No. 21-6630

IN THE

Supreme Court of the United States

DANIEL ANGEL RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The question presented is whether an unconditional guilty plea, by itself, waives a federal defendant's right to appeal a district court's failure to recuse under 28 U.S.C. § 455(a). The government expressly concedes that there is a "decades-old disagreement" on that question among the circuits. BIO 7, 10. There is indeed. The circuits first divided in 1990, and they have been divided 3-to-2 since 2003. The Fifth, Tenth, and Eleventh Circuits have all held that an unconditional guilty plea waives the right to appeal the district court's failure to recuse under § 455(a). The First and Second Circuits have held that it does not. For the last twenty years, lower courts and commentators have repeatedly noted this intractable conflict. *See* Pet. 3, 10–14.

That conflict should be resolved. Guilty pleas resolve 97% of federal cases, and it is "critically important that defendants, prosecutors, and judges understand the consequences of these pleas." *Class v. United States*, 138 S. Ct. 798, 807 (2018) (Alito, J., dissenting). That is especially true where the consequence is a waiver of § 455(a), a statute that Congress enacted to ensure public confidence in the federal Judiciary. Reported decisions, as well as the government's own briefs, confirm that this waiver question has recurred for the last three decades. And it will affect the outcome where § 455(a) matters most: criminal cases where the judge erroneously fails to recuse.

Vehicle-wise, the government does not dispute that this case squarely presents the waiver question. And it agrees that such vehicles are "rare." BIO 12. It argues only that Petitioner might not prevail on his § 455(a) claim. But that is an issue for remand, as the Eleventh Circuit held *only* that his claim was waived. That was error.

I. The Thirty-Year Old Circuit Split Should Be Resolved

Notwithstanding the "decades-old disagreement" among the circuits, the government argues that the question presented "does not warrant this Court's review." BIO 10. But it offers no sound reason to let the split persist indefinitely.

1. As an initial matter, the government does not dispute any of Petitioner's arguments for why this Court's review *is* warranted. To recap: the question presented implicates the integrity of the Judiciary and the administration of criminal justice; 97% of all federal criminal cases—60,000 in 2020 alone—are resolved by guilty plea; the split injects confusion into plea bargaining, plea hearings, and the resolution of § 455(a) claims on appeal; and the split undermines the very purpose of § 455(a) to ensure public confidence in the Judiciary, as it leads to the disparate judicial treatment of § 455(a) claims on appeal based solely on geography. *See* Pet. 3, 14–16.

2. The government asserts, without further explanation, that review is unwarranted because the "question presented arises infrequently." BIO 7. But five circuits have issued precedential decisions resolving it. *See* Pet. 10–13 (summarizing cases). In line with those precedents, the First and Second Circuits have addressed § 455(a) claims that would have otherwise been waived by a plea. *See, e.g.*, *United States v. Pulido*, 566 F.3d 52, 55, 62–63 (1st Cir. 2009); *United States v. Voccola*, 99 F.3d 37, 39, 41–43 (1st Cir. 1996); *United States v. Sturgis*, 667 F. App'x 347, 348–39 (2d Cir. 2016); *United States v. Lovaglia*, 954 F.2d 811, 814–17 (2d Cir. 1992). By contrast, the Fifth and Eleventh Circuits have deemed § 455(a) claims waived by a plea. *See, e.g.*, *United States v. Lopez*, 569 F. App'x 238, 238–39 (5th Cir. 2014);

United States v. Musgrove, 426 F. App'x 754, 758 (11th Cir. 2011); *United States v. Shearer*, 167 F.3d 538 (5th Cir. 1998). Three more circuits have noted but bypassed the waiver question by rejecting § 455(a) claims on the merits. *See, e.g.*, *United States v. Swallers*, 897 F.3d 875, 877 n.2 (7th Cir. 2018); *United States v. Jones*, 718 F. App'x 181, 184–85 (4th Cir. 2018); *United States v. Ross*, 116 F.3d 487, 1997 WL 345646, at *1 (9th Cir. 1997). Finally, the government itself has filed briefs in each of the last three decades noting the split.[1] These reported decisions and briefs, which are not exhaustive, confirm that the waiver "question recurs with some frequency." Pet. 19.

