The Ninth Circuit explained that this Court's subsequent opinion in *Bond v. United States*, 572 U.S. 844 (2014)

[1] Similarly, Article 13 of the Treaty provides that "[t]his Convention shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State."

did not alter the analysis and asserted that § 1203(b), which requires the involvement of a foreign national, at least "requires some international component." *Mikhel*, 889 F.3d at 1023.

The Ninth Circuit also held that § 1203 "was a valid exercise of Congress's power under the Necessary and Proper Clause together with the Treaty Power." *Id*. at 1023. The court relied on *Missouri v. Holland*, 252 U.S. 416, 432 (1920) and stated: "Although this broad reading of the Necessary and Proper Clause has been criticized and debated, *see, e.g.*, *Bond II*, 134 S. Ct. at 2098-102 (Scalia, J., concurring), the Supreme Court has never undertaken to clarify or correct our understanding." *Mikhel*, 889 F.3d at 1023-24. The Ninth Circuit further declared that the statute "clearly bears a rational relationship to the Treaty," and "the Treaty at issue here is well within the President's Treaty Power." *Id.* at 1024. "In short, the Hostage Taking Act is consistent with Congress's 'federalism-based respect for state and local authority in this area of law enforcement.'" *Id.* at 1025. The Ninth Circuit finally concluded that the 1994 amendment adding the homicide provision and the death penalty was also constitutional under the Necessary and Proper Clause, reasoning that Congress has the authority to determine the punishment for federal crimes and the Treaty leaves the choice of punishment to the signatory nations. *Id*.

B. The recusal proceedings

After several months of trial, the district judge held a hearing during a late December holiday break towards the end of the guilt phase and advised the parties that a search committee had asked him to submit his name for the position of United States Attorney for the Central District of California. *Mikhel*, 889 F.3d at 1025. The judge did not explicitly advise whether he had done so but did state that, if he obtained the position, he would only accept "a dollar" per year because he did not believe in "double dipping." *Id.* at 1026.

Approximately 30 days later, petitioner filed a recusal motion; at this point, the jury had returned its verdicts at the guilt phase, and the trial had entered the penalty phase. *Id.* The motion asserted that local news outlets reported that the judge was actually the "frontrunner" for the United States Attorney position. *Id.* at 1027 n.5. The judge denied the motion, stating that defense counsel did not request recusal when he initially raised the issue; he also advised, for the first time, that he had interviewed for the position but stated that he withdrew his name from consideration when the recusal motion was filed. *Id.* at 1026. Petitioner immediately sought a writ of mandamus, which the Ninth Circuit denied. *Id.*

Petitioner again raised recusal on direct appeal. The Ninth Circuit found that the recusal motion was not timely and there was a "heightened risk"

that the motion was made "for strategic purposes." *Id.* at 1027. The Ninth Circuit also rejected the claim on the merits, explaining that the judge stated he would not seek remuneration for the position, he was only in the early stages of the selection process, "and he immediately withdrew his application when defendants filed their motion." *Id.* at 1028. The court concluded: "If defendants had made a timely motion and Judge Tevrizian had not immediately withdrawn his application, this issue might have presented a closer question." *Id.*

ARGUMENT

I. This Court should grant the petition because the Ninth Circuit's interpretation of § 1203 conflicts with the view of the Second Circuit and is inconsistent with this Court's opinion in *Bond*; alternatively, this Court should grant review to resolve the important constitutional questions regarding the Treaty Power that were left open in *Bond*.

The Second Circuit has suggested that § 1203 should be limited to hostage taking involving international terrorism. *United States v. Rodriguez*, 587 F.3d 573, 579 (2d Cir. 2009). The Ninth Circuit ignored *Rodriguez* in reaching a contrary conclusion, and the Eleventh Circuit has since joined the Ninth Circuit, also ignoring *Rodriguez*. *United States v. Noel*, 893 F.3d 1294, 1299-1300 (11th Cir. 2018). This Court should grant review to resolve the confusion that persists even after this Court's 2014 opinion in *Bond*, which adopted an approach to interpreting treaty-based offenses that confirms the Second Circuit's view.

If § 1203 is not susceptible to the limiting construction suggested by the Second Circuit, then this Court should resolve the important constitutional questions avoided in *Bond*. The Ninth Circuit relied on *Holland* and the Necessary and Proper Clause to sustain the constitutionality of the statute, and the Eleventh Circuit did the same in *Noel*, 893 F.3d at 1302, but Justice Scalia's concurrence in *Bond* explains that *Holland* is inconsistent with the text and structure of the Constitution. Furthermore, if the Treaty is as expansive as the Ninth Circuit thinks it is, then the Treaty itself is unconstitutional, as explained in the concurrences of Justices Thomas and Alito in *Bond*; likewise, the statute otherwise violates a proper reading of *Holland*. At the very least, Congress's subsequent decision to bootstrap a homicide offense onto § 1203, a provision that appears nowhere in the Treaty, is unconstitutional. This Court should grant review to consider these important constitutional questions in this *capital* case.

A. This Court should grant review to resolve confusion in the lower courts regarding the reach of § 1203, particularly because the Ninth Circuit's construction is inconsistent with *Bond*

The Second Circuit suggested that § 1203 is limited to hostage-taking "related to international terrorism[,]" explaining that the "Conference Report on the Act makes clear that it 'implements the International Convention Against the Taking of Hostages' [and] [t]he preamble to the Convention states that the

Convention binds its signatories to adopt 'effective measures for the prevention, prosecution and punishment of all acts of taking of hostages *as manifestations of international terrorism*.'" *Rodriguez*, 587 F.3d at 579. The Second Circuit noted that "President Reagan sent to Congress draft legislation that was the predecessor of the Hostage Act '[t]o demonstrate . . . that the United States is serious about its efforts to deal with *international terrorism*.'" *Id.* (emphasis added).

