No. 23-7555

In The
Supreme Court of the United States

ORIGINAL

RICKEY LYNCH

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a court of appeals review a judge's denial of a motion to recuse de novo or for an abuse of discretion?

Did Judge Brown himself created the appearance of impropriety when he brought the Federal Defender lawyer to replace Petitioner paid counsel, finding no grounds to have counsel appointed at public expense, that would reasonably be perceived as coercive abuse of discretion?

PARTIES TO THE PROCEEDINGS

Petitioner, who was a Defendant-Appellant in the Second Circuit, Rickey Lynch.

Respondent, are United States of America, in the District Court, Eastern District of New York.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rickey Lynch, respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION AND JUDGMENT BELOW

The Second Circuit's opinion (App. 55) is unpublished. The district court's opinion (App. 37-49) is published.

STATEMENT OF JURISDICTION

The Second Circuit denied petitioners' Petition for writ of Mandamus on February 27, 2024. This Court has jurisdiction under 28 U.S.C. Sections 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. Section 455 provides, in pertinent part:

(a) 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. Section 455 (e) provides, in pertinent part:

(b) Any justice, judge or magistrate judge of the United States show a conflict under subsection (b) must give a full disclosure on the record of the basis for disqualification.

(d) For the purpose of this section the following word or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

STATEMENT OF THE CASE

This case presents the question whether courts of appeals should review a judge's determination that he is not biased under a deferential " abuse of discretion" standard or instead de novo. Whether Judge Brown himself created the appearance of impropriety when he brought the Federal Defender Tracy Gaffey to replace Petitioner paid counsel, finding no grounds to have Tracy Gaffey appointed at public expense, that would reasonably be perceived as coercive abuse of discretion?

The Petitioner has an upcoming surrender date on July 15, 2024, for a sentence up to 12 months based upon accepting a guilty plea to federal criminal charges for making a false statement to EPA, federal agent during a lead abatement project in violation of 18 U.S.C. sections 1001 (a)(2) and 35513.

Petitioner is the lead Plaintiff on a pending class action lawsuit, that he sustained serious medical conditions from. *Butler et., al., vs. Suffolk County et., al., Case No.*- 2:2001-cv-02602 (E.D.N.Y. 2011). Judge Gary R. Brown during that time was a Magistrate Judge for nine years on Petitioner class action lawsuit, that made decision and rulings on such proceedings .

Petitioner was indicted on Federal Regulation of the Toxic Substance Control Act of 1976, that his company engaged in lead-based paint activities. However, the same judge, Gary Brown became a District Court Judge, and thereafter, was assigned to Petitioner criminal proceedings. *United States of America against Rickey Lynch, Case No. cr. 21-405. During the pre-trial phase* of such proceedings, Judge Brown never disclose his judicial involvement of the class action lawsuit to Petitioner counsel of records, Rosenberg, nor the Government, Bagnuola, that he presided over such proceeding of the Petitioner lawsuit for nine years.

During Petitioner guilty plea, on July 19, 2023, Petitioner civil attorneys alerted Petitioner that Judge Brown was the same judge involved in the class action lawsuit. Neither the government , Judge Brown, or Petitioner prior attorney Rosenberg brought any of these prejudicial involvement before the Petitioner entered such a plea, that could have fundamentally affect Petitioner case's fair and impartial adjudication.

Petitioner filed this Motion for recusal of Judge Brown and withdrawal of guilty plea pursuant to Title 28 U.S.C. sections 455(b)(1), Title 28 U.S.C. sections 455(a), and Federal Rule of Criminal Procedure 32(d), and 11(d)(2)(b) in the U.S. District Court for the Eastern District of New York. App. 1-17.

Judge Brown during a status conference hearing, was determine and based upon, substitution of Petitioner counsel Rosenberg, and to discuss Petitioner motion for recusal and withdrawal of Petitioner guilty plea. Petitioner lawyer, Smantha Chorney was under tense questioning by Judge Brown which includes, if she knew the rules and procedures of the District Court's, and submission of her recusal motion.

