

No. 26-5351

IN THE

Supreme Court of the United States

JEFFREY FRANCIS BARRY,
Petitioner,

v.

AMY KATHLEEN SCHWENDER
Respondent,

On Petition for Writ of Certiorari to the Supreme Court of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED¹

1. Whether a state court's alleged failure to apply the "probability of actual bias" standard established in *Withrow v. Larkin*, 421 U.S. 35 (1975) can rise to the level of a structural error mandating vacatur when Petitioner neither filed a timely appeal to the Supreme Court of Maryland, nor was cited or relied upon by Petitioner below.
2. Whether Maryland's two-step process applied in all child custody modification cases, enunciated in *McMahon v. Piazze*, 162 Md. App. 588 (2005), forecloses a Maryland trial court's ability to consider the best interest of the child otherwise violates the Due Process Clause of the Fourteenth Amendment.
3. Whether a parent with physical custody of a minor child, pursuant to a divorce and custody judgment obtained by the same parent after litigating the underlying matter, who is seeking a modification of the same custody order, has been deprived of their parental liberty when Maryland applies its two-step process for all custody modifications, as enunciated in *McMahon v. Piazze*, 162 Md. App. 588 (2005).

¹ Respondent reframes Petitioner's questions for purposes of clarity. In the underlying child custody matters, Petitioner is the father of the minor child; Respondent is the mother of the minor child.

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OBJECTIONS TO JURISDICTION

As an initial matter, the Petition for Writ of Certiorari should be denied because this Court lacks jurisdiction over this case for multiple reasons.

A. INDEPENDENT AND ADEQUATE STATE GROUNDS

First, this Court lacks jurisdiction because Petitioner seeks review of a decision by the Supreme Court of Maryland which rests entirely on independent and adequate state grounds. Pursuant to 28 USCS § 1257, this Court may review “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had,” provided that the case calls into question the validity of a state law under the Constitution, treaties, or laws of the United States. However, it has long been recognized that this Court’s jurisdiction fails where the judgment of a state court rests upon non-federal ground, independent of any federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

Here, the Maryland Supreme Court dismissed Petitioner’s petition for writ of certiorari, pursuant to Md. Rule 8-302, which provides that a petition for writ of certiorari to the Supreme Court of Maryland must be filed “not later than the later of 15 days after the Appellate Court issues its mandate or 30 days after the filing of that court’s opinion.” The Appellate Court of Maryland affirmed the judgment of the Circuit Court on August 14, 2025, and issued its mandate on September 2, 2025. Nonetheless, Petitioner untimely filed his petition for writ of certiorari on September 18, 2025, 35 days after the Appellate Court of Maryland filed its opinion and 16 days

after it issued its mandate. Resp. App. 1.² On motion by the Respondent, the Supreme Court of Maryland dismissed the petition as untimely filed. Resp. App. 25; Pet. App. 3. The Supreme Court of Maryland likewise denied Petitioner's Motion for Reconsideration without comment. Pet. App. 5. The Supreme Court of Maryland therefore never reached the merits of the case and disposed of the case on adequate state procedural grounds, and this Court does not have jurisdiction under 28 USCS § 1257. Petitioner's failure regarding timeliness divested the Maryland Supreme Court of jurisdiction and was not waivable. Moreover, Maryland state procedure aside, modification of custody orders rests entirely upon Maryland's own standards governing modification of a state judgment as to a merits custody case.

B. NON-PRESERVATION AND WAIVER

Second, this Court lacks jurisdiction because the majority of the issues Petitioner has raised were not preserved for appeal in the State court appellate proceedings. The doctrine of issue preservation requires that a party must raise a legal objection or argument at the trial or administrative level before an appellate court will entertain that argument on appeal. Furthermore, the party must preserve the record for review by setting forth sufficient facts at the trial to support their argument. This doctrine applies to every level of the United States judicial system. This Court has specifically held that even "a constitutional right may be forfeited in

² Some documents in Petitioner's Appendix have also been included in Respondent's Appendix.

