No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Eighth and Fourteenth Amendments are violated when a state supreme court justice declines to recuse himself in a capital case in which he had personally approved the decision to pursue capital punishment against the defendant in his prior capacity as an elected prosecutor and continued to head the prosecutors' office that defended the death verdict on appeal, and when he had publicly expressed strong support for capital punishment during his judicial election campaign by referencing the number of defendants he had "sent" to death row, including the defendant in the case now before the court; and

2. Whether the Eighth and Fourteenth Amendments are violated by the participation of a potentially biased jurist on a multimember tribunal deciding a capital case, regardless of whether his vote is ultimately decisive.

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INTERESTS OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioner and requests that the Court consider the relevant judicial ethics codes and their impact on the due process issues presented. The ABA urges this Court to conclude that due-process relief should be provided in these rare-but-egregious circumstances: where a justice of a state supreme court has disregarded uniform ethics rules and due process protections by refusing to recuse himself from a capital defendant's collateral appeal even though the justice (as the former district attorney) had personally authorized the capital prosecution and the appeal challenged the misconduct of prosecutors under the district attorney's managerial responsibility.

The ABA is one of the largest voluntary professional membership organizations in the United States and the nation's leading organization of legal professionals. Its more than 400,000 members come from all fifty states, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, non-profit organizations, and local, state, and federal governments. Members also include judges, law professors, law students, and non-lawyer

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[1] No counsel for a party authored this Brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

associates in related fields.[2]

One of the ABA's continuing goals has been to "[p]reserve the independence of the legal profession and the judiciary."[3] For over a century, the ABA has worked with lawyers, judges, scholars, and interested organizations to draft and implement ethics codes and guidelines for the administration of justice. As discussed below, every state has adopted ethics codes that are based on or consistent with the ABA's Model Code to govern judicial conduct, to help ensure that all litigants in the justice system are treated fairly and in accordance with due process, and to promote public confidence in the judiciary.

The ABA first began drafting Canons of Judicial Ethics roughly a century ago. The ABA's Committee on Judicial Ethics, which was chaired by Chief Justice William Howard Taft and comprised of judges, lawyers, and experts in judicial ethics, drafted the Canons. CHARLES G. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT vii (2009). The Canons became ABA policy upon adoption by the ABA's House of Delegates.[4] The Canons, in turn, were

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[2] Neither this Brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this Brief, nor was the Brief circulated to any member of the Judicial Division Council before filing.

[3] *See, e.g.*, Am. B. Ass'n, Mission and Goals, http://www.americanbar.org/about_the_aba/aba-mission-goals.html.

[4] The House of Delegates is the ABA's policy-making body, and now has 560 delegates representing states and

adopted by the vast majority of state courts (including Pennsylvania) to guide and govern the ethics of American judges, "as indicating what the people have a right to expect from them." CANONS OF JUDICIAL ETHICS Pmbl. (1924); *see also In re Code of Judicial Conduct*, 643 So.2d 1037, 1038 (Fla. 1994) (noting that most state courts had adopted the Canons); Robert J. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 411 (citing examples of state courts, constitutions, and statutes adopting or referencing the Canons).

In 1969, the ABA's Traynor Committee (named after its former Chair, Chief Justice Roger Traynor of the California Supreme Court) began work on the Model Code of Judicial Conduct. The final product, which the ABA adopted in 1972 and Pennsylvania adopted in 1974, was the result of "careful, time-consuming effort." E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 42-43 (1973). The Committee produced thirteen drafts and distributed 14,000 copies of its interim report and tentative draft to judges and other interested persons across the country for comment. It considered hundreds of comments. It also consulted specialized committees, composed of trial, appellate, and specialty-court judges (among others), conducted independent research, and reviewed the applicable legal scholarship, judicial conference materials, and

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territories, state and local bar associations, affiliated organizations, and the ABA's sections, divisions, and its members, among others. *See* ABA Leadership, House of Delegates General Information, http://www.americanbar.org/groups/leadership/delegates.html.

congressional testimony. *Id.* The Code was well-received in the states, with virtually every state (including Pennsylvania) eventually adopting and implementing it.

The 1972 Code was revised and updated in 1990 through a process no less rigorous. Meeting from 1987 to 1990, the Committee sent an extensive questionnaire to state and federal judges (among many others) in every jurisdiction, held public hearings, reviewed the sizeable literature on judicial conduct, and sent the discussion draft to 5,000 recipients for comments. LISA L. MILFORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 4-5 (1992). As a result of this careful study and robust commentary, the Committee kept those Canons from the 1972 Model Code that were serving their intended purposes, including the prohibition on presiding over a case in which the judge had once served as counsel or in other situations in which the judge's impartiality might reasonably be questioned.[5] *See* MILFORD, *supra,* at 7.