Judge Brown then conducted a colloquy with Petitioner and engaged in extrajudicial activities for Petitioner to choose a counsel that he recommend, that was best for Petitioner Ms. Tracy Gaffey, from their federal defender group ('a public-defender"). Petitioner already had retained counsel of record and petitioner was not indigent for such court's to do so. The Petitioner and Judge Brown prompt the following exchange:

THE COURT: Mr.Lynch, here's the thing, you have retained counsel.

THE DEFENDANT: That's correct, your Honor.

THE COURT: I understand. I always had a lot of respect for you, sir, I want to say. What I did was I brought an attorney here from our Federal Defender group, Ms. Gaffey, very experienced attorney. I want to offer you this. Before you make the decision to change counsel, would you like to discuss that with her? Because there might be reasons that you might want to think twice and she could cover those with you.

That's why I brought her here for that. There is no obligation, not that she is representing you other than she can talk to you as an attorney. It will be confidential. She won't tell me what you said. And you can consult her at no cost to you. Would you like to avail yourself of that opportunity? We can take a break.

THE DEFENDANT: Well, it's up to my counsel.

THE COURT: It's not at all, sir.

THE DEFENDANT: I mean, I retained.

THE COURT: Sir, this is not up to her at all. The fact that it might be problem leaving it up to her is why I brought Ms. Gaffey so you can talk to someone independent and she can give you advice. she can talk to you or not talk to you.

THE DEFENDANT: If she want to talk to me and my counsel here that's fine. But i'm not going to talk without her present.

THE COURT: Okay. Mr Lynch, it's something for you. In other words, if you want to have a conversation about whether or not this is a good idea it might be advisable for you. But if you don't want to do that I have to make some other determinations, which I'll make. But I thought I would give you that opportunity if you wanted it.

THE DEFENDANT: I'm not interested, your Honor.

THE COURT: Okay. Thank you. App. 18-36.

In Judge Brown, Memorandum of Decision and Order he denied Petitioner recusal and withdrawal of defendant's guilty plea, raised by Petitioner attorney Ms. Chorny, and Referred her action for raising such motion, to the Committee on Grievances. App. 37-49. Petitioner counsel Ms. Chorny, then brought a petition for a writ of mandamus to the Second Circuit on November 16, 2023. App. 50-54. On February 27,-2024, the court denied the petition, holding in a one paragraph opinion that "Petitioner have not 'clearly and indisputably demonstrated that the district court abused its discretion in declining to recuse. (quoting *In re Basciano, 542 F.3d 950,-956 (2d Cir. 2008)*). App. 55.

This petition followed.

REASONS FOR GRANTING THE PETITION

This case presents an ideal vehicle to address an important question relating to the judiciary's supervision of itself: whether courts and judges should defer to an interested judge's refusal to disqualify him or herself. Section 455(a) was adopted "to clarify and broaden the grounds for judicial disqualification." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859 n. 7 (1988). In order to promote confidence in the integrity of the judiciary, Section 455 protects not only against actual bias, but against even the appearance of bias. The statute embodies the age-old maxim that "justice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14 (1954).

The courts of appeals are divided, however, over what standard of appellate review applies to disqualification decisions. This Court's review is warranted to bring clarity to this area of the law and to ensure that the federal judiciary applies uniform rules to disqualification requests. This Court's review is also warranted to correct the lower courts' decision to apply a deferential "abuse of discretion" standard, which is inconsistent with the text and purpose of Section 455(a).

This case is an ideal vehicle to address the question presented because the impact here of the standard of review is stark: Judge Brown avowedly used this case to set a global precedent in favor of predictive coding - a technique that had never before been adopted, and that is now (in large part thanks to Judge Brown) gaining footing.

Judge Brown's decision was nothing short of a landmark, and precedent it set continues to reverberate in disclosure disputes throughout the District Court's demonstrated in *Flores et., al., v - Town of Islip*, 448 F. Supp. 3d (E.D.N.Y. 2020). Such decision must be

free from any appearance of impropriety or partiality. The facts of this case thus highlight the importance of the question presented and make it an ideal platform to address the critical issue of judicial impartiality.

I. The Circuits Are Intractably Divided Over The Appropriate Standard To Review Disqualification Decisions.

The courts of appeals have adopted four different rules regarding the proper standard to review a disqualification decision. The conflict is entrenched and calls out for this Court's intervention.

