No.

In the Supreme Court of the United States

TEXAS BRINE COMPANY, LLC &
UNITED BRINE SERVICES COMPANY, LLC,
Petitioners,

v.

RODD NAQUIN, in his capacity as Clerk of Court
for the First Circuit Court of Appeal
for the State of Louisiana,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Appellate courts in this country generally decide cases in panels, often made up of three judges, selected from the membership of the court as a whole. Different courts thus devise different internal procedures to assign cases to particular panels.

In the course of the sprawling litigation below, petitioners came to find that the intermediate appellate court handling hundreds of their related interlocutory writs and appeals was not constituting its panels randomly, as state law requires. See La. Code Civ. Proc. art. 2164.1; La. Rev. Stat. § 13:319. Instead, the court secretly maintained a non-random procedure in which judges were assigned to panels on a geographical basis, privileging certain Louisiana parishes over others—a procedure that the court has only now acknowledged.

The question presented is whether due process requires judges to be assigned to panels randomly from the pool of all the judges available to hear a particular case.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Louisiana Supreme Court are listed in the caption.

The following additional entities participated as *amici* before the Louisiana Supreme Court: Occidental Chemical Corporation; Browning Oil Company, Inc.; LORCA Corporation; Colorado Crude Company, Legacy Vulcan, LLC; Reliance Petroleum Corporation; and Century Indemnity Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that United Brine Services Company, LLC is a wholly owned subsidiary of Texas Brine Company, LLC and that Texas Brine Company, LLC has no parent corporation and that no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

Texas Brine Co. v. *Naquin*, No. 2019-OC-1503
(La. Jan. 31, 2020)

Solomon v. *Naquin*, No. 2019-OC-1508
(La. Jan. 31, 2020)

Texas Brine Co. v. *Naquin*, No. 2019-CW-1053
(La. App. 1st Cir., transferred Sept. 20, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Texas Brine Company, LLC and United Brine Services Company, LLC (collectively, Texas Brine), respectfully petition for a writ of certiorari to review the judgment of the Louisiana Supreme Court in this case.

OPINION BELOW

The opinion of the Louisiana Supreme Court in this original mandamus action (App., *infra*, 1a-31a) is not yet reported in So.3d; it is available at 2020 WL 543513.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on January 31, 2020. App., *infra*, 1a-31a. On April 9, 2020, that court denied a timely application for rehearing. App., *infra,* 50a. This Court's order of March 19, 2020, extended the time to file this petition to September 6, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT

As this Court has repeatedly explained, "the judiciary's authority * * * depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 445-446 (2015). It is therefore a necessity of the judiciary's continued legitimacy that "justice must satisfy the appearance of justice"—a mandate that is carried into action in the judicial-assignment context by the Due Process Clause. *Id.* at 446 (quoting *Offutt* v. *United States*,

348 U.S. 11, 14 (1954)); see generally *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

In turn, "random assignment of cases is essential to the public's confidence in an impartial judiciary." *E.g.*, *Committee on Judiciary* v. *McGahn*, 391 F. Supp. 3d 116, 119 (D.D.C. 2019).

This case presents the question whether these principles hold true to their logical conclusion: Does the *non*-random assignment of judges to cases undermine the public perception of judicial impartiality and thus violate the Due Process Clause? The Court should grant certiorari and hold that it does.

A. Factual background.

1. The litigation underlying this mandamus action arises from the emergence of a sinkhole near the town of Bayou Corne, Louisiana.

From 1982 until 2010, Texas Brine operated a salt-mining well near the town on land owned by the corporate predecessor of Occidental Chemical Corporation, producing salt brine for industrial uses. App., *infra*, 128a, 142a. The well was plugged and abandoned, as required by state law, in 2011. App., *infra*, 147a.

In August 2012, a large sinkhole appeared overnight near the site of the salt cavern, prompting a years-long evacuation of hundreds of residents. App., *infra*, 126a; see, *e.g.*, David J. Mitchell, *Four Years Later Last Evacuation Orders Lifted at Bayou Corne Sinkhole*, Baton Rouge Advocate (Oct. 7, 2016), https://perma.cc/L57J-43E8. The sinkhole eventually grew to over thirty acres in size, and it became a significant political issue in Louisiana. App., *infra*, 126a-127a; see, *e.g.*, Ken Silverstein, *Letter from Baton Rouge: Dirty South*, Harper's Magazine (Nov. 2013) (describing how "an increasingly loud public outcry" caused "the Bayou Corne sinkhole [to] emerge[] as a

major issue" for the governor and legislature), https://perma.cc/2U5B-7BX4.

