No. 24-1231

In the Supreme Court of the United States

ANDREW DOWD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a district judge impermissibly blends the judicial and prosecutorial roles such that his "impartiality might reasonably be questioned," 28 U.S.C. § 455, where he repeatedly "urge[s] the government to continue their investigation" and "pursu[e]" certain "corrupt doctors" and then presides over the ensuing trial.

2. Whether an appellate court may determine that an error at trial was harmless by evaluating only the strength of the government's case and not the potential effect of the error on the jury.

3. Whether a district court violates a criminal defendant's due process rights when it imposes an $8 million restitution order based on the prosector's off-the-docket email, without notifying the defendant of when or how he should respond, and without even waiting the 14 days local rules provide for responses to motions filed on the public docket.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's interest in this case lies in ensuring that the fundamental right to due process enshrined in the Fifth Amendment is protected. Furthermore, Cato is interested in preserving the judiciary's constitutional status as an independent and coequal branch of government—designed to safeguard individual rights from encroachment by the elected branches.

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[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

"I assume, I would hope, and I made it clear to the government during trial and at other proceedings in this case, that the government is pursuing the corrupt lawyers, the corrupt doctors who were involved with this scheme." Cert. Pet. App'x 16a.

U.S. District Judge Sydney Stein spoke the above words in open court. He then presided over the trial of Dr. Andrew Dowd—one of the defendants whose prosecution he had advocated. This case highlights several mistakes made by Judge Stein. Judge Stein's first mistake was to instruct prosecutors, over and over, who their future targets should be. Judge Stein set his sights on Dr. Dowd who was not party to the case—much less a defendant—at the time he made these comments. Judge Stein's second mistake was to decline to recuse himself when the government submitted a related case letter seeking to reassign the case to him. Gov't. Br. at 17. Because Judge Stein presided over Dr. Dowd's trial, an objective, disinterested observer might reasonably conclude that Dr. Dowd never received a fair trial before a fair tribunal.

This Court has held that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). The presumption of innocence forms the bedrock of America's criminal justice system. When a judge proposes targets for prosecution and urges prosecutors to go after them, a disquieting inference is unavoidable: That judge's "[i]mpartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1974).

The Framers recognized that trial by jury was a pillar both of self-governance and of basic fairness.

Furthermore, the jury itself served as a vital check on abuses of power. The Constitution commands that "[t]he trial of all Crimes … shall be by Jury." It underscores that command in the Sixth Amendment by repeating that "in all criminal prosecutions" the defendant has the right to a public trial by an impartial jury. U.S. CONST. art. III, § 2; *id*. amend. VI.

Although jurors are the ultimate guarantors of fairness in legal disputes between citizens and their government, our legal system also requires judges to ensure fair play. Judges are akin to referees or umpires. And just as jurors must be impartial, so too must judges. *Id*.

Judicial "independence refers to the need for courts that are fair and impartial when reviewing cases and rendering decisions. By necessity, it also requires freedom from undue outside influence or political intimidation." C.J. Michael Wolff, State of the Judiciary Address, Missouri (Jan. 25, 2006).[2] In today's partisan climate, preserving judicial independence is increasingly important. A coequal and independent judiciary stands as a bulwark against tyranny—a stark reminder that the United States is "[a] government of laws and not of men." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting MASS. CONST. art. XXX).

The law is clear: Judge Stein impermissibly blended an essentially prosecutorial mindset with his judicial role—functioning not as a neutral adjudicator, but as a public official aligned with the prosecution. Because Judge Stein's impartiality might reasonably be questioned by virtue of his public comments quoted

[2] Transcript available at https://tinyurl.com/44rpxnz9.

above, the law compelled him to disqualify himself. 28 U.S.C. § 455(a) (1974). He failed to do so. The Court should grant certiorari and rectify the ensuing injustice.