... civil cases by the failure to make timely assertions of the right before a tribunal having jurisdiction to determine it.” *Yakus v. United States*, 321 U.S. 414, 444 (1944). A claim that was never properly preserved for appellate review in the state courts is therefore not suitable for this Court’s review.

Here, Petitioner has raised three questions, the first of which was judicially determined to be unpreserved, while the remaining two were never mentioned in the lower courts. The Petitioner’s questions (reframed by the Appellate Court of Maryland) presented for review by the Appellate Court of Maryland (“ACM” or “Appellate Court”), which is the intermediate appellate court in Maryland, are outlined as follows:

- 1) Whether the circuit court erred in denying Appellant’s Petition to Modify Custody and motion regarding the Child’s school enrollment;
- 2) Whether the circuit court abused its discretion in quashing Appellant’s subpoena compelling the Child to testify at the modification hearing;
- 3) Whether the circuit court abused its discretion in denying Appellant’s motion to reconsider the transfer of venue;
- 4) Whether the circuit court abused its discretion in denying Appellant’s request for the Judge to recuse himself from the case; and
- 5) Whether the circuit court erred in entering a judgment against Appellant for attorney’s fees.

Pet. App. 8.

Here, none of these questions before ACM mirror or substantially capture the Questions Presented by Petitioner. *See* Pet. i. The “appearance of impropriety”

standard³ allegedly established in *Rippo v. Baker*, 580 U.S. 285 (2017) was never cited by either party in the trial court, nor was the Fourteenth Amendment cited as anything more than a brief aside in Petitioner’s Motion to Transfer Venue. At no point in the trial court proceedings did Petitioner argue that either the “material change in circumstances” standard or the “best interest of the child” analysis violates the Fourteenth Amendment. Nor was the idea of a rebuttable presumption of equal custody rights raised at any point prior to this Petition for Writ of Certiorari. Petitioner’s only citation to the Fourteenth Amendment that ACM noted referred to a transfer of venue issue related to Petitioner’s attempts to have the trial judge recuse himself or have the custody matter transferred to a different trial court venue within Maryland.

Furthermore, regarding the issue of alleged bias on the part of the Circuit Court judge, ACM applied the four-part preservation test from *Braxton v. Faber*, 91 Md. App. 391 (1992), and held that Petitioner “fail[ed] to set forth any facts in sufficient detail that would show bias,” that he did not reference the record in support of his bias argument on appeal, and that the argument was therefore unpreserved.

³ *Rippo v. Baker* does not actually contain the “appearance of impropriety” language quoted by Petitioner but rather applies the “probability of actual bias” standard established by *Withrow v. Larkin*, 421 U.S. 35 (1975). Petitioner appears to be conflating a judicial-ethics canon provision outlined in Md. Rule 18-101.2 with the constitutional due-process recusal standard.

In sum, Petitioner has not presented a single question to this Court which is properly preserved for review and as such his Petition must be denied.

C. SUBJECT MATTER JURISDICTION

Finally, this Court lacks jurisdiction because the Petitioner has failed to successfully plead any federal law issues which would grant this Court subject matter jurisdiction over this case. The Supreme Court of the United States only has appellate jurisdiction over cases involving federal issues, which includes decisions of inferior federal courts and final judgments of states courts, as authorized by Congress. U.S. Const. art. III § 2, cl. 2.

As discussed previously, Congress has specified that this Court may review final judgments of the highest court of a State by writ of certiorari when the case deals with a federal issue, such as the Constitutional validity of state law. 28 USCS § 1257(a). Furthermore, “[a] petition for writ of certiorari will be granted only for compelling reasons,” such as where “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.” USCS Supreme Ct R 10.