Blame for the sinkhole in the public's eye was initially directed at Texas Brine, based on the company's operation of the well. See David J. Mitchell, *Judge: Fault for Bayou Corne Sinkhole Lies with Texas Brine, OxyChem, Vulcan*, Baton Rouge Advocate (Jan. 12, 2018) ("As the operator of record, Texas Brine has, for years, been held by state regulators and the public as 'the responsible party' for the sinkhole response."), https://perma.cc/366G-2MEF. But while Texas Brine has borne the brunt of political opinion, it *won* a favorable liability judgment: A Louisiana state court held that the company was only 35% responsible for the sinkhole, compared to the 90% to 100% liability that all its opponents claimed. App., *infra*, 125a, 126a-156a. Various Occidental-affiliated entities were assigned 50% of the fault for the sinkhole. App., *infra*, 125a.

2. All told, the sinkhole incident kicked off a "staggering" amount of litigation involving Texas Brine, spanning state, federal, and arbitral forums, with hundreds of millions of dollars at stake. App., *infra*, 155a. Petitioner's continued existence as a going concern likely depends on the outcomes of the various sinkhole suits, which remain ongoing.

Because Louisiana appellate practice authorizes certain interlocutory writ applications in addition to appellate review of final judgments (see, *e.g.*, 1 Frank L. Maraist, Louisiana Civil Law Treatise, Civil Procedure § 14:17 (2d ed. 2018)), that staggering litigation in the state trial courts has, in turn, spawned hundreds of individual appellate proceedings in the Louisiana Court of Appeal, First Circuit, the intermediate appellate court with geographic jurisdiction over the Bayou Corne incident.

Louisiana law mandates that appeals and writ applications be randomly assigned to panels of the appellate court and that the panels themselves be randomly constituted. La. Code Civ. Proc. art. 2164.1; La. Rev. Stat. § 13:319. Pursuant to state law, therefore, each of the twelve judges of the First Circuit should have participated in a roughly equal number of sinkhole proceedings.

In the course of the litigation, however, Texas Brine began to notice that one First Circuit judge—Judge J. Michael McDonald—was participating in Texas Brine's writs and appeals at a remarkably disproportionate rate. Indeed, Texas Brine ultimately submitted evidence demonstrating that Judge McDonald had been assigned to panels hearing thirty-one of the fifty-two sinkhole appeals as of March 2019—and that the odds of that distribution occurring, by random chance, were 24.5 million to one. App., *infra*, 164a-165a.[1] As a professor of statistics would attest in an expert affidavit, this level of participation "cannot, by any measure of statistical analysis, be deemed to arise due to random chance" —the method of assignment mandated by state statute. App., *infra*, 167a.

Texas Brine moved to recuse Judge McDonald on the basis of this unexplained departure from the legislatively mandated judicial-assignment procedure. While Texas Brine ultimately lost the recusal issue at the Louisiana Supreme Court by a vote of 4-3,[2] it

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[1] Judge McDonald's participation in adjudicating supervisory writs involving Texas Brine was even more of an anomaly; the odds that he just happened to be assigned those writs randomly was 25.7 *tredecillion* to one. App., *infra*, 174a.

[2] See *Florida Gas Transmission Co.* v. *Texas Brine Co.*, 270 So.3d 577 (La. 2019) (mem.); *Crosstex Energy Servs., LP* v. *Texas Brine*

learned in the course of the proceedings that the First Circuit in fact *does* have a non-random panel-assignment policy. A retired judge revealed that, rather than drawing three judges from the overall pool of twelve First Circuit judges, the court constitutes its three-judge panels by selecting one judge from each of the three geographical election districts that make up the First Circuit. App., *infra*, 201a.

B. Procedural background.

1. Armed with this new disclosure, Texas Brine petitioned the First Circuit for mandamus, seeking to have the court's clerk—respondent here—assign Texas Brine's writs and appeals through a truly random process, in accordance with state law and the Fourteenth Amendment's Due Process Clause. App., *infra*, 61a. The Louisiana Supreme Court assumed jurisdiction over the petition, consolidated the action with another mandamus petition seeking similar relief, and ordered the First Circuit to "submit a per curiam * * * detailing the internal allotment procedures for appeals and applications for supervisory writs in that court." App., *infra*, 32a.

After the lower court's first per curiam omitted any discussion of the topic (see App., *infra*, 34a-37a), the Louisiana Supreme Court ordered the First Circuit to submit a supplemental per curiam "discussing whether the court's allotment procedures incorporate any geographical considerations." App., *infra*, 47a. In response, the First Circuit made the following statement about its procedure:

> By longstanding practice, and in accord with the constitutional authority specifically reserving such to each court of appeal, absent

Co., 270 So.3d 577 (La. 2019) (mem.); *Pontchartrain Nat. Gas Sys.* v. *Texas Brine Co*, 270 So.3d 578 (La. 2019) (mem.).