The government also asserts, again without further explanation, that the waiver question has "little practical significance." BIO 7. To the extent the government is arguing that it will not be dispositive in a substantial number of cases, that is only because federal judges do not violate § 455(a) in a substantial number of cases. But the federal Judiciary is "duty-bound to strive for 100% compliance" with § 455(a) "because public trust is essential, not incidental, to [its] function." John G. Roberts, Jr., Chief Justice of the United States, 2021 Year-End Report on the Federal Judiciary 3 (Dec. 31, 2021). Yet history teaches that such violations do occur. *See, e.g.*, *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) (trial judge had

[1] *See, e.g.*, *United States v. Shimabukuro*, U.S. Br., 2019 WL 2647857, at *18–19 (9th Cir. June 19, 2019) (Nos. 18-10269, 18-10338); *United States v. Swallers*, U.S. Br., 2018 WL 2203120, at *5–6 (7th Cir. May 4, 2018) (No. 17-2568); *United States v. Lopez*, U.S. Br., 2014 WL 271396, at *15–17 & nn.6–8 (5th Cir. Jan. 15, 2014) (No. 13-10709); *United States v. Harrigan*, U.S. Br., 2003 WL 24045951, at *30–31 (3d Cir. Mar. 27, 2003) (No. 02-3911); *United States v. Metz*, U.S. Br., 1998 WL 34184647, at *15–17 (11th Cir. Aug. 6, 1998) (No. 96-5484); *United States v. Barrios*, U.S. Br., 1997 WL 33553025, at *12 (9th Cir. Sept. 3, 1997) (No. 97-10131).

financial conflict of interest); *United States v. Antar*, 53 F.3d 568, 572–79 (3d Cir. 1995) (trial judge made improper remarks at sentencing); BIO 11 (citing three criminal cases where § 455(a) mandated recusal); *see also Williams v. Pennsylvania*, 579 U.S. 1 (2016) (due process violation where state supreme court justice who voted to uphold capital sentence had been the prosecutor to approve the charges). And it is in those very cases where the waiver question will affect the outcome, for it will determine whether the § 455(a) violation can be remedied on appeal. That class of cases warrants close scrutiny because unchecked recusal violations threaten to undermine the public's confidence in the Judiciary. This Court has always taken that threat seriously, granting review on recusal issues in each of the last four decades.[2]

The dynamic above also explains why the Court has not yet had occasion to resolve the question presented. Because § 455(a) violations are relatively uncommon, courts of appeals tend to resolve claims on the merits, not waiver. The upshot is that suitable vehicles for certiorari seldom come along. Indeed, according to the government, the last petition to present the waiver question came nearly 20 years ago, and the only other petition to do so came last *century* (and before *Patti*). *See* BIO 7 (citing cert. denials in *Patti v. United States*, 540 U.S. 1149 (2004) and *Shearer v. United States*, 528 U.S. 827 (1999)). However, as reiterated below, the waiver question *is* dispositive here: Petitioner—who is serving a 33-year sentence—has a

[2] *See, e.g.*, *Williams*, 579 U.S. 1 (2016); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009); *Sao Paulo State of Fed. Republic of Brazil v. Am. Tobacco Co., Inc.*, 535 U.S. 229 (2002); *Liteky v. United States*, 510 U.S. 540 (1994); *Liljeberg*, 486 U.S. 847 (1988). Individual Justices have also issued in-chambers recusal opinions. *See, e.g.*, *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 541 U.S. 913 (2004) (Scalia, J.).

meritorious § 455(a) claim that the Eleventh Circuit deemed waived by virtue of his plea. Had he been convicted in the First or Second Circuits, that § 455(a) violation would have been remedied. This very case, then, illustrates the importance of the waiver question to the administration of justice. The Court should not remain idle in the face of that geographic disparity and risk yet another three decades of confusion.