The 1990 Code was amended in 2007, following an equally rigorous process. A diverse Commission composed of judges, lawyers, and academics convened in 2003, met over fifty times, held nine public hearings, posted numerous drafts for public comment, and reviewed comments from thirty-nine organizations and over 300 individuals. Mark I.

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[5] *Compare* MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1972) *and* PENN. CODE OF JUDICIAL CONDUCT Canon 3C (1974) (same), *with* MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990) (similar).

Harrison, *The 2007 ABA Code of Judicial Conduct: Blueprint for a Generation of Judges*, JUDGES' J., Vol. 28, No. 3, at 257-58 (2007). As with the earlier codes, the drafters and commentators again concluded that the recusal Canons at issue were integral to the purposes of the Code and should thus be kept in essential part.[6] Therefore, the 2007 Code maintained the ethical standard that judges should recuse themselves from cases in which they formerly participated as counsel or in which their impartiality otherwise might reasonably be questioned. Most states, including Pennsylvania, have since adopted the 2007 Model Code and essentially all states have adopted recusal provisions based in whole or part on the 1972, 1990, and 2007 Model Codes.[7]

The careful process summarized above has produced a Model Code of Judicial Conduct that deserves consideration and reflects the prevailing consensus on the applicable standards of judicial recusal. All states have accordingly chosen to operate under these recusal provisions to ensure the integrity, independence, and impartiality of their

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[6] *See generally* MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007) (continuing to conclude that judges should not sit in cases in which they had previously participated as counsel, in which they harbor a bias for or against a party, or in which their impartiality otherwise might reasonably be questioned); PENN. CODE OF JUDICIAL CONDUCT R. 2.11 (2014) (same).

[7] Of course, many states have customized their Codes, but their Codes still maintain the framework and essential elements of the Model Codes. Moreover, with minor exceptions, these state customizations do not modify the recusal Canons at issue.

judges and to promote public confidence in the fairness and integrity of their courts.

SUMMARY OF THE ARGUMENT

The recusal provisions of the ABA's Model Code of Judicial Conduct and the Pennsylvania Code of Judicial Conduct (which mirror the Model Code) proscribe judges from sitting in cases in which they have formerly participated as counsel or in which their impartiality otherwise might reasonably be questioned. In addition to preventing situations posing significant risks of judicial bias, these long-standing, uniformly adopted recusal provisions avoid the appearance of bias, thus promoting confidence in both the public and litigants that our justice system is fair and impartial. The uniform adoption of these recusal provisions reflects a national consensus that the provisions are necessary to protect the integrity and impartiality of the judiciary. The ethics codes work in tandem with due process requirements in this context to ensure actually and apparently fair proceedings, a quintessential due process goal. Finally, the requirements of the ethics codes and due process apply fully to multimember judicial panels, given the recognized potential for a judge to influence other panel members, particularly where, as here, the influencing judge is the Chief Justice.

The recusal provisions notwithstanding, Pennsylvania's Chief Justice refused to recuse himself from Petitioner's collateral appeal even though (1) the Chief Justice, as then-District Attorney of Philadelphia, had reviewed the facts of

Petitioner's case and personally authorized Petitioner's capital prosecution; (2) the appeal challenged the misconduct of prosecutors in the DA's office; and (3) the Chief Justice had broadcasted to Pennsylvanians on the judicial campaign trail that he had sent to death row forty-five defendants (including Petitioner). In these rare circumstances, due process mandates reversal in light of the serious risks, and appearance, of bias.

ARGUMENT

Consistent with the questions presented, this Brief is organized in two parts: (I) the recusal provisions of the Pennsylvania and Model Codes of Judicial Conduct, and the due process requirements with which these codes work in tandem, require recusal in these egregious circumstances; and (II) the ethics codes and due process contain no exception for multimember tribunals.[8]

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[8] The ABA will not address the Eighth Amendment issues because it takes no position on the death penalty generally. Should a state choose to use the death penalty, however, ABA policies and procedures call upon the state to "ensure that death penalty cases are administered fairly and impartially, in accordance with due process. . . ." ABA Policy # 107 (adopted Feb. 1997) (citations omitted), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1997_my_107.authcheckdam.pdf. Additionally, with respect to the issues raised by the second question presented, the ABA will limit its discussion to the influence that a judge (and especially a chief judge) may exert in the context of a multimember panel.

I.

THE ETHICS CODES AND DUE PROCESS REQUIRE RECUSAL UNDER THESE CIRCUMSTANCES.

The failure to recuse violated the uniformly adopted recusal provisions and due process, as outlined in the following three sections: (A) the Model Code's recusal provisions (as adopted by Pennsylvania and essentially every other state) serve to prevent judicial bias and to promote public confidence in the integrity and impartiality of the judiciary; (B) the Code required recusal below; and (C) in these extreme circumstances, the Code reflects due process.