> recusals, each regular panel of the First Circuit is comprised of one member randomly chosen through mechanical means from the four members of each of the Court's three election districts.

App., *infra*, 48a. That is, the First Circuit confirmed that it does not draw panels randomly from the full pool of twelve judges and, instead, imposes geographic restrictions on the universe of permissible three-judge panels.

With the First Circuit's non-random distribution practice now publicly acknowledged, Texas Brine argued that the court's procedure violated federal due process. For one thing, it resulted in certain judges serving on "more than twenty appellate panels in the Sinkhole Cases in the [last] fifteen months" (App, *infra*, 109a)—thus running the risk, identified by this Court's due-process precedents, "that the judge would be so psychologically wedded to his or her previous position * * * that the judge would consciously or unconsciously avoid the appearance of having erred or changed his position" (*ibid.* (quoting *Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1906 (2016)). For this and other reasons, Texas Brine submitted, the First Circuit's practice "fails to satisfy the requirements of due process" under "the Fourteenth Amendment to the U.S. Constitution." App, *infra*, 106a, 111a.

2. In a 4-3 split decision, the Louisiana Supreme Court denied the writ of mandamus, holding that the First Circuit's imposition of geographic limitations on panel assignments is lawful.

Exercising its "general supervisory jurisdiction over all other courts" (La. Const. art. V, § 5(A)), the court reached the merits of petitioner's claim: "[I]n the exercise of supervisory authority, we will entertain pe-

titioners' arguments on the question of whether the rules of the First Circuit are consistent with the statutory and jurisprudential requirements for random assignment of cases." App., *infra*, 12a; see also App, *infra*, 26a (Crichton, J., dissenting) ("As the majority notes, we exercised our plenary supervisory jurisdiction pursuant to La. Const. Art. V, § 5(A) when assuming jurisdiction over this matter.").[3]

On the constitutional merits, the Louisiana Supreme Court first reaffirmed its prior decisions requiring random allotment under the state and federal constitutions: "[W]e have long recognized due process requires assignments be done on a random or rotating basis." App., *infra*, 13a (citing *State* v. *Simpson*, 551 So. 2d 1303, 1304 (La. 1989)).[4] But it concluded that

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[3] This decision to exercise its supervisory authority gave the court jurisdiction to consider the constitutional merits notwithstanding what it saw as procedural failings with the mandamus petitions. See App, *infra*, 11a (opining that "the petitions for writ of mandamus must fail" on procedural grounds, because "the statute gives the clerk discretion to select an appropriate method to randomly assign such matters," and "[i]f a public officer is vested with any element of discretion, mandamus will not lie") That is, the court considered the merits not as an alternative holding, but in an exercise of a font of judicial power separate from the mandamus petitions. See also *ibid*. ("[W]e recognize the true intent of petitioners is to determine whether the First Circuit's assignment procedure comports with generally accepted principles of random allotment. Although it was perhaps error for petitioners to urge this relief through writs of mandamus, our jurisprudence has long declined to place form over substance, and instead requires courts to look to the facts alleged to discover what, if any, relief is available to the parties.").

[4] The Louisiana Supreme Court has located this requirement in both the state and federal Due Process Clauses, which it interprets to be coextensive. See *Simpson*, 551 So. 2d at 1304 (relying on federal due process precedent); *State* v. *Cooper*, 50 So. 3d 115, 131 (La. 2010) (analyzing argument that "failing to randomly allot

"pure[] random[ness]" is not required, and that the First Circuit's non-random panel-composition procedure does not "run[] counter to the principles of random assignment from a * * * due process standpoint." App., *infra*, 13a-14a; see also App, *infra*, 16a. ("This procedure comports with statutory and jurisprudential requirements for random assignment.").