In the Seventh Circuit, "[a]ppellate review of [disqualification] claims is de novo, and the standard of proof is whether a reasonable person would be convinced that the judge was biased." *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989). That court has held that "appellate review of a judge's decision not to disqualify himself . . . should not be deferential" because "[t]he motion [of recusal] puts into issue the integrity of the court's judgment." *United States v. Balistrieri*, 779 F.2d 1191, 1203 (7th Cir. 1985). Consequently, it makes little sense to defer to that challenged judgment in evaluating the motion. Indeed, "'[d]rawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under § 455(a) into a demand for proof of actual impropriety. So although the court tries to

make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.'" *In re Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998) (quoting *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990)).

Moreover, while the Seventh Circuit requires parties to appeal the denial of a motion for disqualification by petitioning the appellate court for mandamus before trial, the court "review[s] a petition for mandamus to enforce section 455(a) under the normal appellate standard" – *i.e.*, de novo review. *United States v. Boyd*, 208 F.3d 638 (7th Cir. 2000), *vacated and remanded on other grounds*, 531 U.S. 1135 (2001). The court has adhered to this standard repeatedly over a period of decades.[9]

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[9] Following the Seventh's Circuit's approach, at least seven states have recently shifted from an abuse of discretion to a de novo standard of review for recusal motions under their own disqualification statutes. *See Phillips v. State*, 271 P.3d 457, 459 (Alaska Ct. App. 2012); *Peterson v. Asklipious*, 833 So.2d 262, 263 (Fla. Ct. App. 2002); *Mayor & Aldermen of Savannah v. Batson-Cook Co.*, 291 Ga. 114, 119 (2012); *Powell v. Anderson*, 660 N.W.2d 107, 116 (Minn. 2003); *State v. Wilson*, No. ___, 2013 Tenn. Crim. App. LEXIS 126, 131 (Tenn. Crim. App. 2013); *State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998); *Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 109 (1995). As these states have examined the issue more closely, they have concluded that a de novo standard of review ensures that recusal motions will be evaluated in a fair and objective manner.

Other courts of appeals, however, apply a much more deferential standard of review. In this case, the Second Circuit relied on its own precedent in *In re Basciano*, 542 F.3d 950, 955-56 (2d Cir. 2008), which held that a doubly deferential standard of review applies because first, the party seeking recusal on mandamus must meet the standard for a writ (*i.e.*, a "clear and indisputable" right to relief), and second, that the district court must have abused its discretion. The First Circuit has similarly embraced this "doubly deferential" standard, explaining that "relief for the [party seeking recusal] is only warranted if it is 'clear and indisputable' that no reasonable reading of the record supports a refusal to recuse." *In re Bulger*, 710 F.3d 42, 45-46 (1st Cir. 2013).[10] The D.C. Circuit has set forth a similar rule. *See In re Brooks*, 383 F.3d 1036, 1038, 1041 (D.C. Cir. 2004); *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991).

The Third Circuit takes an intermediate position. It has held that when a court of appeals rules on a recusal motion after the district court has already ruled, the "abuse of discretion" standard applies, and not the "clear and indisputable" standard applicable

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[10] The court has held that when the government attempts to obtain recusal of a trial judge in a criminal case, "it would be fairer ... to use the ordinary abuse-of-discretion standard rather than the more exacting standard usually applicable to petitions for mandamus" because the government may not have the alternative of pursuing an end-of-case appeal if the defendant is acquitted. *In re United States (Franco)*, 158 F.3d 26, 31 (1st Cir. 1998).

to a petition for a writ of mandamus. *See In re Kensington Int'l Ltd.*, 368 F.3d 289, 301 (3d Cir. 2004) ("Judge Wolin's decision not to recuse himself must be reviewed for an abuse of discretion, as it is, in effect, no different than an appeal from a district court's order denying recusal."). The Third Circuit embraces the "abuse of discretion" standard, in part, because of a belief that the judge below "is in the best position to appreciate the implications of those matters alleged in a recusal motion," and to render a decision. *Id.* at 224 (internal quotation marks and citations omitted).