Here, Petitioner has attempted to raise two federal issue questions by calling into question the validity of the “material change in circumstances” standard and “best interest of the child” analysis under the Fourteenth Amendment. However, as previously discussed, neither of these questions were raised or preserved for review. Petitioner’s arguments attempt to shoehorn a federal question issue into what is a

domestic matter governed by state law. Petitioner's first question, while closer to presenting a federal question, was likewise not preserved for review. Without preservation, these questions are not an appropriate avenue for granting subject matter jurisdiction. Thus, Petitioner has failed to present a properly preserved federal question, and as such this Court does not have subject matter jurisdiction.

STATEMENT OF THE CASE

For all that Petitioner has attempted to complicate the matter, this case is, at its core, a typical custody modification. Petitioner Jeffrey F. Barry and Respondent Amy K. Schwender were married in October 2013. They had one child together, O. B., born in July 2015. On January 12, 2022, Respondent was granted a Judgment of Absolute Divorce from Petitioner, which set forth a comprehensive legal and physical custody and child support order for O. B. Resp. App. 201-204. Notwithstanding the order, the parties exercised a degree of flexibility in their visitation schedule for the next two years, whereby Petitioner benefitted from increased informal access time. On or about January 2024, Respondent announced her intention to strictly abide by the custody order instead of allowing for flexible visitation. Petitioner subsequently filed several Motions, including the first Motion to Change Venue cited in his Petition, which were each ruled on by the Baltimore County Circuit Court. *See* Resp. App. 192–200.

This culminated in a Petition to Modify Custody and Visitation, filed by Petitioner on December 4, 2024. Resp. App. 189. He subsequently filed a second Motion to Transfer Venue pursuant to Md. Rule 2-327, on the basis that Baltimore

City was a more convenient venue, and the clerks of the Baltimore County Circuit Court had improperly failed to serve certain pleadings in a timely manner. Resp. App. 187. This Motion was denied and a merits hearing was scheduled for January 30, 2025, before the honorable judge Keith Truffer. *Id.*

During the hearing, Petitioner orally moved for reconsideration of his Motion to Transfer Venue, claiming that the court and specifically Judge Truffer were prejudiced against him because Respondent's mother worked at the Baltimore County Circuit Court as a judicial assistant to another judge. Resp. App. 38. Judge Truffer interpreted this as essentially a request that he recuse himself. Resp. App. 39. After clarifying that he had no personal relationship to Ms. Schwender and that the only evidence he learned about the case came from evidence presented in court and the court filings, Judge Truffer denied the Motion to Transfer Venue and declined to recuse himself. Resp. App. 40. Thereafter the court heard testimony from both parties and determined that Petitioner had not demonstrated a material change of circumstances, as required by Maryland law. *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). His Petition was therefore denied.

Petitioner subsequently attempted to appeal the denial of his Petition to Modify, and several other moot issues, to the Appellate Court of Maryland. His appeal was denied in an unreported opinion. Pet. App. 6-39. Petitioner then filed a Petition for Writ of Certiorari to the Maryland Supreme Court, which was dismissed as untimely filed. Pet. App. 3. Petitioner's motion to accept his petition as timely filed *nunc pro tunc* and to reconsider the dismissal was likewise denied without comment

by the Maryland Supreme Court. Resp. App. 6-8; Pet. App. 5. Having exhausted all other avenues, Petitioner now seeks appellate review by the Supreme Court of the United States on a series of questions which are either: a) not properly preserved for appellate review, b) not properly within the subject matter jurisdiction of this Honorable Court, or c) not within the class of issues outlined in USCS Supreme Ct R 10.

REASONS TO DENY THE PETITION

Notwithstanding the jurisdiction issues previously discussed, this Petition should also be denied because the decisions neither conflict with the Constitutional requirements of Due Process, nor do they implicate a Federal question that has not been decided by this Court. Petitioner has therefore completely failed to raise any “compelling reasons” for this Court to grant certiorari. USCS Supreme Ct R 10.

A. THE TRIAL COURT’S DECISION NOT TO RECUSE OR TRANSFER VENUE DID NOT CONSTITUTE A STRUCTURAL ERROR WARRANTING VACATUR.

I. The lower courts were not required to specifically apply *Rippo v. Baker* where neither party cited the case in the lower court proceedings and where a substantially similar mandatory recusal standard was applied instead.