The Ninth Circuit ignored *Rodriguez* and its interpretation of the preamble, as did the Eleventh Circuit in *Noel*, 893 F.3d at 1299-1300. Without citing authority, the Ninth Circuit declared that "the preamble's reference to 'international terrorism' is illustrative only; it limits neither the Treaty nor Congress's implementing legislation." *Mikhel*, 889 F.3d at 1022. But the preamble does *not* use "illustrative" language like "such as," *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998), or "including," *Bloate v. United States*, 559 U.S. 196, 206-07 (2010), or list any other illustrative examples. The Ninth Circuit's reading also disregards the context of the Treaty, which was signed in the wake of several international terrorism incidents in the 1970's.

The Ninth Circuit found that it was bound by its 1995 opinion in *Lopez-Flores*, *Mikhel*, 889 F.3d at 1022, which relied on testimony of a Deputy Assistant Attorney General during legislative hearings, who stated that "[a]lthough

the bill is not limited to hostage-taking by terrorists, in keeping with the purpose of the international Convention, we do not intend to assume jurisdiction where there is no compelling federal interest." *Lopez-Flores*, 63 F.3d at 1476. Nothing demonstrates that Congress agreed with this invalid *noblesse oblige* approach. *Marinello v. United States*, 138 S. Ct. 1101, 1108-09 (2018). It is "problematic" to rely on such testimony rather than reports of "duly appointed committees of the Congress[,]" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 199-20 (2001), and legislators expressed federalism concerns about an expansive statute at the hearings, which were reported as "*Terrorism* Legislation" and "Legislative Initiatives to Curb Domestic and International *Terrorism.*"[2] The Ninth Circuit also did not explain why the deputy's testimony trumped the official statement of President Reagan, entitled "Message to the Congress Transmitting Proposed Legislation to Combat *International Terrorism*." *Rodriguez*, 587 F.3d at 579.

Like the opinion below, the Eleventh Circuit relied on cases from the 1990's. *Noel*, 893 F.3d at 1300. "[A]lthough the first case involving the Hostage Act arose out of a terrorist hijacking of an international flight, *see United States v.*

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[2] Terrorism Legislation: Hearing Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 98th Congress, Second Session, on H.R. 5612, H.R. 5689, and H.R. 5690 (Sep. 26, 1984), at 35-37; Legislative Initiatives to Curb Domestic and International Terrorism, Hearings Before the Subcommittee on Security and Terrorism, Committee on the Judiciary, U.S. Senate, 98th Cong., 2d Sess., at 87-91 (1984).

Yunis, 924 F.2d 1086 (D.C. Cir. 1991), the case law" that developed in the 1990's did not limit the Act "to conduct related to international terrorism, and ha[d] applied it to several instances of confining illegal aliens and demanding payment for their release." *Rodriguez*, 587 F.3d at 579; *see, e.g.*, *United States v. Santos-Riviera*, 183 F.3d 367, 370 (5th Cir. 1999); *United States v. Lin*, 101 F.3d 760, 765-66 (D.C. Cir. 1996). These older cases ignored the Treaty's preamble, offered limited analysis, and stand on unsound footing after this Court's 2014 opinion in *Bond*. Remarkably, the Eleventh Circuit's recent opinion in *Noel* did not even cite *Bond*, and the Ninth Circuit below did not meaningfully address this Court's opinion. This Court should grant review to resolve the confusion in the lower courts and because the majority view is wrong under *Bond*.

Bond considered a federal criminal statute enacted to implement a non-self-executing treaty on chemical weapons, and the defendant argued that: (1) the statute should be narrowly construed, and her conduct of using a chemical compound to burn her husband's lover did not constitute a violation of such a narrowly construed chemical weapons statute; and (2) if not narrowly construed, the statute was unconstitutional under federalism principles. *Bond*, 572 U.S. at 853-55. The majority opinion accepted the statutory construction argument, avoiding the constitutional question. *Id*. at 855-66.

This Court stated that the threshold issue is the meaning of the underlying treaty. *Id.* at 855 ("Section 229 exists to implement the Convention, so we *begin* with that international agreement.") (emphasis added). *Bond* relied on the treaty's *preamble* in ascertaining its meaning and purpose, *id.* at 849-50, and explained that the treaty "arose in response to war crimes and acts of terrorism[,]" and therefore there was "no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault." *Id.* at 856. Similarly, the Treaty arose in response to acts of terrorism, its preamble states that it was intended to apply to "acts of taking of hostages as manifestations of international terrorism[,]" and other provisions also demonstrate an international terrorism context. For example, Article 7 requires that the Secretary General of the United Nations be notified of the outcome of prosecutions under the Treaty, and it is doubtful that such notification was contemplated for local kidnappings. As in *Bond*, there is no reason to think that the nations ratifying the Treaty were interested in all kidnappings.

Even if the Treaty were not limited to hostage taking involving international terrorism, *Bond* makes clear that a statutory analysis must go further. "Even if the Treaty does reach that far, nothing prevents Congress from implementing the Convention in the same manner it legislates with respect to

innumerable other matters – observing the Constitution's division of responsibility between sovereigns and leaving the prosecution of purely local crimes to the States." *Id*. at 856. "[T]he statute – unlike the Convention – must be read consistent with principles of federalism inherent in our constitutional structure[,]" *id.* at 856, even if its language appears "extremely broad[.]" *Id.* at 860.

Relying on *United States v. Bass*, 404 U.S. 336 (1971) and *Jones v. United States*, 529 U.S. 848 (2000), *Bond* rejected the government's "plain language" argument in support of its expansive view of the chemical weapons statute, reasoning that such an interpretation would intrude on the States' general police power. *Bond*, 572 U.S. at 857-60. "These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Id.* at 859. Like *Bond*, "[i]n this case, the ambiguity derives from the improbably broad reach of [§ 1203]; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose – a treaty about . . . terrorism." *Id.* at 859-60.

Although the term "terrorism" does not appear in § 1203, "[t]he notion that some things 'go without saying' applies to legislation just as it does to everyday life[,]" *id*. at 857, and "a fair reading of [§ 1203] suggests that it does not

have as expansive a scope as might at first appear." *Id.* at 860. "'[T]he plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole[,]" including its heading and chapter. *Yates v. United States*, 135 S. Ct. 1074, 1081-83 (2015).