At the same time, the Third Circuit recognizes that "[i]t is somewhat strange to speak in terms of an abuse of discretion where the underlying statute, 28 U.S.C. § 455, states that a judge 'shall' disqualify himself or herself if certain grounds are present," such that "[t]he abuse of discretion standard may be an anachronistic vestige of an earlier version of § 455," which required disqualification only if, in the judge's "opinion," it would be improper for him to remain involved. *Id.* at 301 n.12. The court thus explained that in its view, "[t]o the extent judges continue to retain any discretion under the post-1974 version of § 455, it is only to determine if the facts asserted as comprising bias, a forbidden financial interest, kinship, or the appearance of partiality bring the trial court judge within the disqualifying definition." *Id.* (internal quotation marks and citation omitted). But of course, the ability to determine the import of such facts is extremely important.

Other courts considering the issue on appeal have likewise adopted an abuse of discretion standard.[11] These include the Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits. *See United States v. Cherry*, 330 F.3d 658, 665 (4th Cir. 2003); *Garcia v. City of Laredo*, 702 F.3d 788, 793-94 (5th Cir. 2012); *Johnson v. Mitchell*, 585 F.3d 923, 945 (6th Cir. 2009); *United States v. Wisecarver*, 644 F.3d 764, 771 (8th Cir. 2011); *United States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010); *United States v. Bailey*, 175 F.3d 966, 968 (11th Cir. 1999). Case law establishes that this "abuse of discretion" review is a deferential standard that draws inferences in favor of the judge's decision not to disqualify him or herself. For example, the Sixth Circuit has held that reversal of the denial of a motion to recuse is appropriate only if the record gives rise to a "definite and firm conviction that the trial court committed a clear error of judgment." *In re Triple S Restaurants, Inc.*, 422 F.3d 405, 418 (6th Cir. 2005). The Eleventh Circuit explained that "considering that the standard of review is abuse of discretion, we will affirm a district judge's refusal to recuse himself unless we conclude that the impropriety is clear and one which would be recognized by all objective, reasonable persons." *Bailey*, 175 F.3d at 968. And the Fifth Circuit has cryptically offered that one "hurdle"

[11] These courts also permit parties to challenge the denial of a recusal via a petition for mandamus, but it is not always clear whether, on mandamus review, they apply an "abuse of discretion" standard like the Third Circuit, or a "doubly deferential" standard like the First, Second, and D.C. Circuits.

a party seeking recusal must clear is that "the district court's refusal to recuse was not merely erroneous, but, rather, an abuse of discretion," thus suggesting that the error must be particularly egregious to warrant reversal. *Andrade v. Chojnacki*, 338 F.3d 448, 455 (5th Cir. 2003).

The Tenth Circuit adopts a hybrid rule. That court "generally review[s]" denials of a disqualification motion "for an abuse of discretion." *Sac & Fox Nation of Okla. v. Cuomo*, 193 F.2d 1162, 1168 (10th Cir. 1999) (citing *United States v. Lowe*, 106 F.3d 1498, 1504 (10th Cir. 1997)). However, when the judge below "did not create a record or document her decision not to recuse," review is de novo. *Id.* (citing *United States v. Greenspan*, 26 F.3d 1001, 1007 (10th Cir. 1994)).

This case provides the Court with an opportunity to resolve this division between the courts of appeals so that Section 455 retains its intended vigor in ensuring that Congress's goal of maintaining an impartial judiciary – both perceived and actual – is achieved.

II. The Second Circuit's Decision Is Incorrect.

A. Deferential Review Is Inconsistent With The Text And Purposes Of Section 455(a).

This Court's review is also warranted because the Second Circuit's decision is inconsistent with the text and purpose of Section 455(a).