3. The government emphasizes that the waiver rule adopted by the Fifth, Tenth, and Eleventh Circuits does not create "insuperable barriers" to appellate review because writs of mandamus remain available. BIO 10–11. But "[i]t is, of course, well settled, that the writ is not to be used as a substitute for appeal," *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964), especially in the criminal context, *see Will v. United States*, 389 U.S. 90, 96–97 (1967). Indeed, mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quotation omitted). Thus, a mandamus "petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable." *Id.* at 381 (quotations and brackets omitted).

If the waiver rule adopted by the Fifth, Tenth, and Eleventh Circuits is wrong—and, as reiterated below, it is—then the remote possibility of mandamus does not cure the denial of a defendant's statutory right to appeal. Nearly half of all federal defendants to plead guilty do so in one of those three circuits. *See* Pet. 14–15. Yet, to obtain mandamus, they must satisfy stringent legal standards and heightened burdens of proof that would not apply in their direct criminal appeals. On appeal, they need not show "extraordinary" circumstances or a "clear and indisputable"

§ 455(a) violation. They need show only that "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality, and any doubts must be resolved in favor of recusal." *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (citation omitted). Thus, mandamus is cold comfort to the large swath of defendants who plead guilty each year in the Fifth, Tenth, and Eleventh Circuits.

Once again, this case illustrates the point. After the district court denied Petitioner's recusal motions, he sought two writs of mandamus from the Eleventh Circuit directing the district court to recuse.[3] The Eleventh Circuit summarily denied both petitions. The government speculates that it did so because the petitions were without merit. BIO 11–12. But, given the strength of Petitioner's claim, the denials were more likely due to the near-"insuperable" procedural barriers to mandamus. Regardless, the Eleventh Circuit's cursory treatment shows that mandamus does not afford defendants the robust review and process that they would otherwise receive on appeal. Nor should it; again, mandamus is not supposed to substitute for an appeal.

That well-settled proposition also reveals the problem with the government's argument even if the waiver rule in the Fifth, Tenth, and Eleventh Circuits were correct. On the government's view, defendants in those circuits should liberally employ mandamus as a substitute for the very appeals that their guilty pleas have waived, clogging the circuits with interlocutory appeals masquerading as mandamus

[3] Unlike Petitioner, the defendant in *Patti* did not seek mandamus on the recusal issue, a fact that the government emphasized when opposing review there. *See* BIO 8–10, *Patti v. United States*, 540 U.S. 1149 (2004) (No. 03-575), 2003 WL 23010677.

petitions. That cannot be right. Notably, the government cites no case where a court of appeals has granted mandamus after a plea. In all likelihood, then, no appellate review will be permitted in that posture. Meanwhile, similarly-situated defendants in the First and Second Circuits will continue to receive plenary appellate review.

The government identifies a grand total of three § 455(a) cases in all of history where mandamus was granted (BIO 11), but in those cases mandamus was sought *before* the entry of any plea. While mandamus in that posture would not circumvent any plea-based waiver, the facts giving rise to a § 455(a) violation are not always known—and sometimes do not even exist—at the outset of a case. *See, e.g.*, *Liljeberg*, 486 U.S. at 863 n.11, 869 (explaining that, through no fault of the parties, the judge's conflict was first discovered 10 months after the judgment was affirmed on appeal); *Antar*, 53 F.3d at 572–79 (finding a § 455(a) violation based on the judge's remarks at sentencing). And where the § 455(a) claim is discovered or arises after the plea, the government's expansive view of mandamus would permit, if not incentivize, criminal defendants to circumvent their plea-based waivers via extraordinary writs.

In sum, the government's mandamus arguments bolster rather than undermine the need to resolve the split. On the one hand, if the Fifth, Tenth, and Eleventh Circuits are wrong that a guilty plea waives a § 455(a) claim for appeal, then defendants will be denied their statutory right to appeal—a violation that is not cured by the remote prospect of mandamus—and § 455(a) violations will fall through the cracks. On the other hand, if the waiver rule in those three circuits is correct, then defendants will (on the government's view) be free to use mandamus as a

substitute for the appeals that they have waived, and similarly-situated defendants in the First and Second Circuits will receive plenary appellate review when they should receive none at all. Either way, mandamus is no basis to leave the split intact.