Section 1203 was enacted as part of Chapter XX of Title II of Public Law 98-473. Chapter XX was entitled, "Terrorism," a strong indication of the statute's meaning, and § 1203 is entitled "[h]ostage taking." When the words "hostage" and "taking" are put together, the "ordinary person" envisions terrorism. *Bond*, 572 U.S. at 860 ("Saying that a person 'used a chemical weapon' conveys a different idea than saying the person 'used a chemical in a way that caused some harm.'"). Ordinary persons would describe the conduct in this case as kidnapping, not hostage taking; conversely, they would describe a terrorist takeover of an airplane as "hostage taking," not kidnapping. *Id.* at 860-61 ("no speaker in natural parlance would describe Bond's [conduct] as 'combat'" and the "circumstances of Bond's offense [do not] suggest that a chemical weapon was deployed"). In short, under *Bond*, the statute requires international terrorism hostage taking.

In an effort to distinguish *Bond*, the Ninth Circuit stated that § 1203 had a sufficient "international component" because it requires that a single

codefendant *or* victim be a foreign national. *Mikhel*, 889 F.3d at 1023. This reasoning would open the floodgates to federal prosecution, as any local common law crime could be a federal offense if a defendant or victim is a foreign national, and there is no reason to upset the traditional federal-state balance because the laws of the States are more than sufficient to prosecute such offenses. *Bond*, 572 U.S. at 863-64. Furthermore, as the Department of Justice recognized, allowing a federal prosecution merely because, for example, a defendant is a legal permanent resident raises "serious questions of 'equal protection of the laws' and also basic fairness." *Lopez-Flores*, 63 F.3d at 1474.

The Ninth Circuit's reasoning ignores that an international terrorism limitation also provides a necessary constraint on a criminal statute that would otherwise govern a large swath of innocent conduct. The statutory language does not require a defendant to detain someone unlawfully or with an unlawful purpose, elements presumptively required for such a serious criminal offense. *Bond*, 572 U.S. at 857. Section 1203 must have some limiting unlawfulness requirement or else it would absurdly apply to a variety of innocent conduct, such as exasperated parents who detain their misbehaving children. *Id.* at 862 ("Any parent would be guilty of a serious federal offense – possession of a chemical weapon – when, exasperated by the children's repeated failure to clean the goldfish tank, he

considers poisoning the fish with a few drops of vinegar."). The international terrorism limitation fulfills *both* federalism and overbreadth concerns. *Skilling v. United States*, 561 U.S. 358, 405-06 (2010).[3]

Finally, the Ninth Circuit stated that the laundering of ransom proceeds "demonstrat[ed] an appropriate federal interest in this case." *Mikhel*, 889 F.3d at 1023. A vague "appropriate federal interest" requirement is inconsistent with *Bond*, 572 U.S. at 852, where the defendant used the internet to order chemicals, stole others from a manufacturer, and placed them on the victim's mailbox and car. This Court did not find a sufficient federal interest to sustain application of the chemical weapons statute, even though the mail and facilities of interstate commerce were involved. A limiting construction is based on the purpose of the Treaty, *id.* at 862-66, which is set forth in its preamble specifying hostage taking related to international terrorism. In sum, there is confusion in the lower courts, and the majority view taken below conflicts with *Bond*.

B. The Ninth Circuit's reliance on *Holland* was constitutionally flawed, as explained in Justice Scalia's concurrence in *Bond*

Like *Bond*, this Court can avoid significant constitutional questions by interpreting § 1203 as not applying to petitioner's conduct. If the statute is not

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[3] As in *Skilling*, § 1203 can draw its definition of "international terrorism" from another statute, 18 U.S.C. § 2331, defining the term.

susceptible to this construction, however, then the meaning and validity of this Court's 1920 opinion in *Holland* is squarely presented. Justice Scalia's concurrence in *Bond*, joined by Justice Thomas, establishes that *Holland* and the Ninth Circuit's constitutional analysis are flawed.

The Treaty is not self-executing, and the Ninth Circuit held that Congress had the constitutional authority to enact § 1203 based on *Holland*, *Mikhel*, 889 F.3d at 1023-24, which stated that "[i]f the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432. Justice Scalia explained that this "unreasoned and citation-less sentence" in *Holland* is an *ipse dixit* that is inconsistent with the "Constitution's text and structure . . . ." *Bond*, 572 U.S. at 873-74.

As far as the text of the Constitution, under "Article I, § 8, cl. 18, Congress has the power 'to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'" *Id.* at 874. The relevant underlying power "appears in Article II, § 2, cl. 2: 'The President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present

concur.'" *Id.* "Read together, the two Clauses empower Congress to pass laws 'necessary and proper for carrying into Execution the Power to make Treaties." *Id.* at 874-75. A "power to help the President *make* treaties is not a power to *implement* treaties already made. Once a treaty has been made, Congress's power to do what is 'necessary and proper' to assist the making of treaties drops out of the picture." *Id.* at 876; *see* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005).

The *ipse dixit* in *Holland* also works an invalid and "seismic" change in our constitutional structure. *Id.* at 876-77. *Holland* creates a "loophole" for "unlimited congressional power[,]" and "the possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless and hardly farfetched." *Id.* at 877-78. For example, this Court's constitutional rulings could be reversed, and Congress could acquire a general police power. *Id.* at 878-79. Indeed, the modern trend has been to create multilateral treaties that are "'[o]ften vague and open-ended'" and "'touch on almost every aspect of civil, political, and cultural life.'" *Id.* at 877 (citation omitted). "The Necessary and Proper Clause cannot bear such weight. . . . No law that flattens the principle of state sovereignty, whether or not 'necessary,' can be said to be 'proper.'" *Id.* at 879.

