CAPITAL CASE
No. 18-756

IN THE

Supreme Court of the United States

WILLIAM GITTERE, WARDEN, *et al.*,
Petitioners,

v.

JOSE LORENTE ECHAVARRIA,
Respondent.

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

BRIEF IN OPPOSITION

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April 12, 2019

QUESTION PRESENTED

In 1986, FBI Special Agent John Bailey investigated Jack Lehman, Chairman of the Colorado River Commission, for corruption, fraud, and perjury. In 1988, the U.S. Attorney's Office for the District of Nevada referred evidence from the investigation to the Nevada Attorney General's Office and Gaming Control Board. No state charges were filed, however, and Lehman was thereafter appointed as a state-court judge.

Two years later, in 1990, Jose Echavarria was tried and convicted for Agent Bailey's murder. Lehman was the presiding judge, and the FBI was deeply involved in the case. For example, during a suppression hearing, Judge Lehman had to determine whether FBI agents were complicit in torturing Echavarria to coerce his confession. Judge Lehman never disclosed Agent Bailey's investigation to Echavarria. Instead, Echavarria first discovered these facts during post-conviction proceedings. He then raised a constitutional claim based on the risk of judicial bias, but the Nevada Supreme Court failed to adjudicate it on the merits.

The question presented is:

Whether the Ninth Circuit correctly concluded, after considering the unique facts of this case, that Judge Lehman's failure to recuse from Echavarria's criminal trial created a constitutionally intolerable risk of bias.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are William Gittere, Warden of the Ely State Prison, and Aaron D. Ford, Nevada Attorney General. Respondent is Jose Lorente Echavarria, an inmate at Ely State Prison. No party is a corporation.

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INTRODUCTION

Petitioners ask this Court to review whether "the Nevada Supreme Court's application of law of the case" was "an adjudication of Echavarria's compensatory bias claim on the merits." Pet. i. But they do not identify a circuit split, show any conflict with this Court's precedents, or claim this case presents an "important" federal question. Instead, petitioners contend that the Ninth Circuit "err[ed]" in concluding the Nevada Supreme Court "never addressed the relevant claim." *Id.* at 1. Petitioners acknowledge these issues are "fact-intensive" and "case-specific," but still insist that "[c]orrect application" of the Antiterrorism and Effective Death Penalty Act (AEDPA) "warrants this Court's consideration." *Id.* at 2. Petitioners merely request error correction on factbound issues, which renders their petition uncertworthy. But there are additional reasons to deny review.

First, petitioners' question presented rests on faulty foundations. S. Ct. R. 15.2. They believe "actual bias" is always required "to prevail on a theory of compensatory bias." Pet. 20 (citing *Bracy* v. *Gramley*, 520 U.S. 899 (1997)). Petitioners thus fault the Ninth Circuit for addressing "risk of bias"—a claim, they say, Echavarria never "present[ed]" in state or federal court. *Id.* at 1. Petitioners are mistaken. This Court's precedents establish an objective inquiry into the risk of judicial bias. See, *e.g.*, *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986); *Withrow* v. *Larkin*, 421 U.S. 35 (1975); *In re Murchison*, 349 U.S. 133 (1955). Echavarria fairly presented such a claim in state court, and later raised the same issue in federal habeas proceedings. Indeed, petitioners previously

recognized that Echavarria's claim concerned "an appearance of impropriety." C.A. Doc. 12-31 at 142.

Second, this case is a poor vehicle for further review. The petition is premised on Echavarria's purported failure to present a risk-of-bias claim in state court. Pet. 1. Petitioners suggest this means Echavarria's claim was "procedurally defaulted" (*id.* at 12), but they did not raise that argument in district court or their opening brief on appeal. Any contention based on procedural default was therefore waived. Additionally, the answer to petitioners' question presented—whether the Nevada Supreme Court's decision was entitled to deference—would be wholly advisory. Even "addressing the question under the deferential standard of AEDPA," the Ninth Circuit would have held "Echavarria's right to due process was violated." Pet. App. 29. Thus, this Court's review would have no practical impact on the judgment below.