A. The Canons, Their Underlying Purposes, and Their Uniform Adoption Warrant Consideration.

As its prime objectives, the Model Code of Judicial Conduct demands the integrity, independence, and impartiality of judges and promotes public confidence in the fairness and integrity of the judiciary, which the Court has recognized as a "vital state interest . . . of the highest order." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (quoting *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)) (internal quotation marks omitted).

Judicial independence, integrity, and impartiality have long been the guiding principles of the Canons. In 1924, the ABA's first Canons of Judicial Ethics recognized that judicial conduct "should be free from

impropriety and the appearance of impropriety."[9] CANONS OF JUDICIAL ETHICS Canon 4 (1924); *id.* Canon 30 ("A candidate for judicial position . . . should [not] create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination. . . ."); *see also generally* MILFORD, *supra*, at 4-5 ("[T]he danger caused by the appearance of impropriety consists in damaging public confidence in the judiciary."). Furthermore, to avoid the risk of bias and to promote public confidence in the fairness and impartiality of the justice system, judges were not permitted to sit in any case in which they had a personal interest.[10]

This Court has likewise "recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'" *Williams-Yulee*, 135 S. Ct. at 1666 (quoting *Caperton*, 556 U.S. at 889).[11] Recognizing that the

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[9] This injunction includes recusal issues. *See, e.g.*, John P. Frank, *Commentary on Disqualification of Judges—Canon 3C*, 1972 UTAH L. REV. 377, 377 (citing ABA COMM. ON PROF'L ETHICS AND GRIEVANCES, OPINIONS, No. 200 (1957)).

[10] CANONS OF JUDICIAL ETHICS Canon 29 (1924); *cf. id.* Canon 26 (stating that a judge "should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties"); *id.* Canon 31 (stating that a judge "should not practice [law] in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy").

[11] This is so in part because:

> The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the

"public perception of judicial integrity is a state interest of the highest order," the Model and Pennsylvania Codes accordingly have placed a high premium on public confidence. *Id.* (internal quotation marks omitted). The Codes require "judges, individually and collectively, to treat and honor the judicial office as a public trust, striving to preserve and enhance legitimacy and confidence in the legal system" and to "conduct themselves in a manner that garners the highest level of public confidence in their independence, fairness, impartiality, integrity, and competence." PENN. CODE OF JUDICIAL CONDUCT Pmbl. (2014); MODEL CODE OF JUDICIAL CONDUCT Pmbl. (2007). Moreover, judges "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[12]

> executive or the legislature, the judiciary "has no influence over either the sword or the purse; . . . neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Williams-Yulee, 135 S. Ct. at 1666.

[12] PENN. CODE R. 1.2 (2014); MODEL CODE R. 1.2 (2007); *see also* PENN. CODE Canon 2 (1974) (requiring judges to avoid the appearance of impropriety and to conduct themselves in a manner that promotes integrity and impartiality in the

The Code's recusal provisions in particular uphold both the actuality and appearance of fair and impartial courts and are the result of significant collaboration and vetting, as described above.[13] This Court has recognized that the recusal provisions in the "codes of conduct serve to maintain the integrity of the judiciary and the rule of law." *Caperton*, 556 U.S. at 889. Because they are essential to public confidence in the fairness and integrity of the nation's judges, the recusal provisions at issue have been universally adopted in the states. Thus, judges nationwide may not sit in cases in which they formerly participated as counsel.[14] Furthermore, no judge may participate "in any proceeding in which the judge's impartiality might reasonably be questioned." MODEL CODE R. 2.11(A) (2007); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C (2009) (same); MODEL CODE Canon 3E(1) (2003)

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judiciary); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2 (2009) (same); MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1972) (same). Likewise, "[a] candidate for a judicial office . . . shall . . . act in a manner consistent with the impartiality, integrity and independence of the judiciary." MODEL CODE Canon 5A(3)(A) (2003); MODEL CODE R. 4.2(A)(1) (2007) (same).

[13] *See generally supra* Interests of the *Amicus Curiae* (describing the careful and collaborative process by which the Code and its recusal provisions were adopted and subsequently reviewed).

[14] *See, e.g.*, ABA CENTER FOR PROF'L RESPONSIBILITY, POLICY IMPLEMENTATION COMM., COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS (Nov. 4, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.authcheckdam.pdf (noting no significant difference between the ABA Model Code provisions at issue and those of the adopting states).

(same); *see also* 28 U.S.C. § 455(a) (2000) (same); *Liteky v. United States*, 510 U.S. 540, 548 (1994) (quoting in part 28 U.S.C. § 455(a)) (noting that "quite simply and quite universally, recusal [is] required whenever 'impartiality might reasonably be questioned'").

In sum, the recusal provisions were the product of significant collaboration and vetting, and the states have unanimously adopted the provisions to prevent judicial bias and to promote public confidence in the judiciary's integrity and impartiality.