Justice Scalia's opinion is consistent with this Court's earlier

precedent. The Treaty Power must be exercised consistently "with the nature of our government and the relation between the States and the United States." *Holden v. Joy*, 84 U.S. 211, 243 (1873). Because the "government of the United States . . . is one of limited powers," its authority cannot "be enlarged under the treaty-making power." *New Orleans v. United States*, 35 U.S. 662, 736 (1836). Justice Story emphasized, "the power is nowhere in positive terms conferred upon congress to make laws to carry stipulations of treaties into effect." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 618-22 (1842).

In short, "[t]o legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8 powers." *Bond*, 572 U.S. at 876 (Scalia, J., concurring). In enacting § 1203, Congress stated that it was attempting to implement the Treaty. *United States v. Lue*, 134 F.3d 79, 81 (2d Cir. 1998). Because Congress did not identify any other authority, other Article I powers cannot serve as a basis to sustain § 1203. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 n.7 (1999). In any event, the Ninth Circuit declined to consider any other constitutional authority for § 1203 in Article I, § 8. *Mikhel*, 889 F.3d at 1024 n.3. Thus, the constitutional question addressed by Justice Scalia in *Bond* is squarely presented, making this case an excellent vehicle to review the validity of *Holland*.

C. Even under *Holland*, § 1203 is unconstitutional, at least as applied in this case

Holland stated that "*[i]f the treaty is valid* there can be no dispute about the validity of the" implementing statute. *Holland*, 252 U.S. at 432 (emphasis added). The Treaty, as interpreted by the Ninth Circuit, is constitutionally invalid. Furthermore, § 1203 is unconstitutional under a properly limited reading of *Holland*. The concurring opinions of Justices Thomas and Alito in *Bond* support these conclusions and also demonstrate that this case presents significant constitutional questions that should be reviewed. Indeed, Justice Thomas noted that this Court has not yet had occasion to define the Treaty Power and that, "in an appropriate case . . . the Court should address the scope of the Treaty Power as it was originally understood." *Bond*, 572 U.S. at 883-84. This case fits the bill given the Ninth Circuit's broad interpretation of the Treaty.

In *Bond*, Justice Alito reasoned: "The control of true chemical weapons, as that term is customarily understood, is a matter of great international concern, and therefore the heart of the Convention clearly represents a valid exercise of the treaty power. But insofar as the Convention may be read to obligate the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case, which typically is the sort of conduct regulated by the States, the Convention exceeds the scope of the treaty power." *Id.* at 897. The

Treaty's focus on hostage taking as a manifestation of international terrorism is of great international concern and constitutionally valid. But if the Ninth Circuit's broad interpretation of the Treaty and rejection of the international terrorism limitation in the preamble are correct, then the Treaty exceeds the scope of the Treaty Power and § 1203 "lies outside Congress' reach . . . ." *Id.* The federal government cannot expand its police power by adopting international conventions that prohibit common law and other local offenses. Such conventions, like the Ninth Circuit's view of the Treaty, would create "a gaping loophole in our constitutional structure." *Id.* at 883 (Thomas, J., concurring).[4]

The Ninth Circuit simply cited the Second Circuit's opinion in *Lue*, 134 F.3d at 83, in concluding that the Treaty did not violate the Treaty Power. *Mikhel*, 889 F.3d at 1024. The Second Circuit's conclusion in *Lue* should be read together with its subsequent opinion in *Rodriguez* suggesting that the Treaty is

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[4] Justice Thomas did cite cases stating that the Treaty Power authorizes the making of treaties to *protect* foreign citizens residing in the territory of another. *Id.* at 894. Even assuming (but not conceding) that this permissible scope of the Treaty Power authorizes an encroachment on the States' police power by allowing the federal government to proscribe common law crimes when the victim is an alien, it does not authorize the enactment of federal criminal laws on the basis of the alienage of the defendant. Such a law does not *protect* a foreign citizen and is undermined by the understanding at the time of the Founding that foreign citizens who committed crimes in this country were governed by the laws of the States. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 883 (2006). Thus, the Treaty is unconstitutional, at least as applied in this case, because the theory of prosecution was based on the alienage of petitioner, not the victims.

limited to international terrorism. The Treaty is constitutional if interpreted in this limited manner. The Second Circuit's position does not support the Ninth Circuit's constitutional conclusion as to *its broad* interpretation of the Treaty.

Even if the Treaty, as interpreted by the Ninth Circuit, were valid, that does not mean § 1203 is constitutional under *Holland*. In *Holland*, this Court considered a statute implementing a treaty protecting migratory birds. Missouri contended that the statute interfered with its sovereign right to regulate the killing of migratory birds within its territory. This Court weighed the State's pecuniary interest in regulating the killing and sale of migratory birds, which it viewed as *de minimis*, against the national interest in protecting them, which it viewed as paramount. *Holland*, 252 U.S. at 435 ("a national interest of very nearly the first magnitude is involved"). Because migratory birds are only "transitorily within the State," their protection could "only" occur through "national action in concert with that of another power." *Id.* This Court stated that it did "not mean to imply that there are no qualifications to the treaty-making power." *Id.* at 433.

Holland should be read as limited to situations where the national interest is imperative, the infringement on State authority is minimal, and where effective regulation can only occur through federal legislation. Here, unlike in *Holland*, the balance of those factors do not support the constitutional legitimacy

of § 1203 as applied in this case. There is a minimal national interest in creating a federal offense that applies to local kidnappings, particularly when considering that this field has been reserved for the States. There is no reason to think that the States cannot effectively police local kidnappings, and the States' longstanding ability to do so eliminates any real concern that our Nation may violate its treaty obligations. Indeed, nothing in the Treaty requires the United States to ignore its constitutional structure; the Treaty, "after all, is agnostic between enforcement at the state versus federal level." *Bond*, 572 U.S. at 856.

In sum, even under *Holland*, application of § 1203 to petitioner was unconstitutional. The Treaty, as broadly construed by the Ninth Circuit, violates the Treaty Power. Even if a broad interpretation of the Treaty were constitutional, *Holland* does not authorize § 1203 given the States' longstanding ability to prosecute local kidnappings. This Court should grant review to determine whether Congress can usurp the States' police power by enacting legislation pursuant to an international treaty that governs local crimes of violence.