Petitioner’s allegation that the state court “failed” to apply the *Rippo v. Baker* standard of mandatory recusal is factually inaccurate for two reasons. First, neither Petitioner nor Respondent previously mentioned *Rippo v. Baker* prior to the Petition for Writ of Certiorari to the Supreme Court of Maryland. Generally, the responsibility of framing the dispute, presenting the evidence, and citing the relevant legal authorities falls entirely on the litigants. Courts have no duty to independently

research and apply case law which the litigants failed to present themselves. Petitioner has presented no evidence that he relied upon *Rippo v. Baker* in any of his arguments before the trial court or the appellate court, and indeed there is nothing on the record indicating otherwise. It cannot be said that either of the state courts erred in not specifically citing *Rippo v. Baker* in their decisions.

Secondly, the trial court and ACM did in fact apply in trial and review in their unreported opinion recusal standards similar to the one cited in *Rippo v. Baker*. In the Order denying Petitioner's Motion to Change Venue, the Circuit Court for Baltimore County cited Md. Rule 18-102.11, which provides for mandatory recusal where the judge has "a personal bias or prejudice concerning a party or a party's attorney, or personal knowledge of facts that are in dispute in the proceeding." Resp. App. 199. The trial court also cited to the unreported opinion, the case being *In re K.H.*, that cited the controlling law, noting that "a judge is required to recuse himself or herself from a proceeding when a reasonable person with knowledge and understanding of all the relevant facts would question the judge's impartiality." 253 Md. App. 134, 154 (2021). The Maryland Court of Appeals later cited several other cases which apply the same standard. Pet. App. 33.

This "reasonable person" language, in combination with the statutory mandatory recusal standard, is substantially similar to the standard applied in *Rippo v. Baker*, which stated that "[r]ecusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" 580 U.S. 285, 287 (2017). The fact that the lower courts

relied upon state law instead of the substantially similar federal standard is not an error significant enough to warrant this Court's attention.

II. Even if the lower courts were required to apply Rippo v. Baker, the record does not support a finding of an unconstitutionally high "probability of actual bias."

Assuming, *arguendo*, that the lower courts were in fact required to apply the mandatory recusal standard cited in *Rippo v. Baker*, the facts on the record do not evidence a constitutionally intolerable "probability of actual bias." *Rippo v. Baker* involved a capital defendant whose trial judge was under criminal investigation for bribery by the very prosecutor's office trying the defendant, indicating a direct financial/liberty stake for the judge in the outcome of cases handled by that office. 580 U.S. 285 (2017). By contrast, in *Withrow v. Larkin*, the Court determined that a procedural scheme by which an Examining Board was empowered to both investigate allegations of certain proscribed acts and adjudicate the resulting hearing did not constitute an "unconstitutional risk of bias." 421 U.S. 35, 47 (1975). These fact patterns indicate a very high standard for the level of direct conflict which must be demonstrated to constitute a "probability of actual bias" high enough to mandate recusal.

Here, the alleged "conflict" is that a courthouse administrative employee is related to a litigant, with no allegation that the judge had any communication with her about the case, any financial stake, or any personal relationship with her at all beyond incidental workplace proximity in a large county courthouse with many judges, many floors, and many chambers. Petitioner alleges that the trial court judge

“acknowledged his familiarity with Ms. Schwender” on the record. Pet. 4. However, the quote Petitioner attributed to Judge Truffer in support of this allegation cannot be found anywhere in the record. Indeed, the January 30th hearing transcript shows that Judge Truffer asserted the exact opposite, stating that he had limited contact with Respondent’s mother during her employment, that he only knew of her, denying that he had ever communicated with her about the case. Resp. App. 40. The Petitioner has offered no credible evidence that the trial judge had any sort of relationship with Respondent’s mother. This fact pattern is a materially weaker showing than the one this Court found to be insufficient in *Withrow v. Larkin*, let alone the fact pattern which was determined to establish a due process violation in *Rippo v. Baker*.