ARGUMENT

I. JUDGES MUST EMBODY IMPARTIALITY.

The concept of due process, deeply rooted in centuries of Anglo-American jurisprudence, is a cornerstone of American constitutionalism. In 1215, King John promised that "No freeman shall be disseized, dispossessed, or imprisoned except by the judgment of his peers or by the law of the land." Richard Thompson, *An Historical Essay on the Magna Carta of King John 85* (Gryphon Editions, Ltd. 1982). This declaration—originating in the promises of Magna Carta and refined through English common law—established the foundational principle that government must act in accordance with settled law and fair procedures. *Id.* The phrase "due process of law" derives from a 1354 English statute during the reign of King Edward III. 28 Edw. III c. 3. That phrase supplanted the Magna Carta's less precise language of the "law of the land," and it laid the groundwork for the vital legal protections that found definitive expression in the United States Constitution. *Id.*

In the Fifth Amendment, the Framers enshrined due process as a critical limitation on federal power: That Amendment guaranteed that no person would be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V. The Framers understood that an independent judiciary was essential to our freedoms. They therefore insisted on life tenure and salary protections for judges that would insulate

them from the transient political pressures of the day. U.S. CONST. art. III, § 1.

Dr. Dowd was entitled to an independent tribunal; Judge Stein failed to provide one. The judge's actions crossed a crucial line: They conflated the duties of his judicial role with the function of the executive branch. Once prosecutors heeded the judge's recommendation and filed charges, the case was randomly assigned to Judge Preska. Cert. Pet. at 9. But prosecutors then requested a reshuffle: they asked that Dr. Dowd's case be reassigned to Judge Stein. *Id.* In light of Judge Stein's conduct, that reassignment now looks less like a reshuffle than a stacked deck.

A. Early Departures from Due Process Illustrate the Inherent Dangers of Judges Overstepping Their Bounds.

Long before William Penn founded the colony that became Pennsylvania, he was prosecuted in England—along with William Mead—for preaching to an unlawful assembly and for breach of the peace.[3] In what came to be known as *Bushel's Case*, the judge sought to elicit a guilty verdict from the jury.[4] Four jurors, led by Edward Bushel, defied the judge's instructions.[5] The judge's actions and the subsequent vindication of the jurors' independence underscore the importance of a fair adjudicative process—including

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[3] Andrew Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, WASHBURN L.J. 379, 381-382 (2007) (explaining that in seeking to elicit a guilty verdict, the judge admonished the jury—confining them to a cold room without access to food and water).

[4] *Id.*

[5] *Id.*

specifically an impartial judiciary—to the free and fair administration of justice.

The American colonists, keen to deter similar abuses of authority, soon had their own opportunity to insist upon judicial impartiality. In 1734, more than half a century before the Bill of Rights was ratified, the British Crown accused dissident publisher John Peter Zenger of seditious libel.[6] His crime: publishing pieces critical of New York's royal governor, William Crosby.[7] Chief Justice James Delancey, an ally of Crosby's, had twice tried—and failed—to secure a grand jury indictment against Zenger.[8] A frustrated Attorney General Richard Bradley then subverted the grand jury process and issued an information against Zenger.[9] Chief Justice Delancey then set an astronomically high bail to ensure that Zenger remained behind bars pending trial.[10]

The Chief Justice then disbarred Zenger's attorneys, William Smith and James Alexander, as they stood ready to defend Zenger.[11] Eventually, Andrew Hamilton stepped in to represent Zenger, whom a jury ultimately acquitted. His case became a celebrated early example of the importance of due process—

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[6] Andrew Morgan, *The Trial of John Peter Zenger*, JURIST (Oct. 11, 2016), https://tinyurl.com/ycy7rfym/.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id. (*emphasizing how the judge stripped Zenger of his skilled counsel and replaced him with John Chalmers—a less accomplished lawyer who was an ally of Crosby's).

including judicial impartiality—and of the way a jury can check the arbitrary use of government power.[12]

The prosecutions in *Bushel's Case* and the *Zenger* trial were each politically motivated. Both were facilitated by judges who placed their thumb on the scales of justice. And both illustrate the dangers posed by judges who actively encourage the prosecution of individuals whom they disfavor—as Judge Stein did here.