D. At least the 1994 amendment is unconstitutional

Article 1 of the Treaty sets out a hostage taking offense and mentions nothing about homicide. Article 2 states that the signatory countries "shall make the *offences set forth in article 1* punishable by appropriate penalties . . . ." Article

2 (emphasis added). In 1994, Congress amended § 1203 to include a homicide offense — found *nowhere* in the Treaty — by adding: "if the death of any person results, shall be punished by death or life imprisonment." 18 U.S.C. § 1203(a).

The 1994 amendment represents the type of bootstrapping that troubled Justice Scalia in *Bond*. He explained that the President and the Senate could hijack any area of the law for the federal government by entering into a non-self-executing treaty by which Congress could then "gain lasting and flexible control" because "[i]mplementing legislation is as much subject to modification and repeal by Congress as legislation upon any other subject." *Bond*, 572 U.S. at 881. Under the pretense of a non-self-executing treaty on hostage taking that had already been implemented under the purported authority of the Necessary and Proper Clause, a subsequent Congress enacted an additional homicide offense. One can only imagine what other additions may be bootstrapped in the future and in the context of other statutes implementing non-self-executing treaties.

The Ninth Circuit reasoned that the 1994 amendment was constitutional because Congress has the authority to determine the punishment for federal crimes and the Treaty leaves the choice of punishment to the signatory nations, *Mikhel*, 889 F.3d at 1025, but ignored that the 1994 amendment created a *homicide offense*, not a mere penalty. *See Jones v. United States*, 526 U.S. 227

(1999). Article 2 states that the parties are to establish "appropriate penalties" for the hostage-taking offense in Article 1 and does not authorize, let alone make it "necessary," for them to establish penalties for a homicide offense.

Outside the treaty context, this Court has mentioned five factors in assessing legislative authority under the Necessary and Proper Clause: (1) the breadth of the Clause; (2) the history of federal involvement in the arena; (3) the reasons for the statute's enactment in light of the government's interest; (4) the statute's accommodation of state interests; and (5) the scope of the statute. *United States v. Comstock*, 560 U.S. 126, 149 (2010). The first factor assesses "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id*. at 134. This standard is not the same as the rational basis test under the Due Process Clause. *Id.* at 151-53 (Kennedy, J., concurring). Instead, "application of a 'rational basis' test should be at least as exacting as it has been in the Commerce Clause cases, if not more so." *Id.* at 152. A court must find "a demonstrated link in fact, based on empirical demonstration[,]" as opposed to "a mere conceivable rational relation." *Id.*

The 1994 amendment fails the first *Comstock* factor. There are no Congressional findings as to why the addition of a homicide offense and capital punishment was needed to effectuate the treaty, *United States v. Lopez*, 514 U.S.

549, 563 (1995), leaving mere conjecture about "conceivable" reasons for the amendment, and this Court has found insufficient linkage even when there were findings. *United States v. Morrison*, 529 U.S. 598, 614-18 (2000). The Congress that originally enacted § 1203 evidently did not believe that the homicide/death penalty provision was needed to effectuate the President's treaty power, and, rather than being tailored to treaty obligations, the 1994 amendment was part of a wholesale addition of death penalty provisions to approximately 50 federal criminal statutes. The 1994 amendment does not satisfy the "exacting" rational basis test under the first *Comstock* factor, and Congress should not have a "free-floating power to legislate as it sees fit on topics that could potentially implicate" a treaty. *United States v. Lara*, 541 U.S. 193, 225 (2004) (Thomas, J., concurring).[5]

Under the second *Comstock* factor, policing homicide offenses has historically been reserved for the States. *Morrison*, 529 U.S. at 618. There is not

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[5] The amendment actually conflicts with the Treaty because the preamble recognizes the rights set out in the International Covenant on Civil and Political Rights ("ICCPR"). An optional protocol to the ICCPR abolished the death penalty three years before the 1994 amendment. Numerous parties to the Treaty are also parties to the ICCPR protocol, including Lithuania, the country of citizenship for petitioner. The amendment frustrates the purposes of the Treaty, as the death penalty can be an impediment to international cooperation in the extradition and prosecution of criminal offenses, including terrorism offenses. *See* Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 Ariz. J. Int'l Comp. L. 491 (2003).

a history of bootstrapping additional offenses onto a treaty-based offense, nor is there a history of enacting federal death penalty provisions pursuant to treaty-based offenses. Indeed, the federal death penalty did not even exist when § 1203 was originally enacted in 1984.

Under the third factor, Congress gave no explanation for the 1994 amendment and did not raise a concern that the States may abandon their traditional role in prosecuting homicides. The State of California was ready, willing, and able to file homicide charges here, and there is no reason to think that state prosecutors would have declined to seek the death penalty. Moreover, it is difficult to discern the federal interest in adding a homicide offense when the Treaty does not provide for one, and it is not clear why there is any federal interest in adding a death penalty provision to a treaty-based offense when so many parties to the Treaty have abolished capital punishment.

Under the fourth factor, although there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime[,]" *Morrison*, 529 U.S. at 618, the 1994 amendment makes no accommodation for the State's interest in prosecuting homicides. Unlike the statute in *Comstock*, the 1994 amendment contains no language about deferring prosecutions to the States, particularly those where the

death penalty should be sought. In other words, unlike the statute in *Comstock*, the 1994 amendment contains no provision stating that a federal capital prosecution can only be commenced if the State declines to pursue one.

Finally, the scope of the 1994 amendment also demonstrates that it is unconstitutional. The homicide provision, on its face, lacks a mens rea, as it simply applies if death "results." As interpreted below, § 1203 does not even require that the defendant detain a person "unlawfully." Thus, the statute allows the federal government wide leeway to prosecute local homicides and kidnappings under a watered-down version of those offenses. In sum, Congress's subsequent decision to expand this treaty-based offense starkly presents open constitutional questions and makes this case an excellent vehicle for review.