3. Three of seven justices dissented. Justice Crichton observed that, "[w]hile we have recognized that the goal of insuring due process to litigants does not require an allotment system that is 'purely random,' in each of the cases on which the majority relies to condone the First Circuit's geographical limitations there was a concern for judicial efficiency or costs that necessitated the manner in which allotment was effected." App., *infra*, 29a (citation omitted). Here, however, "the Clerk provides no compelling reason for the geographical limitation in its allotment procedure in the nature of judicial efficiency or otherwise." App., *infra*, 30a. Justice Crichton therefore "dissent[ed] from the majority's finding that the First Circuit's procedure is consistent with the statutory and jurisprudential requirements for random assignment of cases." App., *infra*, 29a.[5]

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this case * * * is a violation of due process" under "both the federal and state constitutions" without distinguishing between the two); see also *Progressive Sec. Ins. Co.* v. *Foster*, 711 So. 2d 675, 688 (La. 1998) ("Unlike Louisiana's provision on equal protection * * *, our due process guarantee in La. Const. Art. I, § 2 does not vary from the Due Process Clause of the Fourteenth Amendment to the United States Constitution."); accord *Cripps* v. *Louisiana Dep't of Agric. & Forestry*, 819 F.3d 221, 232 (5th Cir. 2016) (same).

[5] Justice Hughes dissented on the basis that the cases should be transferred to another appellate court in light of pervasive recusals. App., *infra*, 21a.

Justice Genovese also dissented from the majority opinion "as it employs a metamorphosis in linguistics and lexicology by redefining the word 'random.'" App., *infra*, 22a; see also App., *infra*, 23a-24a ("The legal issue in this case is whether the [First Circuit] employs constitutionally and legislatively mandated random allotment in its panel selection for review of lower court rulings coming before it. In my view, the answer is clearly no, it does not."). He explained that while "there is random selection from each of the three geographical districts, * * * there is *no random selection among the twelve members of the [First Circuit]*, which I find violates the constitutional and legislative mandates of our law." App., *infra*, 24a.

"Our law does not provide for a limited, restricted, or geographical random allotment," Justice Genovese continued; "it requires random allotment, pure and unadulterated, not quasi-random allotment." App., *infra*, 25a; see also App., *infra*, 24a ("When you confine and/or restrict random allotment, it is no longer random allotment.").

Ultimately, Justice Genovese concluded that "litigants having to appeal to the [First Circuit] are denied the equal protection and due process of litigants having to appeal in all other courts of appeal in this state." App., *infra*, 25a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari and hold that due process requires multi-member courts that sit in panels to assign cases to judges randomly, without substantive limitation. That is, to comport with due process, a court must comprise its panels by random draw from all available judges for a particular case.

First, non-random assignment conflicts with fundamental due-process principles and results in suspi-

cions that cloud the public's perception of an impartial judiciary—an issue of tremendous structural importance. Second, there is disagreement among the lower courts that warrants resolution. And, finally, this case is a compelling vehicle for review.

A. Due process obligates multi-member appellate courts to assign judges on a random basis.

Properly construed, the Constitution's guarantee of due process includes a right to appear before a randomly constituted panel of judges.

1. The core constitutional values protected by due process in the judicial-assignment setting include not only fairness to parties, but also the legitimacy of the judiciary in the public eye.

"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 *In re Murchison*, 349 U.S. 133, 136 (1955)). That is, "the floor established by the Due Process Clause clearly requires * * * a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy* v. *Gramley*, 520 U.S. 899, 904-905 (1997); accord, *e.g.*, *Concrete Pipe & Prod. of Cal., Inc.* v. *Construction Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge in the first instance.'") (quoting *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61-62 (1972)); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 73 (1936) (Brandeis, J., concurring) ("The inexorable safeguard which the due process clause assures is * * * that the trier of the facts shall be an impartial tribunal.").

Actual bias is not the *sine qua non* of a due-process violation, however. Instead, "objective standards may

also require recusal whether or not actual bias exists or can be proved. Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Caperton*, 556 U.S. at 886 (quoting *Murchison*, 349 U.S. at 136); accord, *e.g.*, *Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("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.'") (quoting *Caperton*, 556 U.S. at 881).

Critically, "[t]he neutrality requirement" not only protects the parties—"help[ing] to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law"—but also "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)); see also *ibid.* (neutrality requirement "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him").

That is, the *appearance* of fairness is crucial, as "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta* v. *United States*, 488 U.S. 361, 407 (1989). As the Court put it in *Caperton*:

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect

> accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

556 U.S. at 889 (quoting *Republican Party of Minn.* v. *White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)); accord *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 445-446 (2015) ("Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.' The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions.") (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (Alexander Hamilton)).

The Court's precedents thus teach that "[b]oth the appearance *and* reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams*, 136 S. Ct. at 1909 (emphasis added); accord, *e.g.*, *Williams-Yulee*, 575 U.S. at 446 ("As Justice Frankfurter once put it for the Court, 'justice must satisfy the appearance of justice.'") (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)); *Application of Gault*, 387 U.S. 1, 26 (1967) ("[T]he essentials of due process" include "the appearance as well as the actuality of fairness, impartiality and orderliness."). For that reason, "[a] multimember court must not have its guarantee of neutrality undermined." *Williams*, 136 S. Ct. at 1909.