Under Section 455(a), "any United States justice, judge, or magistrate *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned," whether he is actually biased or not. 28 U.S.C. § 455(a) (emphasis added). The statute requires bias or prejudice "to be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994). It imposes an objective inquiry into whether the totality of the circumstances is reasonably likely to create an appearance of partiality or impropriety in the eyes of a reasonable layperson; while knee-jerk recusals are not advisable, doubts are to be resolved in favor of recusal.[12] The current formulation of the statute reflects Congress's 1974 amendment "to clarify and broaden the grounds for judicial disqualification" to conform with the then recently adopted Canon 3C of the American Bar Association's Code of Judicial Conduct. *Liljeberg*, 486 U.S. at 859 n.7. As Chief Justice Rehnquist explained:

> Previously, a federal judge was [only] required to recuse himself when he had a substantial interest in the proceedings, or when "in his opinion" it was improper for

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[12] *See, e.g., In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1320 (2d Cir. 1988); *In re United States (Franco)*, 158 F.3d 26, 30 (1st Cir. 1998); *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995); *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993); *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989); *German v. Fed. Home Loan Mortgage Corp.*, 943 F. Supp. 370, 373 (S.D.N.Y. 1996).

> him to hear the case. Subsection (a) was drafted to replace the subjective standard of the old disqualification statute with an objective test. Congress hoped that this objective standard would promote public confidence in the impartiality of the judicial process. . . . The amended statute also had the effect of removing the so-called "duty to sit," which had become an accepted gloss on the existing statute.

Id. at 858-59 (Rehnquist, C.J., dissenting).

It is beyond dispute that Section 455 requires judges to recuse themselves *sua sponte* in any proceeding that reasonably raises a question about their partiality and thereby leaves it to each judge to determine, in the first instance, whether he or she should be disqualified from hearing a particular matter. If a judge declines to disqualify him- or herself, and is subsequently asked by a party to do so, the judge is effectively being asked to reverse his or her own prior ruling. It is perhaps unsurprising that many judges therefore deny motions for recusal, as they "hesitate to impugn their own standards." *In re Mason*, 916 F.2d at 386.

Moreover, because "a judge must apply the standard as its interpreter and its object," *SCA Servs. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977), this inquiry inevitably injects subjectivity into the "objective, disinterested observer" analysis that the statute imposes. *Pepsico Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985). That is significant not only because

it elevates the risk that a judge will decide the motion incorrectly, but more importantly because permitting the judge to resolve the matter in the first instance may create an appearance of unfairness, *i.e.*, it may appear to conflict with "the general rule that 'no man can be a judge in his own case.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 880 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

Meaningful appellate review is the obvious check on any appearance of impropriety that arises from judges deciding their own recusal motions. Section 455(a) does not directly address the standard for appellate review, but two features of the statute weigh heavily against a deferential standard. First, Section 455(a) is phrased in mandatory terms: it *requires* judges to disqualify themselves if its conditions are met. It makes no sense to review determinations under this statute for an "abuse of discretion" because the text of the statute does not afford any substantial degree of discretion. Second, the statute imposes an objective inquiry, calling for judges to decide a question of law (or at most, a mixed question of law and fact). While the challenged judge may have a stronger grasp of the intricacies of the case, an appellate court is equally well – if not better – suited to evaluate how an objective third party would regard the challenged judge's participation. Forcing the more objective court to defer to the challenged judge on a question of law is inconsistent with the standard of appellate review for practically every other such question, and is at

odds with Congress's command that the inquiry be objective.

Rather than dispelling the appearance of a self-serving judiciary, deferential review exacerbates the appearance of impropriety that arises from judges deciding their own cases and thus undermines the purposes of Section 455(a). In jurisdictions applying a deferential standard, an independent, disinterested examination of the key question – whether the judiciary's image might be harmed if the judge presides over the case – never occurs. Instead, appellate courts defer to the decisions of challenged judges when determining whether they failed to consider relevant factors, improperly considered irrelevant factors, or committed errors of judgment. *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984). Although this highly deferential standard does not in principle "mean that the district court may do whatever pleases it," its practical consequence is that doubts almost always are resolved in favor of the challenged judge. *Id.*; *see, e.g.*, *In re United States (Franco)*, 158 F.3d 26, 27 (1st Cir. 1998); *In re Kansas Public Employees Retirement Sys.*, 85 F.3d 1353, 1364-65 (8th Cir. 1996); *United States v. Bayless*, 201 F.3d 116, 129-30 (2d Cir. 2000). Where a challenged judge appears to gratuitously consider or weigh certain facts over others as determinative, the abuse of discretion standard exacerbates the appearance of partiality by giving allegiance to the lower court's opinion at each stage of appellate review.