II. This Court should grant review to resolve the conflict in the lower courts regarding whether the federal recusal statute, 28 U.S.C. § 455, has a timeliness requirement and the standards that apply to recusal under § 455; this Court should also provide needed guidance on the precedential value of the opinions of the Committee on the Codes of Conduct of the Federal Judiciary and should otherwise hold that recusal is required when a judge applies to become the United States Attorney while presiding over a capital case prosecuted by that same office.

This Court should also grant review to resolve longstanding conflict regarding whether 28 U.S.C. § 455 requires a "timely" motion to recuse. If the statute does have such a requirement, this Court should further clarify the appropriate standards for timeliness and for appellate review, also sources of

considerable confusion. Petitioner maintains that § 455(a) is self-enforcing and does not contain a timeliness requirement, but, even if it does, his recusal motion satisfied that requirement as the standard should properly be construed.

Also, this Court has not had occasion to discuss the precedential value of the opinions of the Committee on the Codes of Conduct of the Federal Judiciary. This Court should hold that lower federal courts are generally bound by the opinions. Here, a Committee opinion required the district judge to recuse himself, and the Ninth Circuit ignored the opinion despite petitioner's heavy reliance on it. The Ninth Circuit's decision also conflicts with other authority, including an opinion by Judge Posner for the Seventh Circuit, which demonstrates that recusal was required under § 455. Recusal was also required under this Court's due process precedent, a claim that cannot be waived or forfeited.

A. This Court should clarify whether § 455 requires timeliness, and, if so, what are the appropriate standards; this Court should also clarify the standard of review for § 455 claims

Section 455(a) states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Section 455(b) requires recusal if a judge "has a personal bias" and lists other situations when recusal is mandatory. Section 455(e) states that where "the ground for disqualification arises

only under subsection (a), waiver may be accepted provided it is proceeded by a full disclosure on the record of the basis for disqualification."

The lower courts are split on whether § 455 requires a "timely" motion. Furthermore, those courts requiring timeliness are divided on whether: (1) a recusal motion must be made at "the earliest possible moment" or instead within a "reasonable" time; (2) if a motion is untimely, does it result in waiver or forfeiture allowing for plain error review, *United States v. Olano*, 507 U.S. 725, 733 (1993); and (3) if a timeliness requirement applies, does it apply to § 455(a), § 455(b), or both. The circuits are also divided on the standard of review.

The Sixth and Seventh Circuits have held that § 455 does not have a timeliness requirement. *Roberts v. Bailar*, 625 F.2d 125, 128 n.8 (6th Cir. 1980); *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977). Unlike the older recusal statute, which explicitly requires a "timely" application, 28 U.S.C. § 144, "[n]either the text nor the legislative history of § 455 contain any suggestion that the procedures of § 144 are applicable to disqualification under § 455(a)." *Roberts*, 625 F.2d at 128 n.8. "In fact, Congress disregarded suggestions that requirements such as timeliness apply to disqualification under § 455." *Id.* "[A]lthough the Department of Justice recommended that the new section 455 should include some limitation of time 'to prevent applications for disqualification

from being filed near the end of a trial when the underlying facts were known long before,' Congress did not incorporate this recommendation in the statute." *SCA Services, Inc.*, 557 F.2d at 117. The statute "is a product of the self-enforcing Code of Judicial Conduct[,]" *Roberts*, 625 F.2d at 128 n.8, and therefore its "provisions are mandatory; they are addressed to the judge" and "impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought." *SCA Services, Inc.*, 557 F.2d at 117.

Other circuits have taken different and inconsistent views. The Second Circuit became the first court to state explicitly that § 455 has a timeliness requirement, *In re International Business Machine Corp.*, 618 F.2d 923, 932 (2d Cir. 1980), which it later described as requiring a party to move for recusal "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987). Concurring, Judge Winter noted that the "earliest possible moment" language used by the majority was "particularly troubling" and explained: "Recusal motions are serious matters, and responsible counsel are most reluctant to make them, largely out of respect for judges. This reluctance is by and large good for the judicial process. We should not therefore structure the law so as to encourage premature or unnecessary recusal motions." *Id.* at 335. The Second

Circuit does not treat untimeliness as a waiver, however, as a party is still entitled to plain error review. *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000).

The D.C. Circuit initially noted the conflict, *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981), and later adopted a timeliness requirement. However, it set forth a different standard and articulated a *waiver* rule, stating that a recusal claim is foreclosed unless it is filed "'within a reasonable time after the grounds' for recusal 'are known.'" *United States v. Brice*, 748 F.3d 1288, 1289 (D.C. Cir. 2014) (quoting *United States v. Barrett*, 111 F.3d 947, 953-54 (D.C. Cir. 1997)). Judges on that court have questioned the soundness of the rule. In *Barrett*, Judge Tatel disagreed with a waiver rule, stating that while timeliness is a factor, an appellate court must at least review a recusal claim under § 455 for plain error, even if no recusal motion was filed in the district court. *Barrett*, 111 F.3d at 954-55 (Tatel, J., concurring). Likewise, Judge Williams has questioned the rationale behind a timeliness requirement and endorsed Judge Tatel's view that waiver does not apply. *Brice*, 748 F.3d at 1292-93 (Williams, J., concurring).

The Third Circuit agrees with a no-waiver rule, stating that § 455 "contains no explicit timeliness requirement," and "even when [recusal] motions are not made in the district court," there should be review at least for plain error. *United States v. Antar*, 53 F.3d 568, 573 (3d Cir. 1995). Other circuits requiring

timeliness have taken inconsistent approaches, *compare United States v. Berger*, 375 F.3d 1223, 1227 (11th Cir. 2004) (forfeiture); *with United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983) (waiver), and the Tenth Circuit has acknowledged that its precedent conflicts regarding whether an untimely motion constitutes a waiver or only a forfeiture. *United States v. Lang*, 364 F.3d 1210, 1216-17 (10th Cir. 2004), *vacated on other grounds*, 543 U.S. 1108 (2005).