2. Randomness in judicial assignment is a key safeguard of this fundamental interest in the public legitimacy of the judiciary.

As a wide range of courts have recognized, "random assignment of cases is essential to the public's confi-

dence in an impartial judiciary." *Committee on Judiciary* v. *McGahn*, 391 F. Supp. 3d 116, 119 (D.D.C. 2019) (quoting *Dakota Rural Action* v. *United States Dep't of Agric*., 2019 WL 1440134, at *1 (D.D.C. Apr. 1, 2019)). Such procedures "ensure greater public confidence in the integrity of the judicial process, guarantee fair and equal distribution of cases to all judges, avoid public perception or appearance of favoritism in assignments, and reduce opportunities for judge-shopping." *Id.* at 118; see also, *e.g.*, *In re Union Carbide Corp.*, 273 S.W.3d 152, 157 (Tex. 2008) ("Practices that subvert random assignment procedures breed disrespect for and threaten the integrity of our judicial system.") (quotation marks omitted; alteration incorporated); *Ahmed* v. *Miller*, __ F. Supp. 3d ___, 2020 WL 1694594, at *4 (E.D. Mich. Apr. 7, 2020) ("[T]he random assignment of cases is essential to maintaining public confidence in the impartiality of judicial proceedings.").

That is, "[c]ourts have * * * recognized the role that random assignment procedures play in promoting fairness and impartiality and in reducing the dangers of favoritism and bias." *United States* v. *Phillips*, 59 F. Supp. 2d 1178, 1180 (D. Utah 1999) (collecting authorities); see also *ibid.* ("[R]andom assignment protects the integrity of the judicial system by leaving the pairing of cases and judges to chance.") (quoting Christine S. Studzinski, The Law of the Lawyer, 44 No. 4 Prac. Law. 7 (June 1998)); *United States* v. *Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992) ("[T]he blind, random draw selection process utilized in all cases by this court * * * prevents judge shopping by any party, thereby enhancing public confidence in the assignment process.").[6]

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[6] *See also, e.g.*, *Jenkins* v. *Bellsouth Corp.*, 2002 WL 32818728, at *6 (N.D. Ala. Sept. 13, 2002) ("The random assignment of cases

That confidence, in turn, is one of the core values protected by the Due Process Clause in the area of judicial assignment. See, *e.g.*, *Marshall*, 446 U.S. at 242; *Caperton*, 556 U.S. at 889. Indeed, as the Louisiana Supreme Court has "long recognized," therefore, "due process requires assignments be done on a random or rotating basis." App., *infra*, 13a (citing *State* v. *Simpson*, 551 So. 2d 1303, 1304 (La. 1989)); cf., *e.g.*, J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 Tex. L. Rev. 1037, 1100 (2000) (Due Process Clause "prohibits practices that create the 'probability of unfairness,' something that would arguably apply to any system of assignment not based on principles of neutrality.") (quoting *Murchison*, 349 U.S. at 136).

3. A court's imposition of substantive restrictions on panel makeup—including geographical limitations—is incompatible with the due-process requirement of random allotment. As one of the dissenting Justices explained below, "[w]hen you confine and/or restrict random allotment, it is no longer random allotment" (App., *infra*, 24a (Genovese, J., dissenting in part)) and ceases to serve the fundamental due-process values of public legitimacy on which the judiciary's constitutional authority rests. See also App., *infra*, 23a ("[R]andom is random, period."). At the least, pro-

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* * * has the obvious, commonsensical and beneficial purpose of maintaining the public's confidence in the integrity of the judiciary."); *Tripp* v. *Executive Office of the President*, 196 F.R.D. 201, 202 (D.D.C. 2000) ("The fundamental rationale for the general rule requiring random assignment of cases is to ensure greater public confidence in the integrity of the judicial process."); *La Unión Pueblo Entero* v. *Ross*, 2019 WL 6035604, at *2 (D. Md. Nov. 13, 2019) ("The general rule is that all new cases are randomly assigned in order to ensure greater public confidence in the integrity of the judicial process.").

grammatic departures from random assignment must be justified by neutral, generally applicable concerns of "judicial efficiency or costs"—but no such explanation is proffered here. App., *infra*, 29a-30a (Crichton, J., dissenting).

The state appellate court's non-random, geographic assignment procedures here are especially troubling in several respects.