Furthermore, even if the facts did indicate a high “probability of actual bias,” transfer of venue would not be the appropriate remedy absent a sufficient showing that a transfer “is for the convenience of the parties and witnesses and serves the interests of justice.” Md. Rule 2-327(c). Petitioner presents no argument in his Petition as to either of these requirements.

In sum, Petitioner has failed to present any compelling evidence that the trial court’s decision not to recuse or transfer venue was in error, let alone an error severe enough to mandate vacatur of the lower court decision.

B. PETITIONER HAS NOT PRESENTED A COMPELLING ARGUMENT THAT THE “MATERIAL CHANGE IN CIRCUMSTANCES” STANDARD VIOLATES DUE PROCESS.

I. Due process was not violated when both parties had notice and a meaningful opportunity to be heard during the earlier divorce proceedings and the later modification proceedings.

Petitioner's allegation that he was unconstitutionally prevented from presenting evidence and arbitrarily deprived of his parental rights because of the "material change in circumstances" misstates the posture of the parties and the litigation in Petitioner's motion to modify itself. In Maryland, a party seeking modification of an existing custody order must first demonstrate a material change in circumstances affecting the welfare of the child, then demonstrate that it is in the best interests of the child to modify the order. *McMahon v. Piazze*, 162 Md. App. 588 (2005).⁴ The Fourteenth Amendment Due Process Clause has been construed to protect both "procedural due process," meaning that the government must follow certain procedures before it may deprive a person of a protected life, liberty, or property interest, and "substantive due process," meaning that there are certain fundamental rights the government may not infringe upon even if it provides procedural protections.⁵ In *Mathews v. Eldridge*, this Court held that procedural due process requires notice and a meaningful opportunity to be heard, weighed against the risk of erroneous deprivation and the state's interests. 424 U.S. 319 (1976).

⁴ This standard has now also been codified at Md. Family Law Code Ann. § 9-202.

⁵ Petitioner does not specify whether he is referring to procedural due process or substantive due process.

Starting with custody access pursuant to the parties' divorce judgment, the Petitioner initiated the custody modification and had a trial on the merits. The record indicates that Petitioner testified and presented evidence that go to both the best interest standard and whether was a "material change in circumstances" since the divorce and custody judgment. What Petitioner's argument misses is that evidence amounting to the best interest of the child is often co-terminus with a material change analysis. The almost circular aspect of this reasoning is not lost on Maryland domestic law practitioners and is enshrined in Maryland case law. "Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child. Thus, the question of 'changed circumstances' may infrequently be a threshold question, but is more often involved in the 'best interest' determination," the then Court of Special Appeals (now referred to as the Appellate Court of Maryland) wrote in *McMahon v. Piazza*, 162 Md. App. 588, 594, 875 A.2d 807 (2005).

Put differently, any material change in circumstances affecting a child and allowing a trial court in Maryland to modify a custody judgment is itself powerful best interest of the child evidence. New evidence showing how the best interest of the child since the judgment has changed, i.e., how circumstances are materially different than those present at the underlying trial, is evidence of a material change. But here, Petitioner presented several topics of evidence that could go both best interest and material change. At Petitioner's modification hearing, the trial court declined to find those changes to be "material" and hence left the prior judgment undisturbed,

implicitly finding it still to be in the minor child's best interest. Petitioner's question presented about due process and parental liberty does not accurately state the facts in this matter. Petitioner started on equal footing with Respondent during their divorce and custody proceedings. Thereafter, Petitioner initiated and litigated the denial of the custody modification.

II. The "material change in circumstances" standard is a matter of domestic relations which should not be treated as a federal question.