B. Contemporary Challenges Underscore the Importance of an Impartial Judiciary.

"Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

Today, this foundational principle faces unprecedented challenges. In particular, the judiciary has been the subject of sustained and markedly intemperate criticism by the current Administration,[13] as has Congress.[14] Partisan attacks against judicial independence have lately intensified in ways that

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[12] *Id*.

[13] Jerry Lambe, *'This Ruling is Deranged': Trump Admin Escalates War on Judiciary After Federal Judge Says DHS 'unquestionably' violated court order*, LAW & CRIME (MAY 22, 2015) (detailing how Tricia McLaughlin, assistant secretary for public affairs at DHS, referred to U.S. District Judge Brian Murphy as an "activist" judge, claiming he was fighting to bring "vicious criminals" back to the U.S.), https://tinyurl.com/fwux35r7.

[14] Scott Wong, *House votes to rein in federal judges amid Trump's attacks on the courts*, NBC NEWS (Apr. 9, 2025) (noting House passage along partisan lines of legislation to limit district court's abilities to issue nationwide injunctions), https://tinyurl.com/35kh4v6y.

jeopardize the norm of judicial impartiality. These criticisms illuminate the need for clear guidance for district judges regarding permissible interactions with prosecutors. Nevertheless, the public overwhelmingly recognizes the vital importance of an independent judiciary as a check against executive overreach.[15]

The legitimacy of the judiciary rests on a rigorous commitment to fair procedures and just outcomes. That foundation is especially critical in the current environment, where public confidence in institutions, including both the criminal justice system[16] and the judiciary[17]—has plummeted. This Court's unwavering commitment to judicial impartiality was amplified by Chief Justice Roberts in rare public remarks last month. Before a Buffalo, New York audience the Chief Justice stressed that the role of the judiciary is "[t]o obviously decide cases but in the course of that to check

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[15] Dylan Ebs, *Poll: Americans Overwhelmingly Want Trump to Obey Court Rulings, but MAGA Republicans are Split*, NBC NEWS (June 16, 2025) (noting that Americans overwhelmingly recognize the judiciary's role in determining the legality of a president's actions—81 percent of adults believe the president must obey judicial rulings, but that percentage is split evenly among MAGA supporters), https://tinyurl.com/beyw5y8d.

[16] Megan Brenan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023) (showing that 49 percent of Americans think the criminal justice system is fair, down from 66 percent in 2003), https://tinyurl.com/4k6buu3a.

[17] Lindsay Whitehurst, *American's Confidence in Judicial System Drops to Record Low*, PBS NEWS (Dec. 17, 2024) https://tinyurl.com/3kcr8pdb (citing Benedict Vigers & Lydia Saad, *Americans pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024) (noting that "[A]mericans' confidence in their judicial system dropped to a record-low 35 percent in 2024—setting the U.S. far apart from other wealthy nations"), https://tinyurl.com/mryd857m.

the excesses of Congress or the executive, and that does require a degree of independence."[18]

But a steadfast commitment to judicial independence can come with various costs. Court-baiting is one of them.

> Donald Trump's attacks on the courts lack recent precedent in the United States, but they follow a clear pattern seen in backsliding democracies around the world. In many countries, when political leaders challenge the courts, the end result isn't merely a win in a single policy dispute. These attacks have a deeper, more destructive effect: They systematically weaken the courts as a check on the executive's power—opening the door for governments to abuse that power to target opponents and endanger democracy.[19]

Regrettably, the Administration's court-baiting has extended to the bar as well as the bench. "In many other countries that have lost their freedom, the rulers have made it an early order of business to intimidate, if not do away with, the sectors of the bar that were willing to represent opposition and dissident clients and challenge government actions."[20] Members

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[18] Abbie Van Sickle, *Courts Must 'Check the Excesses' of Congress and the President, Roberts Says*, N.Y. TIMES (May 7, 2025), https://tinyurl.com/3xeysecy.