First, the particular makeup of the "mystical, geographical districts" employed by the First Circuit (App., *infra*, 24a (Genovese, J., dissenting in part)) leads to serious concerns about representational fairness. The First Circuit presides over 16 Louisiana parishes; however, one of the three "districts" comprising the court consists of only a single parish: East Baton Rouge. See La. Rev. Stat. § 13:312(1)(b). The First Circuit's unwritten practice of constituting its panels with one judge from each district (see pages 4-6, *supra*) thus ensures that a judge from East Baton Rouge Parish will participate in deciding *every* case before that court. None of the other 15 parishes enjoys such preferential treatment.

It is easy to see how a litigant from an outlying parish facing off against an opponent from East Baton Rouge might perceive the First Circuit as providing a less than even playing field, particularly in a system where judges are responsive to the electorate only of the individual districts they represent. See La. Rev. Stat. § 13:312.1(A) (providing that First Circuit judges shall be elected "by the qualified electors of each district, respectively"); cf., *e.g.*, *Marshall*, 446 U.S. at 242 (due-process guarantee of neutrality "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him").

Second, Texas Brine presented evidence below that the First Circuit's geographical restriction on panel composition reduced the number of possible panels by 70.9%. See App., *infra*, 186a-187a (explaining that only 64 unique three-judge combinations are possible under the First Circuit's practice, compared to 220 unique panels under a purely random draw).[7]

That is a concerning result, given the corpus of social-science literature demonstrating that diversity—both intellectual and otherwise—in a decisionmaking body leads to better, more accurate decisions. See, *e.g.*, David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Business Review (Nov. 4, 2016) (collecting research showing that diverse teams are more fact-oriented, process facts more carefully, and engage in greater innovation), https://perma.cc/N24R-UWRH; see also Eric Stirgus, *Justice Sotomayor Bemoans Lack of Diverse Backgrounds on Top Court*, Atlanta Journal-Constitution (Feb. 6, 2018) (quoting Justice Sotomayor as explaining that because each Justice brings his or her own unique experience and intellectual background to the bench, diversity "make[s] a difference" in the Court's decisionmaking process: "It's a richer, broader conversation when you have people from [different] experiences participating."), https://perma.cc/K9TS-5EHC. By prohibiting the majority of three-judge combinations that would be available under truly random allotment, the First Circuit's procedure denies Louisiana litigants the substantive benefits that would accrue from a freer exchange of ideas among judicial actors.[8]

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[7] The permissible panels are further reduced where, as in this case, several judges are recused. See App., *infra*, 190a.

[8] There is a large body of literature leveling similar criticisms at specialized courts, largely centered around the Federal Circuit

Finally, departures from random assignment are particularly troubling where—as here—a court bases its non-random assignment of cases on an *unwritten* and *secret* policy, which requires the intervention of the state supreme court even to make public. See pages 5-6, *supra*. Such secret, non-random backroom dealings hardly foster "the feeling, so important to a popular government, that justice has been done" (*Marshall*, 446 U.S. at 242 (quoting *Joint Anti-Fascist Comm.*, 341 U.S. at 172 (Frankfurter, J., concurring))), nor do they "satisfy the appearance of justice" (*Williams-Yulee*, 575 U.S. at 446 (quoting *Offutt*, 348 U.S. at 14)). As such, they cannot withstand due-process scrutiny.

To avoid these and other concerns—each of which goes to the perceived fairness, and therefore the public legitimacy, of the judiciary—due process requires panels to be constituted randomly out of the entire pool of judges available to hear a particular case.[9]

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and its exclusive patent jurisdiction. See generally, *e.g.*, Sarang Vijay Damle, *Specialize the Judge, Not the Court*, 91 Va. L. Rev. 1267, 1281 (2005) (collecting such criticisms, including "a lack of 'cross-pollination' of ideas in the common law when relying on specialized judiciaries"); Hon. Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425, 425 (1951) (similar).

[9] If a judge is recused from hearing a case, he or she is not "available" and may therefore be permissibly excluded from the pool from which the panel is selected. The key is that this and any other "availability" criteria must be neutral and non-substantive in order to ensure that the due-process benefits of randomness are achieved. Cf. Brown & Lee, *supra*, at 1100, 1102 (noting that "assignment practices can be attacked as a structural issue under the Due Process Clause," and "[a]n assignment system not based on principles of neutrality would arguably * * * create the probability of unfairness," offending due process). As Justice Genovese observed below, this case involves no such neutral and non-substantive criteria. App., *infra*, 24a-25a.

B. The Court's review is warranted.

Not only is the Louisiana Supreme Court's decision wrong, but the issue is exceptionally important; the lower courts are in disagreement about the due-process necessity of random assignment; and this case is an excellent vehicle. The Court should grant certiorari to resolve this important constitutional issue.