The Eighth Circuit suggested that timeliness is less important in the context of § 455(a) than § 455(b), *United States v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996), drawing criticism. *United States v. Tucker*, 82 F.3d 1423, 1426 (8th Cir. 1996) (McMillan, J., dissenting from denial of rehearing). Meanwhile, another judge has flipped that rationale, stating that while § 455(a) may contain a timeliness requirement, § 455(b) does not. *Kolon Industries Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 180-84 (4th Cir. 2014) (Shedd, J., dissenting). Other circuits requiring a timeliness requirement, however, have held that it applies to both § 455(a) and (b). *Summers v. Singletary*, 119 F.3d 917, 920-21 (11th Cir. 1997); *United States v. York*, 888 F.2d 1050, 1053-56 (5th Cir. 1989).

The Ninth Circuit's precedent has reflected the inconsistency throughout the circuits. The Ninth Circuit initially observed that § 455 does not contain the timeliness requirement set forth in § 144 and is self-enforcing; thus, a

recusal claim under § 455 could be made for the first time on appeal. *United States v. Sibla*, 624 F.2d 864, 867-68 (9th Cir. 1980). Justice Kennedy, however, interpreted *Sibla* as requiring timeliness but left open "the question whether timeliness may be disregarded in exceptional circumstances." *United States v. Conforte*, 624 F.2d 869, 880 (9th Cir. 1980). Nonetheless, the Ninth Circuit still relied on *Sibla* to apply plenary review of a § 455 claim even when recusal was not requested in the district court. *In re Manoa Finance Company, Inc.*, 781 F.2d 1370, 1373 (9th Cir. 1986). It later reverted to a timeliness requirement, described as requiring a motion to be filed "with reasonable promptness after the ground for such a motion is ascertained[,]" *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991), but also acknowledged its law was not clear. *United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991). More recent opinions have applied plain error review to recusal claims made for the first time on appeal, *United States v. Rangel*, 697 F.3d 795, 804 (9th Cir. 2012), but, adding confusion, the decision below seemed to fold timeliness into the merits. *Mikhel*, 889 F.3d at 1027-28.

The circuits are also divided on the standard of review for a timely recusal claim under § 455. The Seventh Circuit applies *de novo* review, *United States v. Diekemper*, 604 F.3d 345, 351 (7th Cir. 2010), but most circuits review for abuse of discretion. *United States v. Cordova*, 806 F.3d 1085, 1092 (D.C. Cir.

2015); *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012); *United States v. Estey*, 595 F.3d 836, 842 (8th Cir. 2010); *United States v. DeTemple*, 162 F.3d 279, 283 (4th Cir. 1998); *United States v. Lowe*, 106 F.3d 1498, 1504 (10th Cir. 1997); *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989). Judges in circuits applying abuse of discretion review have disagreed with that approach, explaining that recusal is a mixed question of law and fact that should be reviewed *de novo*, and a rule "which favors the discretion of the challenged judge over the appearance that his or her actions might reasonably convey to the citizenry, is particularly egregious considering that it directly conflicts with Congress's purpose in enacting § 455(a)." *In re United States (Franco)*, 158 F.3d 26, 36 (1st Cir. 1998) (Torruella, C.J., dissenting); *see In re Drexel Lambert Inc.*, 861 F.2d 1307, 1321 (2d Cir. 1988) (Lumbard, J., dissenting) ("the standard for review of a judge's refusal to recuse himself is *not* an abuse of discretion").

While this Court should resolve the conflict, it should also grant review because the Ninth Circuit's conclusion was wrong. This Court should adopt the view of the Sixth and Seventh Circuits that there is no timeliness requirement. Even if there is one, the standard should be reasonableness and give the benefit of the doubt to the moving party, not an "earliest possible moment" standard. Attorneys should not be rushed into a recusal motion, *Apple*, 829 F.2d at

335 (Winter, J., concurring), considering "Machiavelli's famous caution – 'Never strike at a king except to kill.'" *Brice*, 748 F.3d at 1292 (Williams, J., concurring). A "motion to recuse is a very serious matter and . . . may take some time to build the foundation." *In re United States*, 441 F.3d 44, 65 (1st Cir. 2006).

In its appellate brief, the government *conceded* that petitioner's recusal claim was not forfeited as to the penalty phase. Petitioner's motion was made approximately 30 days after the judge first mentioned the issue, with an intervening holiday break and while the attorneys were dealing with numerous other matters in a capital trial. The Ninth Circuit failed to cite a single case supporting untimeliness with such a short interval, and similar delays have been held to be timely. *In re United States*, 441 F.3d at 65; *United States v. Anderson*, 160 F.3d 231, 234 (5th Cir. 1998). Another judge could have continued with the proceedings, Fed. R. Crim. P. 25, and the speculation that petitioner may have "hope[d]" there would be no retrial of the penalty phase, *Mikhel*, 889 F.3d at 1027, conflicts with precedent stating that the possibility of a retrial is not a relevant consideration in the § 455 analysis. *Kelly*, 888 F.2d at 746 and n.24. The Ninth Circuit adopted "an overly rigid application of timeliness principles" that "would effectively preclude appellate review" contemplated by the statute. *Id.* at 747.

This Court should also clarify that recusal is the type of objective

question, *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016), subject to *de novo* review and direct the Ninth Circuit to conduct such an independent inquiry. *Ornelas v. United States*, 517 U.S. 690 (1996); *Thompson v. Keohane*, 516 U.S. 99 (1995). In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858-61 (1988), this Court appeared to apply *de novo* review to the § 455(a) question.