B. The Uniformly Adopted Recusal Provisions Applicable to This Case Require Recusal.

Since 1924, the Code has generally counseled recusal, and since 1972, the Code has specifically required recusal when a judge has previously participated as counsel. Even without this specific prohibition, sitting in such cases presents serious risks of bias and causes the impartiality of such judges to be reasonably questioned. All states (including Pennsylvania) and the federal courts have thus required recusal in such circumstances for decades.

At the time that Chief Justice Castille refused to recuse himself, the Pennsylvania Code (based on the 1972 Model Code) provided:

> Judges should disqualify themselves in a proceeding in which their impartiality

> might reasonably be questioned, including but not limited to instances where:
>
> (a) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; [or]
>
> (b) they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter. . . .

PENN. CODE OF JUDICIAL CONDUCT Canon 3C (1974, as amended); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C (2009) (similar); MODEL CODE Canon 3C (1972) (same).[15] The 2007 Model Code and the 2014 Pennsylvania Code carry forward these requirements without significant amendments.[16]

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[15] The official commentary clarified that a government lawyer is not necessarily imputed with the conflicts of the lawyer's former government colleagues: "A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1) cmt. (1972). The drafters of the 1990 Model Code renumbered the provisions above and made them gender neutral but did not otherwise amend these provisions.

[16] *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1), (6) (2007); PENN. CODE OF JUDICIAL CONDUCT R. 2.11 (2014)

Indeed, these requirements have been adopted universally and without controversy.[17]

Thus, the ethics codes at all relevant times prohibited a judge from participating in a case in which his impartiality might reasonably be questioned, in which he harbored a personal bias for or against a party, or in which he had previously participated as a lawyer (or public official). Here,

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(same). In the 2007 Model Code, the drafters added a specific category for former-government-employees-turned-judges, mirroring the distinction previously made in the official commentary. Such judges must recuse themselves if they "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or ha[ve] publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy." MODEL CODE R. 2.11(A)(6)(b) (2007); PENN. CODE R. 2.11 (2014) (same). This amendment became effective in Pennsylvania in 2014, after Chief Justice Castille's refusal to recuse himself or refer the matter to the full court. Because Chief Justice Castille reviewed the facts, personally authorized this capital prosecution, and supervised the office now being challenged for misconduct, that he "participated personally and substantially" cannot reasonably be disputed.

[17] *See generally* THODE, *supra*, at 63 ("If the former [governmental] agency lawyer, now a judge, served as a lawyer in the matter in controversy, he is disqualified. The judge is disqualified also if his association with an agency lawyer now before the court or his association with the matter in controversy leads to the conclusion that . . . his impartiality might reasonably be questioned."); Penn. Jud. Ethics Comm., Formal Op. 2015-4 (citing PENN. CODE OF JUDICIAL CONDUCT R. 2.11) ("Some of the circumstances outlined in the Rule are straightforward. E.g., there is little room for discretion . . . if the judge served as a lawyer in the matter in controversy. In those situations, the judge is disqualified.").

Chief Justice Castille had been the District Attorney of Philadelphia during Petitioner's trial and direct appeal, had reviewed at least some of the case's facts, and had personally authorized Petitioner's capital prosecution. Chief Justice Castille's participation therefore violated the recusal provisions and created the serious risk (and appearance) of bias.[18]

The failure to recuse in this case appears particularly detrimental to the public's (and Petitioner's) confidence in the fairness, integrity, and impartiality of the proceedings because Petitioner's collateral appeal raised the misconduct of prosecutors in Chief Justice Castille's former office—prosecutors whom Chief Justice Castille had an ethical duty to supervise.[19] The trial court concluded that Chief Justice Castille's former deputies had "plainly 'suppressed'" and "knowingly withheld

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[18] For example, anecdotal and empirical evidence suggests that advocates often suffer from partisan bias toward the side employing them. *See, e.g.*, Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 6-12 (2009) (noting that lawyers generally possess "both a 'partisan' bias that is based on an affiliation with the client or a litigation-related social cause, and a 'self-serving' bias, as the lawyer benefits from the client's success," and that these and related biases can actually alter the way in which the lawyers view the facts).

[19] "Prosecutors with managerial authority and supervisory lawyers must make 'reasonable efforts to ensure' that all lawyers and nonlawyers in their offices conform to the Rules of Professional Conduct . . . [and] must adopt reasonable policies and procedures to achieve these goals." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (citing MODEL RULES OF PROF'L CONDUCT R. 5.1, 5.3).

evidence" by failing to disclose mitigating and impeachment evidence and later made "less than candid" representations to the court concerning the suppressed evidence, including "grossly misrepresent[ing] the evidence in the government's files."[20] *Commonwealth v. Williams*, CP-51-CR-0823621-1984 (Phila. Ct. C.P. Nov. 27, 2012), at 41 & App. 5, 10.