[19] Andrew O'Donohue, *Trump's Legal Strategy Has a Name*, THE ATLANTIC (May 14, 2025), https://tinyurl.com/4cm48brn.

[20] Walter Olson, *Trump's Vengeful Moves Are Chilling the Bar's Independence*, CATO AT LIBERTY (March 12, 2025), https://tinyurl.com/5xhmahdr.

of the bar have an irreplaceable role in a society governed by the rule of law: That role includes championing unpopular causes and defending even detestable clients. There are ominous parallels here to the Zenger prosecution: President Trump has sought to curtail the advocacy of attorneys who espouse viewpoints he finds uncongenial.[21] But unlike Zenger's lawyers, today's zealous advocates appear before impartial jurists—enabling them to discharge their professional duty of zealous advocacy.

Fortunately, the Administration's persistent efforts to stifle dissent and silence opposition from the organized bar have been largely, though not entirely, ineffectual. This is no accident. The Framers understood the critical need for an impartial judiciary to check the overreach of the elected branches. In a criminal trial, the judge must ensure fundamental fairness and protect the rights of the accused. But Dr. Dowd's trial judge misconceived his role in this proceeding and encouraged Dr. Dowd's prosecution in a way that fatally undermined both the appearance and reality of impartiality.

II. THE FAIR ADMINISTRATION OF JUSTICES REQUIRES AN IMPARTIAL JUDICIARY.

The era of the Nixon Administration was a tumultuous time for the federal judiciary. In 1969, Supreme Court Justice Abe Fortas resigned after his conduct created the appearance of impropriety.[22] President Nixon's first two choices to replace Fortas each

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[21] *Id*.

[22] Andrew Glass, *Abe Fortas Resigns from Supreme Court May 15, 1969*, POLITICO (May 15, 2008), https://tinyurl.com/bdfr8jm9.

foundered.[23] The Senate rejected both Clement Haynsworth and G. Harrold Carswell, likely due to their shared hostility towards the civil rights movement.[24] Nonetheless, senators voiced serious and legitimate concerns over Judge Haynsworth's perceived impropriety while serving on the Fourth Circuit.[25] Although Judge Haynsworth's conduct was perturbing, it was not actually prohibited.[26] But that would soon change.

In 1972**,** the American Bar Association adopted a new Model Code of Judicial Conduct that included a broad standard requiring judges to avoid not only impropriety, but the appearance of it.[27] The primary purpose of the new standard was to guide judicial ethics and promote public confidence in the judiciary.[28] The Model Code encouraged Congress to revise the federal recusal statute to align with these higher ethical expectations. Charles G. Geyh, *Judicial Disqualification: An Analysis of Federal Law* 7 (3d ed. 2020). Correspondingly, the 1974 amendment to the judicial disqualification statute was meant to align federal law with the new ABA Model Code. *Id*. at 8.

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[23] Roy Reed, *Senate's Rejection of High Court Nominees Seized on as Major Issue by G.O.P. Candidates in South*, N.Y. TIMES (Apr. 19, 1970), https://tinyurl.com/sdu9h994.
[24] *Id*.
[25] Douglas, Davison, *Book Review of Clement Haynsworth, the Senate, and the Supreme Court*, AM. J. LEGAL HIST., 392, 393 (1992) (noting that judicial disqualification standards at the time rendered the ethical arguments largely without merit).
[26] *Id* (noting that the central issue was Haynsworth's ownership of a significant share of a company that did business with a party that appeared before him).
[27] *See* Walter P. Armstrong, *The Code of Judicial Conduct*, 26 SMU L. REV. 708 (1972).
[28] *Id*. at 714.