II. This Case Is an Excellent Vehicle to Resolve the Split

1. As explained in the Petition (at 7–9, 16–17), this case neatly tees up the question presented. Petitioner moved to recuse Judge Ungaro, Dist. Ct. ECF Nos. 277, 280, and she denied his request on the merits, Pet. App. E, 60a–65a. After unsuccessfully seeking mandamus, Petitioner reiterated his § 455(a) argument on direct appeal. Without addressing the merits, the Eleventh Circuit held that he had "waived any argument concerning his § 455(a) motion when he entered a voluntary and unconditional guilty plea." Pet. App. 8a (citing *Patti*, 337 F.3d at 1320). After that dispositive holding, he sought rehearing en banc, unsuccessfully urging the Eleventh Circuit to overrule *Patti* and adopt the law in the First and Second Circuits. Given that clean procedural posture, the government does not dispute that this case squarely presents and implicates the waiver question dividing the circuits. BIO 10.

2. Instead, the government lodges only a superficial vehicle objection. It argues that, even if the Eleventh Circuit erroneously held that Petitioner's § 455(a) claim was waived, he "would not be likely" to prevail on the merits. BIO 12. But while the Eleventh Circuit *did* reject his argument that the 1994 recusal order applied, it did *not* address the merits of his "alternative[ ]" recusal argument based on § 455(a). Pet. App. 7a–8a; *see* BIO 4–6. Thus, the merits of Petitioner's § 455(a) claim is not before this Court. *See* Pet. 17; *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7

(2005) ("we are a court of review, not of first review"). And because that claim would be addressed in the first instance by the court of appeals, it is irrelevant here whether that claim involves "atypical facts" (BIO 12), as compelling recusal claims often do.

3. In any event, the government's arguments fail even on their own terms.

a. The government argues that § 455(a) did not require Judge Ungaro's recusal (BIO 13–14 & n.*), but its analysis is incomplete. The government argues that recusal is not required merely because Petitioner was charged with assaulting Judge Highsmith in an unrelated case back in 1994. BIO 13. But that analysis omits two crucial (and undisputed) facts. *See* Pet. 6–7, 18; BIO 4–5. First, Judge Ungaro was Judge Highsmith's colleague at the time of the alleged assault, and she remained his colleague until he retired in 2008. Second, in 2010, the District's Chief Judge displayed *actual* bias against Petitioner by opposing his request for sentencing credit on the ground that he had "actual[ly] attack[ed]" Judge Highsmith, Dist. Ct. ECF No. 277-2, a charge for which Petitioner had been acquitted. The Ninth Circuit later held that this letter violated not only § 455(a) but due process. For no discernible reason, the Chief Judge sent his letter to every Judge in the District, including Judge Ungaro. The government omits this key episode from its analysis (BIO 13), but it re-poisoned the judicial well. These troubling facts alone raise an appearance of impropriety.

Judge Ungaro's actions in Petitioner's criminal case exacerbated rather than mitigated that appearance. The government does not dispute that she ruled against him at every turn, ultimately imposing a 33-year sentence—effectively a life sentence for a then 47-year old man. Pet. 8–9, 18. Nor can the government deny that Judge

Ungaro knew about the "Judge Highsmith assault" before counsel informed her (BIO 13 n.*), confirming that she had recalled Petitioner due to his notoriety in the District and/or that she had been infected by the Chief Judge's 2010 letter. Pet. 7–8, 18. And her damning comment that recusal would be a "gift" to Petitioner indicates that she had negatively pre-judged his upcoming sentencing. Pet. 8, 18. Indeed, that comment came in the context of discussing whether Petitioner would represent himself at sentencing. In light of these additional facts, a reasonable observer could surely question Judge Ungaro's impartiality. The most the government can say is that the Eleventh Circuit affirmed her rulings on appeal. BIO 13–14. But it did so after reviewing ten of her rulings deferentially—all for abuse of discretion, clear error, or plain error. If anything, that highlights just how much discretion Judge Ungaro—a statutorily disqualified judge—exercised in Petitioner's criminal case.