In addition to his role in overseeing the DA's office being challenged, Chief Justice Castille also declared on the judicial campaign trail that he had sent to death forty-five defendants, including Petitioner.[21] These expressions may appear to the

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[20] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (requiring prosecutors to turn over such evidence); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009); *see generally Smith v. Cain*, 132 S. Ct. 627 (2012) (reversing a murder conviction because the DA's office committed *Brady* violations); *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (citing the ABA MODEL RULES OF PROF'L CONDUCT) ("Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the defense. An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.").

[21] Then-candidate Chief Justice Castille told the public:

- "'My campaign was basically that I've spent 20 years in law enforcement as a prosecutor, and the citizens want somebody who's tough on crime. My record's been just that.'" Tim Reeves, *Castille Leads GOP Sweep of Courts*, PITTSBURG POST-GAZETTE, Nov. 3, 1993 (quoting Castille);
- After attacking his opponent as soft on crime, Chief Justice Castille's television ads concluded with the following statement: "'If you are looking for a law-and-order guy—Ron Castille. He put 45 murderers on death row and has been endorsed by over 36,000

public as a bias in favor of one party (i.e., the State) over the other (i.e., the Petitioner).[22]

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professional police officers in Pennsylvania.'" Katharine Seelye, *Castille Emphasizes Law-and-Order Image*, PHILADELPHIA INQUIRER, Oct. 21, 1993 (quoting Castille).

- Finally, "'You ask people to vote for you, they want to know where you stand on the death penalty. I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint.'" Lisa Brennan, *State Voters Must Choose Next Supreme Court Member*, LEGAL INTELLIGENCER, Oct. 28, 1993 (quoting Castille).

See also Petitioner's Motion to Recuse Chief Justice Castille, No. 163 EM 2012 (Pa. Sup. Ct. Oct. 1, 2012) (listing additional press accounts of then-candidate Castille's tough-on-crime boasts).

[22] *See, e.g.*, *In re Burick*, 705 N.E.2d 422, 425–26 (Ohio Comm'n of Judges 1999) (reprimanding and fining judge for proclaiming that she "will be a tough Judge that supports the death penalty and isn't afraid to use it" and will "favor[] the death penalty for convicted murderers"); *In re McMillan*, 797 So. 2d 560, 566–67 (Fla. 2001) (removing judge in part because he proclaimed that he "will go to bat for" police officers and "will always have the heart of a prosecutor"); *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997); *Judicial Inquiry and Review Bd. v. Fink*, 532 A.2d 358, 367 (Pa. 1987); *see also generally* PENN. CODE OF JUDICIAL CONDUCT Canon 7B(1) (1974, as amended) ("Candidates . . . for a judicial office . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] make statements that commit the candidate with respect to cases, controversies or issues that are likely to come before the court. . . ."); PENN. CODE R. 4.2 (2014) ("A judicial candidate . . . shall . . . act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary. . . .").

Therefore, the recusal provisions and the serious risk and appearance of bias should have precluded Chief Justice Castille's participation.[23]

C. The Code Reflects Due Process in These Particular Circumstances.

Although due process and the Code are not always coextensive, they work in tandem in this case for the following reasons: (1) these uniformly adopted recusal provisions were designed to ensure fair proceedings by preventing the risk and appearance of bias; (2) fair proceedings are a quintessential due process value (particularly in death penalty cases); (3) the failure to recuse in this extreme case not only violates the ethics codes but concurrently violates due process; and (4) due process provides the necessary mechanism to enforce

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[23] *See, e.g.*, *Mixon v. United States*, 620 F.2d 486 (5th Cir. 1980) (citing 28 U.S.C. § 455(b)(3) (1976)) (vacating judgment and remanding because "the magistrate happened to have been the Assistant United States Attorney who had represented the Government in the earlier proceedings on petitioner's motion for reduction of sentence, and, therefore, he was automatically disqualified to hear petitioner's section 2255 motion"); *People v. Vasquez*, 718 N.E.2d 356, 359 (Ill. Ct. App. 1999) ("It appears that Judge Bridges actively participated as an assistant State's Attorney in the original prosecution of defendant [because he] appeared at a single status hearing, informed the trial court that the State had not yet determined whether it would seek the death penalty, and sought a continuance. . . . [W]e find that a postconviction proceeding is sufficiently related to the original prosecution that it falls within the scope of [the recusal rule]."); *Ajadi v. Comm'r of Correction*, 911 A.2d 712, 723-24 (Conn. 2006); *Penoyer v. State*, 945 So.2d 586, 587 (Fla. Ct. App. 2006).

the underlying values in both the Code and the Constitution.