De novo review addresses these concerns effectively and efficiently. It would appropriately require that an appellate court review all the relevant facts and consider their cumulative effect on a reasonable observer, without giving deference to the individual serving as his or her own judge. The application of a de novo standard immediately and inevitably dispels any suspicion that the challenged judge has the power to decide his own case.

The prospect of de novo review also encourages all challenged judges to properly consider all of the relevant facts under the "reasonable person" standard as an initial matter. As this Court explained in *Salve Regina College v. Russell*, "an appropriately respectful application of de novo review should encourage a district court to explicate with care the basis for its legal conclusions." 499 U.S. 225, 233 (1991). This Court has previously held that even in fact-intensive inquiries, for example, those including probable cause and reasonable suspicion, de novo review is valuable because it encourages judges to follow best practices and facilitates clarification of the law, therefore providing all parties with clearer guidance that will enable them to make correct determinations in the first instance. *See Ornelas v. United States*, 517 U.S. 690, 697 (1996).

Finally, applying a de novo standard will not open the door to gamesmanship or manipulation of the judicial process because reviewing courts will be free to consider, as the lower court did, whether a motion for disqualification was properly preserved and

presented, and what the proper remedy for a Section 455(a) violation should be. *See Liljeberg*, 486 U.S. at 862. And challenged judges will likely issues detailed opinions defending their decision not to recuse, which appellate courts can evaluate just as they evaluate any other opinion on an issue of law. There is thus no significant prospect that appellate courts applying de novo review will reverse the denial of a substantial number of meritless recusal petitions, and there is therefore no cost to efficiency or the integrity of the judiciary from adopting that standard of review. The equities weigh only in one directions.

In sum, while deferential review conflicts with Section 455(a)'s text and undermines its purpose, de novo review has the opposite effect. The Second Circuit's decision applying a deferential standard in this case should be reversed.

B. This Case Is An Ideal Vehicle To Address The Question Presented

Had de novo review been applied by the Second Circuit, Judge Brown's recusal would have been required because the circumstances created an untenable "appearance of partiality" under Section 455(a). But because the reviewing courts in this case were compelled to apply the forgiving, deferential abuse of discretion standard, Judge Brown's inherently flawed decision, which ignored certain facts and excused others, survived unscathed. The reviewing courts summarily affirmed Judge Brown's decision and, in doing so, perpetuated his mistakes. Such adherence to form over substance, as is called for by the abuse of discretion standard, impugns the integrity of the judicial system in contravention of Section 455(a).

On October 12, 2023, Judge Brown denied petitioners' recusal motion. But rather than looking at the "totality of the circumstances" and addressing whether an "objectively reasonable observer" would find that their cumulative effect created an " appearance of partiality," he reviewed only a few facts in *isolation*, seeming to counter with his own subjective opinion that he was not in fact biased.

For instant, Judge Brown excuse for not disclosing his involvement in petitioner prior pending lawsuit, during the petitioner pre-trial proceeding, to petitioner lawyer, Rosenberg nor government is outlined clearly in his Memorandum of Decision and Order as following:

> " *The matter need not be left to inference, however,* as the record contains direct proof. On January 7, 2012—"nearly" a decade before the commencement of this criminal prosecution—Mr. Lynch wrote a handwritten letter to the Clerk of the Court" See App.37.

Judge Brown failed to consider all the relevant facts that a handwritten letter to the clerk of the court address to him a "decade" before the commencement of petitioner criminal prosecution, has no bearings on Title 28 U.S.C. - Section 455(e)(b), that require disclosure on the record to any potential basis from presiding over prior proceeding where the same defendant was present, whether criminal or civil matters, which was not done in case. And Judge Brown is not mentioning whatsoever in his Decision and Order of such disclosure. See App. 37-49.

By applying a heightened recusal standard to Section 455(a), Judge Brown artificially raised petitioner burden of proof in denying petitioner recusal motion.