A. Judges Whose Impartiality Is Reasonably Called into Question Must Disqualify Themselves.

Congress has been unequivocal: If a lower court judge's impartiality might reasonably be questioned, that judge must disqualify himself or herself. 28 U.S.C. § 455(a) (1974). When Judge Stein suggested a prosecutorial focus and target to the Justice Department, he stepped outside of his judicial role. Officers of the court may not successively serve in prosecutorial and judicial roles on the same matter. Thus, for example, a prosecutor who sought the death penalty must then be disallowed from sitting as an appellate judge for the same defendant. *Williams* v. *Pennsylvania*, 579 U.S. 1, 8 (2016). This Court held that "[a]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Id.* at 8. *See In re Murchison*, 349 U. S. 133 at 136-37.

Section 455 is informed by well-established due process principles. 28 U.S.C. § 455(a) (1974). Due process requires the absence of actual bias on the part of the judge. *In re Murchison*, 349 U.S. at 136. In 2019, Judge Stein presided over the trial of Bryan Duncan, Ryan Rainford, and Robert Locust. Each defendant was convicted for his role in the trip-and-fall scheme in which they implicated Dr. Dowd. Throughout the trial, the defendants (the "runners") contended that the lawyers and doctors were the most culpable—naming Dr. Dowd specifically. Cert. Pet. at 7. On multiple occasions during these proceedings, Judge Stein encouraged Dr. Dowd's prosecution. At Locust's sentencing, Judge Stein expressed his hope that the government "[would] pursu[e] the corrupt lawyers, the corrupt doctors who were involved in this scheme." *Id.* at

8. At Duncan's sentencing, Judge Stein similarly "urge[d] the government to continue their investigation" because "the lawyers and doctors were heavily involved in this." *Id.* at 7.

In August 2021, only a month after Locust's sentencing, prosecutors indicted Dr. Dowd. Cert. Pet. App'x 15a. The matter was initially assigned to Judge Preska. Cert. Pet. at 9. However, at the request of the government, the case was promptly reassigned to Judge Stein. *Id.*

Prosecutors ostensibly based their reassignment request on judicial efficiency and Judge Stein's knowledge of the case, Gov't Br. at 25, but of course judicial efficiency cannot trump the due process rights of the accused. "[T]he Due Process Clause in particular [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

The law requires a federal judge to "[d]isqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1974). The purpose of § 455(a) is to "promote public confidence in the judiciary by avoiding even the appearance of impropriety." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). Accordingly, "[w]hat matters [with respect to 455(a)] is not the reality of bias or prejudice but its appearance." *Liteky* v. *United States*, 510 U.S. 540, 548 (1994).

The Second Circuit held that a judge must recuse himself "whenever an objective, informed observer could reasonably question the judge's impartiality, regardless of whether he is actually partial or biased." *United States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000). "Or phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?" *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992). In short, Judge Stein's impermissible blurring of prosecutorial and adjudicative roles necessarily calls his impartiality into question and dictates his recusal.

B. Judge Stein Abused His Discretion by Failing to Disqualify Himself.

The judicial power "[i]ncludes the power to serve as a neutral adjudicator in a criminal case [but] does not include the power to seek out law violators in order to punish them—which would be incompatible with the task of neutral adjudication." *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 816 (1987) (Scalia, J., concurring). "It is accordingly well established that the judicial power does not generally include the power to prosecute crimes." *Id.*; *see United States v. Cox*, 342 F.2d 167, 182 (5th Cir. 1965) (en banc) (Brown, J., concurring), *id.* at 185 (Wisdom, J., concurring). By refusing to recuse himself, Judge Stein abused his discretion and contravened the fundamental principle that an adjudicator must remain neutral.

The statute required Judge Stein to recuse himself because an informed observer would question the judge's impartiality after he urged Dr. Dowd's prosecution. *Bayless*, 201 F.3d at 126. At Byran Duncan's sentencing, Judge Stein's statements suggest that he

had already determined that the doctors and lawyers Duncan had worked with were corrupt. Any reasonable observer would entertain significant doubt as to Judge Stein's capacity to serve as a neutral adjudicator, given the directives he issued and the accusations he made. *Lovaglia*, 954 F.2d at 815. Dr. Dowd was named in the runners' arguments, and it is reasonable to infer that Judge Stein's pronouncements were referring to Dr. Dowd.