First, the states have unanimously adopted the recusal provisions at issue to ensure the actuality and appearance of a fair and impartial judiciary. In other words, every state has essentially concluded that the risks and appearance of bias are intolerably high when a lawyer moves from advocating a case to judging it.[24] This unanimity suggests that these provisions reflect due process norms and expectations.

Second, the historical pedigree of similar recusal rules suggests that these provisions reflect the due process—and public expectations of due process—necessary to ensure fair proceedings in American courts.[25] For example, this Court has recognized elsewhere that "a universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is

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[24] As this Court has indicated, a state consensus is often entitled to careful consideration. For example, in *Williams-Yulee*, the Court remained "mindful that most States" had adopted the Canon at issue because the states' "considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance—how to select those who 'sit as their judges.'" 135 S. Ct. at 1666 (quoting in part *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

[25] This suggestion should not be taken to imply that all Code violations are also due process violations. Rather, this suggestion merely highlights the historical lineage of the recusal norms at issue and notes that this lineage is one reason (among several others) indicating that these norms reflect due process in these particular circumstances.

constitutional. . . .” *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002)) (internal quotation marks omitted). Moreover, “early congressional enactments ‘provid[e] contemporaneous and weighty evidence of the Constitution’s meaning.’” *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 905 (1997)). The *Carrigan* Court recounted the significant history of recusal rules:

> Federal conflict-of-interest rules applicable to judges . . . date back to the founding. In 1792, Congress passed a law requiring district court judges to recuse themselves if they had a personal interest in a suit or had been counsel to a party appearing before them. In 1821, Congress expanded these bases for recusal to include situations in which “the judge . . . is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit.” The statute was again expanded in 1911, to make any “personal bias or prejudice” a basis for recusal. The current version, which retains much of the 1911 version’s language, is codified at 28 U.S.C. § 144.[26]

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[26] *See also generally* CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 5 (2d ed. 2010) (“In 1792, the U.S. Congress . . . codified the common law

Carrigan, 131 S. Ct. 2343 (citations omitted). In addition to the federal-court history, "[a] number of States enacted early judicial recusal laws as well." *See, e.g.*, *id.* at 2349 n.4 Although the Model Code provisions particularly applicable here are of more recent vintage (1972), similar recusal rules and standards have been in place even longer and are consistent with due process.

Third, these provisions reflect the universal judgment that the conduct at issue presents a serious risk and appearance of bias, which endangers the fair proceedings fundamental to due process. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Johnson v. Miss.*, 403 U.S. 212, 216 (1971); *see also Williams-Yulee*, 135 S. Ct. 1656 (Scalia, J., dissenting) ("Unlike a legislator, a judge must be impartial—without bias for or against any party or attorney who comes before him."). Justice must be disinterested and impartial in both actuality *and appearance*.[27] *Aetna Life Ins. Co. v.*

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by calling for disqualification of a district judge who was 'concerned in interest,' but added that a judge could also be disqualified if he 'has been of counsel for either party.'"). To this day, Section 455 specifically prohibits the conduct at issue. 28 U.S.C. § 455(b)(2)-(3). Analogously, moreover, a long-standing rule prohibits judges from sitting on appeal of their own rulings. GEYH, *supra*, at 5. Chief Justice Castille essentially sat on appeal of his own decision to seek the death penalty and of the trial court's finding of prosecutorial misconduct in his office.

[27] In addition to satisfying public confidence in the judiciary's integrity and impartiality, this appearance-based

Lavoie, 475 U.S. 813, 825 (1986) ("The Due Process Clause may sometimes bar trial by judges who have no actual bias . . . . But to perform its high function in the best way, justice must satisfy the appearance of justice.") (internal quotation marks and citations omitted); *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt*, 348 U.S. at 14) (noting that not only actual justice but the "appearance of justice" must be satisfied); *Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 466-67 (1952) (Frankfurter, J.) ("The guiding consideration [in recusal] is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."). Due process and the Code speak in unison in this regard.

To satisfy the appearance of justice, the Court has held that due process requires disqualification on the following bases (among others): (1) a twelve-dollar interest in the case's outcome;[28] (2) an interest in the town's general fisc;[29] (3) involvement of a business competitor; [30] (4) participation in the

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test avoids difficult inquiries into, and problematic accusations of, actual bias. *See, e.g.*, *Caperton*, 556 U.S. at 883 ("The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.").

[28] *Tumey v. Ohio*, 273 U.S. 510 (1927).

[29] *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (holding that due process required disqualification of a dual mayor-judge because, as judge, the fines he imposed on conviction partially funded the town's general fisc, and as mayor, his interest in the town's finances gave him a "possible temptation" to convict).