1. The neutral assignment of judges is an issue of enormous importance.

The process by which judges are assigned to cases is a tremendously important issue, as it speaks directly to the legitimacy of the judiciary as a whole.

As we have explained (at 13-14), randomness in judicial assignment "is essential to the public's confidence in an impartial judiciary" (*McGahn*, 391 F. Supp. 3d at 119). And that confidence, in turn, is the very basis for the judiciary's place in the constitutional structure: Because "the judiciary 'has no influence over either the sword or the purse,'" the "authority" of the courts "depends in large measure on the public's willingness to respect and follow [their] decisions." *Williams-Yulee*, 575 U.S. at 445-446 (quoting The Federalist No. 78, *supra*, p. 465). "It follows that public perception of judicial integrity is 'a state interest of the highest order.'" *Id.* at 446 (quoting *Caperton*, 556 U.S. at 889). Indeed, the stakes are no less than "the rule of law itself." *Williams*, 136 S. Ct. at 1909.

In other words, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship" (*Mistretta*, 488 U.S. at 407), meaning that "safeguarding 'public confidence in the fairness and integrity of the nation's elected judges'" is a "vital state interest" (*Williams-Yulee*, 575 U.S. at 445 (quoting *Caperton*, 556 U.S. at 889)). And safeguarding that confidence demands that impartiality be

maintained both in fact *and* in appearance: "[B]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements." *Williams*, 136 S. Ct. at 1909; see also *Gault*, 387 U.S. at 26 ("[T]he appearance as well as the actuality of fairness, impartiality and orderliness" are among "the essentials of due process"); *Marshall*, 446 U.S. at 242.[10]

The Court therefore carefully polices issues—like judicial assignment—that impact the perceived legitimacy of judicial decisionmaking in the lower courts, even absent disagreements among them. See *Murchison*, 349 U.S. at 136 ("[The] [i]mportance of the federal constitutional questions raised" by state procedures that undermined neutrality "caused us to grant certiorari."). Indeed, because of the importance of the due-process guarantee of an impartial tribunal to our constitutional system of government, "[t]he requirement of neutrality has been jealously guarded by this Court." *Marshall*, 446 U.S. at 242. This case should be no exception.

What is more, these values are effectuated only if panel assignment is *truly* random—and not secretly only partially random as in the First Circuit. Where a court touts a random assignment process but maintains instead a secret, nonrandom procedure, the appearance of neutrality is critically undermined. To maintain the public's confidence in a fair and neutral

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[10] As noted above (at 16-17), procedures that artificially cabin the diversity of represented viewpoints in a decisionmaking body also result in less accurate substantive outcomes and less beneficial innovation. Such procedures thus threaten the perceived legitimacy of multi-member appellate courts even apart from concerns about conscious or unconscious bias. Cf. *supra* pages 18-19.

judicial system, courts must engage in *completely* random assignment of cases to judges.

2. The disagreement among lower courts further supports the need for review.

It is for the reasons just stated that the Louisiana Supreme Court—although it applied the rule incorrectly in this case—rightly recognizes that "due process requires assignments be done on a random or rotating basis." App., *infra*, 13a (citing *Simpson*, 551 So. 2d at 1304).[11]

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[11] No doubt recognizing the implications for fairness and public legitimacy, many courts assign judges randomly by statute, court rule, or internal procedure, meaning that these courts have not needed to consider whether due process requires the same result. See Richard E. Flamm, Judicial Disqualification 657 (3d ed. 2017) ("In most jurisdictions, cases are ordinarily assigned to judges on a random draw basis."); see also, *e.g.*, *United States* v. *Bulger*, 2012 WL 2914463, at *3 (D. Mass. July 17, 2012) ("One of the most important of the measures taken in recent years by the federal court to promote public confidence in its inner workings was the random assignment of cases to judges to eliminate any suspicion, real or imagined, that case assignments were part of a politicized process."); *United States* v. *Long*, 697 F. Supp. 651, 654 (S.D.N.Y. 1988) ("The instant case was assigned to this court by the 'wheel' in an absolutely impartial and random fashion."). This widespread practice also extends to the random composition of appellate panels. See, *e.g.*, Joanne Geha Swanson, *Behind the Scenes at the Michigan Court of Appeals*, Mich. Bar Journal (Jan. 2016) (explaining that a computer program "randomly assigns the case to a panel consisting of three randomly assigned judges."), https://perma.cc/Z4M7-VK8N. These widespread practices confirm that this is an essential aspect of procedural fairness. See, *e.g.*, *Schad* v. *Arizona*, 501 U.S. 624, 640 (1991) (noting "the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require" for due-process purposes).