Since 1989, courts have been foreclosed by the Supreme Court from statutorily compelling counsel to represent an "indigent" Plaintiff or Defendant, whether it's criminal or civil under 28 U.S.C.-Section 1915(e), which state that:

> Court "may request" that an attorney represent a party who is unable to afford counsel. Justice Brennan, writing for the Court's, concluded that Section 1915(e) " does not authorize coercive appointment of counsel."

That's what happen in petitioner case, Judge Brown conducted a colloquy with the petitioner and engaged in a coercive matter with the petitioner on substitute of a appointed counsel, in which petitioner already had retained counsel of record. Judge Brown consistently persist that petitioner should take the Federal Defender, Ms. Gaffey.

In open court, during a status conference hearing on September 27, 2023, Judge Brown abuse his discretion by trying to persuade the petitioner to be represented by a particular attorney of his choosing. See-App. 18-36. Judge Brown here, never inquired into petitioner eligibility for appointed counsel, finding no grounds to have counsel appointed at public expense. The fact that Judge Brown's actions here, conflict with the Code of Conduct of United States Judges is an important exacerbating factor.

Judge Brown's outward hostility toward petitioner in response to the recusal motion is another factor in favor of recusal. Court's have recognized that such unprofessional conduct is an indication that the judge has become "personally embroiled" with petitioner counsel when he referred petitioner counsel Ms. Chorny to the grievance committee for filing of such a motion. [1] See App. 37-49.

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1 *Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (citing Offutt, 346 U.S. 11); See, e. g. United States v. Amico, 486 F.3d 764 (2d Cir. 2007); Edgar v. K.L., 93 F.3d 256, 261 (7th Cir. 1996); Alexander, 10 F.3d at 164-66 (3d Cir. 1993); United States v. Ritter, 540 F.2d 459, 462-64 (10th Cir. 1976).*

In like circumstances, Judge Brown conduct towards Petitioner attorneys may created at least an appearance of partiality. [2] This is especially the case where, as here, a judge has imposed disproportionate and unwarranted discipline or has threatened to do so. [3]

The Second Circuit issued a one-sentence summary opinion devoid of any factual analysis. Employing an abuse of discretion standard, the Second Circuit deferred to the lower courts' incomplete recitation of events and misapplication of law.

It concluded that petitioners "have not 'clearly and indisputably demonstrated that the district court abused Its discretion in declining to recuse." App. 55.

In sum, there has never been any independent inquiry into whether Judge Brown should be recused in this case. In essence, Judge Brown has been his own judge, with only a veneer of oversight. The Second Circuit's use of an abuse of discretion standard of review allowed Judge Brown original errors to persist through each round of review. Had the Second Circuit reviewed Judge Brown's decisions not to recuse himself de novo, one or both would have had the opportunity to correct his erroneous legal conclusions. Applying a de novo review to recusal decision thus affords reviewing courts a meaningful opportunity to uphold the letter and spirit of Section 455(a) where District courts have failed to do so.

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2 *See, e.g., United States v. Whitman, 209 F.3d 619, 624-26 (6th Cir. 200); Maldonado Santiago v. Velazquez Garcia, 821 F.2d 822, 832-33 (1st Cir. 1987); Walberg v. Israel, 766 F.2d 1071, 1077 (7th Cir. 1985); Ritter, 540 F2d at 462-64. See generally Rafferty v. NYNEX Corp., 60 F.3d 844, 848 n.3 (D.C. Cir. 1995) (" A judge's impression of counsel... can sometimes so develop that ultimately the judge determines his impartiality may be lost"); S.S. Wakefield, 764 P2d 70, 73 (Colo. 1988) ("Because a judge's bias or prejudice against an attorney can adversely affect the party represented by the attorney, disqualification should also be required when a judge so manifests an attitude of hostility or ill will toward an attorney that the judge's impartiality in the case can reasonably be questioned.")*

3 *See, e. g., Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978); Brewster v. Dist. Court, 811 P.2d 812, 814 (Colo. 1991); McDonald v. McDonald, 407 Mass. 196, 203 (1990).*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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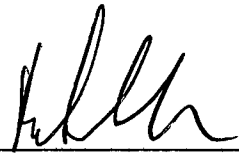

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