[30] *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that an administrative board of optometrists had a

accusatory process before trial (a circumstance analogous to Chief Justice Castille's previous participation in Petitioner's case);[31] (5) relatively small business dealings with a party approximately one year earlier;[32] (6) an interest in the type of (but not the actual) legal claim;[33] and (7) of course, receiving the benefit of a litigant's significant independent expenditures.[34] As the Court has taken care to note, the disqualified judges in each of these instances were not necessarily biased, but the risk

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disqualifying pecuniary interest when presiding over a hearing against competing optometrists).

[31] *Murchison*, 349 U.S. at 137 ("Having been a part of that [accusatory process of a one-judge grand jury] a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.") (footnote omitted); *cf. also Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (concluding that due process requires "a defendant in criminal contempt proceedings . . . be given a public trial before a judge other than the one reviled by the contemnor").

[32] *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968) (applying the holding to arbitrators but unanimously agreeing that the standards articulated in the opinion would apply to judges).

[33] *Aetna*, 475 U.S. at 823-25 (vacating judgment that enhanced the legal claim of the justice who authored the state court's opinion).

[34] *Caperton*, 129 S. Ct. at 2263–64 ("We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.").

and appearance of bias and impropriety were too significant for due process to ignore.

Although not every violation of the applicable Canons also violates a litigant's due process rights,[35] the failure to recuse at issue violates both. The head prosecutor, who had reviewed the facts and personally authorized the capital prosecution, became the Chief Justice who presided over the collateral appeal—and the appeal raised issues regarding the ethical misconduct of the very same prosecutors whom the Chief Justice (as head prosecutor) would have had a duty to manage.

Furthermore, Chief Justice Castille was not only the head justice over Petitioner's appeal but also the head prosecutor over Petitioner's conviction. Heads of office are often more heavily scrutinized under the applicable ethics rules in light of their actual and apparent prominence and influence.[36] They are the public face, appear on official communications,[37]

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[35] *See, e.g.*, *id.* at 2267.

[36] *See, e.g., United States v. Smith*, 995 F.2d 662, 675-76 (7th Cir. 1993) (disqualifying defense lawyer because he had served as chief prosecutor during the underlying investigation, had supervisory responsibilities over the prosecutors, had attended two high-level departmental meetings regarding the investigation, and had signed one immunity agreement); *Sec. Inv. Protection Corp. v. Vigman*, 587 F. Supp. 1358, 1366-67 (C.D. Cal. 1984) (disqualifying lawyer because, as a former regional administrator of the SEC, he signed the complaint and trial brief in a related matter).

[37] Here, for example, Chief Justice Castille's name was on the state's brief in Petitioner's direct appeal and on the stationery sent to the parole board requesting relief for Petitioner's co-defendant. As the trial court found, Chief

have general access to the files, make the policies, and have the ability to fire or otherwise discipline subordinates. Although a more difficult disqualification question would arise if the former head of office had no actual contact with the applicable case, Chief Justice Castille indisputably reviewed the factual memorandum and personally authorized this capital prosecution.

Fourth, and finally, the Code and due process have a symbiotic, if not dependent, relationship in this case. Recusal questions, in the first analysis, are answered by the judge whose impartiality is in question. If the judge fails to honor the Code, the litigant might be able to raise the disqualification issue with a presiding judge or another (often superior) court. If, however, the judge sits on a state court of last resort and fails to honor the Code (and the due process norms embedded in it), the litigant in reality has no recourse and the Code has no further enforcement mechanism—save due process. Disciplining the judge after-the-fact does not assist the litigant and may not adequately restore public confidence in the court (especially following a highly publicized decision); the disciplinary process never alters the decision in the underlying case.[38] State

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Justice Castille's office failed to disclose this agreement to write a letter to the parole board in exchange for the co-defendant's testimony, and the co-defendant falsely denied its existence at trial (and the trial prosecutor never corrected this false testimony). *See generally Giglio v. United States*, 405 U.S. 150 (1972) (concluding that failure to disclose such information may violate due process).

[38] In any event, no evidence suggests that Chief Justice Castille was ever investigated or disciplined for his conduct.

judges are nevertheless bound by state law and the Constitution (including the Code and due process, respectively), and the proper, timely, and essentially only course for an aggrieved litigant in these circumstances is to raise the due process violation.

In sum, although due process is not violated whenever a judge violates the Code, these extreme circumstances violate due process and warrant a remedy. Having personally authorized this capital prosecution and having general supervisory authority over the deputies whose misconduct was at issue, Chief Justice Castille could not be, or appear to be, the disinterested and impartial jurist required by due process.[39] Simply put, the "serious risk of actual bias—based on objective and reasonable perceptions"—is intolerably high when the same person has occupied the conflicting positions of both prosecutor and judge in the same controversy.[40] *Caperton*, 129 S. Ct. at 2263–64.

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[39] "These are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 129 S. Ct. at 2263 (quoting *Withrow*, 421 U.S. at 47); *see also id.* at 2266 (stating that recusal is required whenever there is an "unconstitutional probability of bias"). The Court has been quite clear, however, that actual bias is not required for reversal. *Id.* at 2263.