Petitioner's argument as to the constitutional validity of the state law "material change in circumstances" standard is inappropriate on its face due to the domestic relations abstention doctrine. This Court has long held that "the whole subject of domestic relations ... belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593–594 (1890). Indeed, this Court rarely involves itself in matters of family law, typically only doing so when there is a serious threat to the substantive due process rights protected by the Fourteenth Amendment. State law regarding the procedural custody-modification burden-of-proof sequencing is precisely the kind of family law mechanism this Court has consistently left to the States. Indeed, laws of this kind seem to be the national standard among the States. For Maryland's neighbor's *see* D.C. Code § 16-914(f); 13 Delaware Code § 729; Pa. C.S. § 5338; Va. Code Ann. § 20-108; and 23 W. Va. Code § 48-9-401. Petitioner has not shown that Maryland law poses any threat to a procedural or substantive due process right, and as such this Court has no compelling reason to intervene.

C. PETITIONER HAS NOT PRESENTED A COMPELLING ARGUMENT THAT THERE IS A CIRCUIT SPLIT ON THE CONSTITUTIONAL VALIDITY OF THE MULTIFACTORAL “BEST INTEREST OF THE CHILD” STANDARD VERSUS A REBUTTABLE PRESUMPTION OF SHARED CUSTODY.

Petitioner’s assertion that this Court must grant certiorari to resolve a “national split” on the Fourteenth Amendment Due Process requirements pertaining to parents’ rights in custody cases lacks all evidence of a “national split.” First, “split” is misapplied here. This Court favors granting certiorari when “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort,” or where “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.” USCS Supreme Ct R 10(a), (b). This scenario is typically referred to as a “circuit split” or a “split of authority.” However, Petitioner has not cited to a single case—and certainly not more than one allowing for a comparison requisite to argue the existence of a “split—a demonstrating that “a rebuttable presumption of equal shared parenting is the only baseline that satisfies the Fourteenth Amendment.” Pet. 11. The two cases regarding protected parental liberty he cites, *Troxel v. Granville* and *Mahmoud v. Taylor*, have nothing to do with custody presumptions between biological parents. *Troxel v. Granville* addressed a third-party visitation statute that gave no weight to a fit custodial parent’s own determination,

a vastly different scenario to the two-parent custody modification litigation at the center of this case. 530 U.S. 57 (2000). Meanwhile, *Mahmoud v. Taylor* addressed the right of parents to opt their children out of certain public-school instructional material under the Free Exercise Clause of the First Amendment. 606 U.S. 522 (2025). Neither of cases show any kind of split, when “split” is directed towards varying decisions between United States courts of appeals or State courts of last resort.

Like the blacksmith Procrustes, Petitioner attempts to use other States’ joint custody laws to fit the bed that is his Fourteenth Amendment argument. Pet. 11. Simply put, Petitioner’s argument is ignorant of Maryland law’s own presumption of equal parental rights and conflates his particular custody order with elements and burdens of proof of a modification of a custody judgment. The natural law’s tenet that parents have equal duty, and hence equal rights, to raise their children, is codified in Md. Code Ann., Fam. Law § 5-203. The same duty and right is recognized under the Fourteenth Amendment’s liberty interest. Determining how parents should share those rights, and thereafter modify that delegation if at all, by applying the best interest of the child standard found in *Taylor v. Taylor*, 306 Md. 290 (1986) is not violation of a liberty interest.⁶

Petitioner’s assertion that this case presents “the ideal vehicle” to resolve the alleged circuit simply lacks foundation in his own case or in the laws of other States

⁶ This standard has is also codified at Md. Family Law Code Ann. § 9-201.

referenced. Pet. 13. At Petitioner's trial, the court determined that there was not a "material change in circumstances" and therefore never reached the issue of the best interests of the child, though it received and considered evidence that would be relevant to the same best-interest factors. Simply put, there is therefore nothing for this Court to review on this question.

CONCLUSION

For the foregoing reasons, the Petitioner's has not established any compelling reasons for the Court to grant the Petition. Therefore, Respondent Schwender respectfully requests that the Petition be denied.

Respectfully submitted,



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