The respondent's counterargument leans heavily on *U.S. v. Wedd*, in which the Second Circuit held that "[i]n multi-defendant cases, judges are often called upon to sentence one or more co-defendants while others are still awaiting trial." *United States v. Wedd*, 993 F.3d 104, 117 (2d Cir. 2021). "Questions of relative culpability may sometimes be unavoidable" in such circumstances. *Id.* But when Judge Stein directed the government to investigate the "corrupt" doctors and lawyers who had worked with the defendants upon whom he had passed sentence, he was not assessing the relative culpability of co-defendants. Rather, he was instructing the government who to target next. Unlike the judge in *Wedd*, who weighed the relative culpability of co-defendants—all of whom were tried together—Judge Stein compared the culpability of the runners who were on trial to that of others who had yet to be charged.[29] And unlike the judge in *Wedd*, Judge Stein urged the government to "pursue and investigate" persons who, at that time, had never been before the court—and then Judge Stein ultimately went on to preside over their trial. Cert. Pet. at 7.

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[29] The sentencings of Duncan and Locust, where the challenged comments took place, occurred in January 2020 and July 2021, respectively. Cert. Pet. App'x 16a.

The Justice Department made the curious suggestion that Judge Stein's statement at the runner's sentencing—"I'm not a prosecutor, I'm a judge"—somehow absolved him of his obligation to disqualify himself. Cert. Pet. App'x 16a. The prosecutor contended that "a reasonable observer would take Judge Stein's remarks at face value" and conclude that Judge Stein "had no control over the government's investigation." Gov't Br. at 26. That argument overlooks a stark reality: Judge Stein's bare declaration that he was a judge did not—and indeed could not—remediate the inherently prosecutorial sentiments he had articulated mere moments before. It is largely irrelevant whether a reasonable observer might conclude that Judge Stein had no control over the government's investigation. Instead, what must be determined is whether a reasonable observer would entertain significant doubt—despite Judge Stein's pointing out that he was a judge—"that justice would be done absent recusal." *Lovaglia*, 954 F.2d at 815. Any reasonable observer of Judge Stein's directives to prosecutors to pursue Dr. Dowd would certainly doubt whether it would be appropriate for Judge Stein to preside over Dr. Dowd's trial. Indeed, Judge Stein underscored the impropriety of his remarks when he emphasized that "those people [including Dr. Dowd] are not in front of me." Cert. Pet. App'x 20a.

In affirming Dr. Dowd's conviction, the Second Circuit held that Judge Stein's imposition "of a significantly below-Guidelines sentence . . . further undermines [Dowd's] insistence that [Judge Stein] harbored any bias." *United States v. Constantine*, No. 23-6440, 2025 U.S. App. LEXIS 4296, at *3 (2d Cir. Feb. 25, 2025). In other words, the Second Circuit used Judge Stein's below-Guidelines sentence as a retroactive

justification for Stein's refusal to disqualify himself. *Id.* That particular argument is every bit as troubling in its substance as it appears at first blush. Applied generally, it would authorize judges who are required by statute to recuse themselves to sidestep the statutory command of 28 U.S.C. § 455 with a bromide or two and a sentence below the guidelines. Notably, Dr. Dowd's counsel filed the recusal motion before his trial began. Judge Stein's capacity as an impartial adjudicator must therefore be assessed based upon the circumstances at that moment. Judicial impartiality is an absolute requirement of our system, and it is not a matter that can be sidestepped by imposing a shorter sentence.

The bottom line is that the controlling statute unambiguously requires recusal when the impartiality of a judge might reasonably be questioned. 28 U.S.C §455(a) (1974). The goal of this statute is to avoid "even the appearance of partiality." *Liljeberg,* 486 U.S. at 860. At a minimum, Judge Stein created the appearance of bias by calling for Dr. Dowd's prosecution, which required him to recuse himself from the ensuing trial. He did not do so.

CONCLUSION

For these reasons, and those described by the Petitioner, the Court should grant the petition.

Respectfully submitted,

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