Finally, Judge Ungaro *did* recuse from a civil suit that Petitioner brought against the Chief Judge based on the letter. Pet. 18–19. And that recusal occurred shortly after she sentenced Petitioner (and denied his motion for compassionate release). Even if her recusal in the civil case could be attributed to the Chief Judge's status as a party, as the government speculates (BIO 13 n.*), a reasonable observer could still find it disconcerting that she did not also recuse in the criminal case, where Petitioner's liberty was at stake. It is not every day that a federal judge recuses from a civil case brought by a person over whose criminal case she is actively presiding, especially where the same core facts underlie the request for recusal in both the civil and criminal cases. At best, this situation was highly irregular and ethically fraught.

b. Unable to impugn the merits of Petitioner's § 455(a) claim, which is not even presented for review, the government also asserts, in one passing sentence, that Petitioner's failure to timely seek recusal "may have forfeited" such relief. BIO 12–13. But that equivocal assertion fails on procedural, legal, and factual grounds.

Procedurally, the Eleventh Circuit did not address any timeliness issue, and this Court routinely grants review where a district court has alternatively ruled on grounds not reviewed by the court of appeals. *See, e.g.*, *Brownback v. King*, 141 S. Ct. 740, 746–47 (2021); *Harris v. Reed*, 489 U.S. 255, 258–60 (1989). That practice is most sensible in a case like this one, where the district court's alternative ruling was a conclusory afterthought. Its five-page recusal order focused on the merits. Pet. App. 60a–65a. The lone exception was a footnote at the tail end where, in tiny font, the court stated that Petitioner had "waived" recusal because, in addition to entering an unconditional guilty plea, he had "waited too long to raise the issue." Pet. App. 65a n.1. But the court gave no reasoning and made no findings. Then, on appeal, the government relied solely on the guilty plea. U.S. C.A. Br. 37–38. Its failure to raise any timeliness issue on appeal was (if not a waiver) a forfeiture that the Eleventh Circuit would be bound to enforce on remand unless the government could show "extraordinary circumstances." *See Wood v. Milyard*, 566 U.S. 433 (2012).

In any event, as a legal matter, there is no statutory timeliness requirement at all. The actual text of § 455 imposes "no duty on the parties to seek disqualification, nor any time limits within which disqualification must be sought. Although the Department of Justice recommended that section 455 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." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1115 (5th Cir. 1980) (quotation omitted). Notwithstanding that deliberate textual omission, the Eleventh Circuit has grafted a timeliness requirement onto § 455 for the purpose of preventing an "eleventh-hour ploy based upon [a party's] dissatisfaction" with an adverse ruling. *United States v. Siegelman*, 640 F.3d 1159, 1188 (11th Cir. 2011).

Even if that judicially-invented timeliness requirement were sound, the district court's single-sentence footnote-only assertion made no factual findings at all. It certainly made no finding that Petitioner abusively sought recusal due to an adverse ruling. And the government makes no such accusation here. After all, his lawyers expressly told Judge Ungaro at the 2019 status conference that the 1994 recusal order had only just come to their attention, and they filed the recusal motions as soon as they obtained a copy from the National Archives. Pet. App. 47a–49a, 55a–56a. And Petitioner himself—who was shocked to learn that Judge Ungaro had been on the bench back in 1994—insisted that he "never waived recusal." Pet. App. 56a.

III. The Majority View Is Wrong

The government argues that the Fifth, Tenth, and Eleventh Circuits are correct that a guilty plea waives a § 455(a) claim for appeal. BIO 7–10. They are not.

1. That categorical rule cannot be squared with the text of § 455(e), which provides that a party's waiver of § 455(a) "may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification." By conditioning

§ 455(a) waivers on a "full disclosure on the record," Congress precluded waivers by implication. And that strict textual limitation on waiver accords with § 455(a)'s purpose of "promot[ing] public confidence in the integrity of the judicial process." *Liljeberg*, 486 U.S. at 859–60. Where there is an appearance of impropriety, public confidence in the judicial process can be maintained only through recusal or a waiver following a "full disclosure on the record" of the factual basis. *See* Pet. 20–23.