[40] *See, e.g.*, *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 534) (noting that due process is violated in a "'situation in which an official . . . occupies two practically and seriously inconsistent positions, one partisan and the other judicial'"); *Murchison*, 349 U.S. at 137 ("Having been a part of that [accusatory process] a judge cannot be . . . wholly disinterested in the conviction or acquittal of those accused. . . . Fair trials are too important a part of our free society to let prosecuting

II.

THE REQUIREMENTS OF THE CODE AND DUE PROCESS APPLY TO JUDGES IN MULTIMEMBER TRIBUNALS.

That the judge whose conduct is at issue served on a multimember tribunal does not detract from the analysis above. The recusal provisions apply to each individual judge, including Pennsylvania justices, and the requirements of the Code and due process do not vanish simply because the disqualified judge happens to sit on an appellate or other multimember tribunal. Indeed, in addition to the generally greater visibility of appellate courts to the public eye, appellate decisions usually are collaborative and influenced by the composition of judges. *See, e.g.*, *Aetna*, 475 U.S. at 833 (Blackmun, J., concurring) (noting that "the collegial decision-making process that is the hallmark of multimember courts [might lead the opinion's] author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. And because this collegial exchange of ideas occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case."); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals*, 157 PENN. L. REV. 1319, 1322 (2009) (noting that "federal appeals court judges do *not* vote the same way regardless of panel composition, but instead appear to be influenced by the preferences of the other judges with whom they

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judges be trial judges of the charges they prefer.") (footnote omitted).

sit when deciding a case" and citing several studies finding such so-called "panel effects"). Thus, regardless of whether a judge sits alone or on a multimember panel, the damage to the litigant's and the public's confidence in the judiciary and to the fairness of the proceeding is largely the same whenever a judge continues to participate in a case from which that judge should be disqualified.[41]

Even if the applicable recusal provisions had a harmless error exception (which they do not), this would be an inappropriate case for such an exception. Here, the disqualified judge is the Chief Justice, who serves as the court's most prominent member, exercises administrative oversight, and assigns certain opinions.[42] As part of the "collegial decision-making process," *Aetna*, 475 U.S. at 833

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[41] Analogously, this Court has not hesitated to vacate a decision of a circuit court even though only "one member of that court had been prohibited by statute from taking part in the hearing and decision of the appeal." *Nguyen v. United States*, 539 U.S. 69, 78 (2003) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962); *Am. Constr. Co. v. Jacksonville, T. & K. W R. Co.*, 148 U.S. 372 (1893)).

[42] Penn. Sup. Ct. Internal Operating Procedures § 63.3(A)(3) (1994) ("The Chief Justice shall preside at the conference [discussing cases], lead the Court's discussion, and call for a tentative vote on the decision of each case. . . ."); *id.* § 63.3(B) ("All motions, petitions and applications will be assigned to the Chief Justice, except for emergency motions, motions addressed to a single Justice, and applications for stay of execution in capital cases."); *cf.* PENN. CODE OF JUDICIAL CONDUCT R. 2.12(B) (2014); MODEL CODE R. 2.12(B) (2007) (noting the increased responsibilities of supervisory judges). Of note, should this Court reverse and remand, Pennsylvania has a new Chief Justice (and several new associate justices).

(Blackmun, J., concurring), the Chief Justice voted against his former adversaries (Petitioner and his counsel) in essentially the same case in which he had previously participated as head prosecutor. He then wrote a concurrence (which another justice joined) criticizing his former adversaries and defending his former employees (whom he had an ethical duty to supervise).[43] Thus, the appearance and actuality of the disqualified judge's influence on the multimember court should preclude a deviation from the requirements of the recusal provisions and due process.

In sum, Chief Justice Castille's full participation as a member of his collaborative court unconstitutionally tainted the judgment below with a serious risk and appearance of bias.

CONCLUSION

For the reasons set out above, *amicus curiae* the American Bar Association respectfully requests the

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[43] After Chief Justice Castille switched from authorizing and overseeing Petitioner's capital prosecution to judging Petitioner's collateral appeal raising misconduct in the DA's office, Chief Justice Castille, in his concurring opinion, criticized the trial court for its "frivolous *Brady* claim," for "losing sight . . . of its role as neutral arbiter," and for permitting discovery into "the government's files" (including files of the DA's office during the time that Chief Justice Castille headed that office). *See Commonwealth v. Williams*, Nos. 668-69 CAP (Pa. Sup. Ct. Dec. 15, 2014) (Castille, C.J., concurring) (expressing dismay that the trial court took the "lawless step of essentially opening the prosecutor's files to appellee's counsel").

Court to reverse the judgment of the Supreme Court of Pennsylvania.

RESPECTFULLY SUBMITTED this 4th day of December, 2015.

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