Other state and federal courts, however, have rejected a due-process requirement of randomness in judicial assignment. See *In re Marshall*, 721 F.3d 1032, 1040 (9th Cir. 2013) ("[A] party has no due process right to random case assignment."); *Firishchak* v. *Holder*, 636 F.3d 305, 309 (7th Cir. 2011) ("A non-randomly assigned judge, without more, simply does not make for a due process violation,"); *Sinito* v. *United States*, 750 F.2d 513, 515 (6th Cir. 1984) ("Nor does a defendant have the right to have his judge selected by a random draw."); *State* v. *Langford*, 735 S.E.2d 471, 479 (S.C. 2012) ("[T]here is no right to have one's judge selected randomly.").[12]

The Court should take this case to resolve this conflict, affirming that random assignment is a fundamental due-process safeguard and delineating the bounds of that requirement.

3. This case is a compelling vehicle for review.

Finally, this case presents an appealing vehicle to identify the due process requirement of randomness in judicial assignment.

First, the constitutional question is cleanly presented. Below, Texas Brine sought to compel respondent to assign appeals to judges randomly, asserting that the denial "of the random, neutral assignment of each appeal or review of its case" denied Texas Brine "its right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution." App., *infra*, 61a. Following Texas Brine's lengthy argument regarding the federal constitutional issue (App, *infra*, 105a-111a), that court concluded that

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[12] As commentators have observed, these decisions denying a due-process right to random assignment "generally * * * undertake little thoughtful analysis." Brown & Lee, *supra*, at 1099.

the First Circuit's allotment "procedure comports with statutory and jurisprudential requirements for random assignment," including "the due process aspects of random allotment." App., *infra*, 14a, 16a; cf. App., *infra*, 24a (Genovese, J., dissenting in part) ("[T]here is *no random selection among the twelve members of the [First Circuit]*, which I find violates the constitutional and legislative mandates of our law.").[13] The due-process necessity of random assignment of judges is thus cleanly teed up for review.

Second, resolution of the federal constitutional question was necessary to the judgment below, leaving no adequate and independent state ground for the Louisiana Supreme Court's decision. Cf., *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1037-1042 (1983) (noting "[t]he principle that we will not review judgments of state courts that rest on adequate and independent state grounds"). Notwithstanding certain misgivings about the scope of its mandamus jurisdiction, the Court "entertain[ed] petitioners' arguments" on the constitutional issue "in the exercise of supervisory authority." App, *infra*, 12a. Having determined to exercise this authority, the court decided the merits of the case, including the independent arguments turning on federal due process. See App., *infra*, 11a-12a ("La. Const. art V., § 5(A) grants this court 'general supervisory jurisdiction over all other courts,'" which grant of authority "is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court.");

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[13] These references to "due process" are under both the federal and state constitutions, which the Louisiana courts interpret coextensively. See *supra* page 7-8 n.4; *Progressive Sec. Ins. Co.* v. *Foster*, 711 So. 2d 675, 688 (La. 1998). Indeed, *Simpson*, 551 So. 2d at 1304, relied on below, rested, in part, on the federal due process holding in *Turner* v. *Louisiana*, 379 U.S. 466 (1965).

App., *infra*, 26a (Crichton, J., dissenting) ("As the majority notes, we exercised our plenary supervisory jurisdiction pursuant to La. Const. Art. V, § 5(A) when assuming jurisdiction over this matter.").

Any alleged state-law procedural failings of the mandamus request are thus irrelevant to this petition—which seeks review of the state court's federal constitutional holding—because that holding was rendered in an exercise of jurisdiction completely independent of mandamus. In other words, this is not a case in which "the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws." *Michigan*, 463 U.S. at 1042 (quoting *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)). Rather, the decision below rested wholly on the state court's evaluation of the federal constitutional question presented here.[14]

The Court should therefore continue its tradition of "jealously guard[ing]" the due-process "requirement" of judicial "neutrality" (*Marshall*, 446 U.S. at 242) by granting certiorari in this case.

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[14] Additionally, the Court "ha[s] often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive [the Court] of the right to review." *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964); see also *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-263 (1982) ("Our decisions * * * stress that a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'") (quoting *Barr*, 378 U.S. at 149); *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988) (same). Here, this very case demonstrates that the procedural prerequisites for mandamus are not "strictly or regularly followed" by the Louisiana courts as the Louisiana Supreme Court dispensed with them under its "plenary" and "complete[ly] discretion[ary]" supervisory authority over lower courts. App, *infra*, 12a; see also App, *infra*, 11a ("[O]ur jurisprudence has long declined to place form over substance.").

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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