In response, the government *concedes* that the Eleventh Circuit's "finding that petitioner's unconditional guilty plea waived his right to appeal the denial of his recusal motions is not itself the waiver of a recusal under Section 455(e)." BIO 9. That is exactly Petitioner's point. Entering a guilty plea does not, by itself, satisfy § 455(e)'s on-the-record disclosure requirement. As a result, a guilty plea alone does not waive the right to a § 455(a)-qualified judge. And if a guilty plea does not waive that right, why would it waive the ability to appeal the denial of that right? To the extent the government is drawing such a distinction, it cites no supporting authority.

Unable to address § 455(e), the government attacks a straw man. It asserts that district courts are not required to advise defendants of "every potential claim" that may be waived by a plea. BIO 9. But Petitioner has never argued that they are. His point is simply that, if a court fails to satisfy § 455(e)'s disclosure requirement (whether at the plea hearing or otherwise), then the defendant has not waived a § 455(a) claim for appeal. That Rule 11 does not require district courts to advise defendants of potential § 455(a) issues only highlights that the typical plea hearing will not satisfy § 455(e). The only plea hearings likely to do so are those where there

is an express § 455(a) waiver in a plea agreement, the terms of which the court must explain at the hearing. In that situation, any appearance of impropriety will likely be obviated by a knowing, explicit waiver. But anything short of that will not.

2. Even putting aside § 455(e), the government's defense of the waiver rule in the Fifth, Tenth, and Eleventh Circuits is lackluster and vague. In one brief paragraph, the government appears to argue that a guilty plea waives a § 455(a) claim because it is a pre-trial defect that would contradict admissions made at the plea. BIO 7–8. But the government fails to identify what admission a § 455(a) claim would contradict. While the government refers to a defendant's admission to the charges, that admission obviates trial-related rights going to factual guilt (*e.g.*, where incriminating evidence was obtained in violation of the Fourth or Fifth Amendments). *See Class*, 138 S. Ct. at 803–05; *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975). That admission, however, does not accept a particular judge's authority to preside over the case. And where a judge is statutorily disqualified from presiding, that defect infects the entire proceeding, not just the trial phase where guilt would be determined.

If anything, § 455(a) claims resemble those claims that are *not* waived by a guilty plea. Under this Court's precedents, that includes claims that: the statute of conviction is unconstitutional, as applied to conduct admitted at the plea, *Class*, 138 S. Ct. at 804–06; the prosecution is vindictive, in violation of due process, *Blackledge v. Perry*, 417 U.S. 21, 30–31 (1974); and the prosecution violates double jeopardy, as judged on the face of the record, *United States v. Broce*, 488 U.S. 563, 575 (1989) (citing *Menna*, 423 U.S. at 62 n.2). These claims all share a common feature: if

established, then "the Court had no power to enter the conviction or impose the sentence." *Broce*, 488 U.S. at 569. The same is true of § 455(a) claims: if established, then the District Judge had no power to enter the conviction or impose the sentence.

Finally, as a historical matter, this Court has scrupulously enforced statutes protecting the integrity of the federal Judiciary. For example, in *Nguyen v. United States*, 539 U.S. 69 (2003), the Court vacated a decision affirming the petitioner's convictions because the panel included a visiting judge who was not a "district judge" under the designation statute. Although the petitioner raised no objection below, the Court explained that it had consistently "agreed to correct, at least on direct review, violations of a statutory provision that embodies a strong policy concerning the proper administration of judicial business even though the defect was not raised in a timely manner." *Id*. at 78 (quotation omitted). Section 455(a) is precisely such a provision. Thus, this Court's precedents align with Congress's policy judgment in § 455(e): statutes safeguarding judicial integrity cannot be easily forfeited or implicitly waived.

CONCLUSION

The petition for a writ of certiorari should be granted.

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