Even if untimely, this Court should clarify that there would only be a forfeiture resulting in plain error review. The district court did not "accept" a waiver under § 455(e) from petitioner, who moved for recusal. Canon 3D of the Code of Conduct for United States Judges states that a waiver can only be accepted if "the parties and their lawyers have an opportunity to confer outside the presence of the judge," and "all agree in writing or on the record that the judge should not be disqualified[,]" but no such written or on-the-record agreement was made. Acceptance of such a waiver, "should be limited to marginal cases and should be exercised with the utmost restraint." *Kelly*, 888 F.2d at 745. "[A]s a general rule, a federal judge should reach his own determination on recusal, *without calling upon counsel* to express their views. The too frequent practice of advising counsel of a possible conflict, and asking counsel to indicate their approval of a judge's remaining in a particular case is fraught with potential coercive elements which make this practice undesirable." *Id.* at 745-46. Coercive

elements were applicable in this capital case, and this Court "indulge[s] every reasonable presumption against waiver." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The judge also did not make a "full disclosure" as required under § 455(e) because he did not inform the parties that he had formally applied and interviewed for the position until *after* the motion was filed. *Kelly*, 888 F.2d at 747.

In sum, application of § 455 has generated multi-faceted confusion. This Court should resolve the conflict and correct the flawed conclusion below.

B. Recusal was required under Opinion No. 84 and other relevant precedent

The Supreme Court of New Jersey has observed that "a sitting judge's exploration of future employment opportunities" is "an area fraught with peril . . . ." *DeNike v. Cupo*, 958 A.2d 446, 449 (N.J. 2008). The Committee on the Codes of Conduct of the Federal Judiciary has devoted an entire opinion (No. 84) to this subject. Under Opinion No. 84, the district judge was required to recuse even though he withdrew his application to become the United States Attorney when petitioner moved for recusal. The Ninth Circuit ignored Opinion No. 84, and this Court should direct the lower courts to follow the Committee's opinions.

The Committee's opinion states: "After the initiation of any discussions with a law firm, no matter how preliminary or tentative the exploration may be, the judge must recuse, subject to remittal, on any matter in which the firm

appears. Absent such recusal, a judge's impartiality might reasonably be questioned." Op. No. 84. The term "law firm" is not limited to private firms and applies "to other potential employers[,]" *id.*, like the Department of Justice. *Scott v. United States*, 559 A.2d 745, 750 (D.C. 1989) (*en banc*). Citing no authority, the Ninth Circuit held that the judge's withdrawal of his application eliminated any recusal problem. *Mikhel*, 889 F.3d at 1028. The Committee's opinion says otherwise: "[T]he Committee recommends recusal, subject to remittal, for a period of at least one year from the conclusion of the negotiations." Op. No. 84.

The Committee's opinion is consistent with other precedent. In *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 459-61 (7th Cir. 1985), recusal was required when a headhunter mistakenly contacted the two firms appearing before a judge, who decided to rejoin his old partnership thereby terminating the prospect of future employment with the firms. Judge Posner explained that recusal is required when a judge "is in negotiation – albeit preliminary, tentative, indirect, unintentional, and *ultimately unsuccessful* – with a lawyer or law firm or party in the case over his future employment." *Id.* at 461. Even when the potential for employment is terminated, an "objective observer might wonder whether" the judge would favor the litigant who sought his services. *Id.* Likewise, in *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012), the Minnesota Supreme Court held that

recusal was required because the judge had previously been retained by the civil division of the prosecutor's office to serve as an expert witness in an unrelated federal civil lawsuit even though the judge never received any compensation and advised, during the trial, that he would no longer be available to serve as an expert witness. "A reasonable examiner might also question why [the judge] withdrew from the relationship . . . shortly before Pratt's trial ended." *Id.* at 877.

In sum, the Ninth Circuit's citation-less analysis on the merits was wrong. Opinion No. 84 and other precedent established that recusal was required, and even if the recusal motion were somehow untimely, the district court committed "plain" error under Opinion No. 84 and all relevant authority.

C. Recusal was required under the Due Process Clause, a claim that cannot be waived or forfeited

The Ninth Circuit held that "[b]ecause there was no abuse of discretion under § 455(a), there was no due-process error." *Mikhel*, 889 F.3d at 1028 n.6. A § 455 claim should be subject to *de novo* review, not abuse of discretion, and this Court's due process recusal cases have employed independent review. *Williams*, 136 S. Ct. 1899; *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Thus, the Ninth Circuit applied the wrong standard of review.

The Ninth Circuit's § 455(a) analysis, which was the sole basis for its due process conclusion, heavily relied on a timeliness/waiver rationale. Some

rights, however, "are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discrediting the federal courts.'" *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995). At least in a capital case, a due process recusal claim, which constitutes structural error, *Williams*, 136 S. Ct. at 1909, cannot be waived or forfeited, as independent review is required to preserve the integrity of the courts. *Id*. at 1907 ("to end the defendant's life is one of the most serious" decisions in the justice system, and its "importance" and "the profound consequences it carries" cannot be overstated).

Like *Williams*, where this Court held that a Chief Justice who decades earlier served as the District Attorney in a death penalty case had to recuse, due process was violated here. Under "a realistic appraisal of psychological tendencies and human weakness," the judge's application to lead the office prosecuting this capital case created an unconstitutional risk of bias. *Caperton*, 556 U.S. at 883-84. Even if plain error review applies, the error was obvious and required reversal based on longstanding due process cases, *In re Murchison*, 349 U.S. 133, 137 (1955), culminating in *Williams*. *Henderson v. United States*, 568 U.S. 266 (2013) (plainness evaluated at time of appellate consideration).

CONCLUSION

The Court should grant this petition.

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Respectfully submitted,

s/Benjamin L. Coleman

BENJAMIN L. COLEMAN
Counsel of Record
COLEMAN & BALOGH LLP
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@colemanbalogh.com

BARBARA E. O'CONNOR
O'CONNOR & KIRBY P.C.
P.O. Box 4356
Burlington, Vermont 05406
Telephone (802) 863-0112
barbara@kirbyoconnor.com

MARGARET HILLS O'DONNELL
Attorney at Law
P.O. Box 4815
Frankfort, Kentucky 40604
Telephone (502) 320-1837
mod@dcr.net

Counsel for Petitioner