Third, the decision below was correct. Petitioners maintain this Court should "reverse" (Pet. 24) because, in their view, the Ninth Circuit reached the wrong result in this particular case (*id.* at 16–26). But petitioners' merits arguments do not provide a basis for certiorari, S. Ct. R. 10, and are wrong in any event. The Ninth Circuit correctly applied *de novo* review and faithfully followed this Court's judicial disqualification precedents. Pet. App. 22–31.

The Ninth Circuit's decision makes perfect sense, given the unique facts of this case: Echavarria was accused of murdering Agent Bailey, who personally investigated Judge Lehman for various crimes. The FBI was also deeply involved and invested in the prosecution. For instance, Judge Lehman had to decide whether FBI agents were complicit in torturing Echavarria to coerce his confession. The average judge in Lehman's position would have recused. The

Constitution requires judges to hold the balance between prosecution and defense. It matters not whether the average judge would be biased *against* the prosecution, or *for* the prosecution to disguise such impartiality. A judge in those circumstances cannot be expected to fairly call balls and strikes.

In sum, petitioners seek review of a question that is not actually presented to correct an error that did not actually occur. The petition should be denied.

STATEMENT

A. Agent Bailey investigates Lehman and discovers evidence of corruption, fraud, and perjury.

1. The facts underlying this case concern two suspicious real-estate transactions, with unusually beneficial terms. One involved the Colorado River Commission of Nevada (CRC), and the other involved the American Bank of Commerce. Pet. App. 10–11. Both transactions involved the same players: Jack Lehman (CRC's Chairman), Robert Bugbee (a CRC Commissioner), and John Midby (a land developer). *Id.* Lehman and Bugbee were also on the Bank's corporate board. *Id.* at 11.

In 1985, FBI Special Agent John Bailey personally investigated Lehman for fraud, corruption, and perjury. Pet. App. 10. Agent Bailey believed the CRC was "selling state-owned land for a fraction of its actual value, allowing the buyers to resell at substantial profits." *Id.* He learned that the CRC sold a 120-acre parcel in Laughlin, Nevada to Midby for $2,500 per acre (while adjacent land sold for $45,000 per acre). *Id.* at 10–11. Lehman and Bugbee were the only members of the CRC who "supported Midby's bid for the Laughlin property from the beginning." *Id.*

Before bidding on the Laughlin property, Midby leased "5,000 square feet of commercial space" to the Bank. Pet. App. 11. Bugbee negotiated the deal, and Midby eventually dropped his price to $0.85 per square foot (from $1.05 to $1.15); agreed to $80,000 to $90,000 for improvements paid for by the Bank (instead of $165,000); and included 1,000 square feet rent-free for a year. *Id.* Lehman later testified—under oath before the Nevada Gaming Control Board—that he had "[a]bsolutely nothing" to do with the lease. *Id.* at 12. But the FBI obtained "three letters signed by Lehman . . . in which [he] discussed and negotiated terms of the Midby lease," suggesting that he "may have committed perjury." *Id.*

2. The U.S. Attorney's Office for the District of Nevada declined to prosecute Lehman under the Hobbs Act and deemed perjury "a matter for state prosecution." Pet. App. 12. The FBI wrote to the U.S. Attorney's office, recommending they give state officials "documents showing that Lehman may have committed perjury." *Id.* The FBI intended to "turn [the documents] over" to the Gaming Control Board's Chairman, who "expressed an intense interest." *Id.* Agent Bailey wrote a memorandum, recommending the matter remain "[p]ending" until authorization was provided "to present state officials with evidence of perjury . . . with respect to Lehman." *Id.* at 12–13. In 1988, U.S. District Judge Lloyd D. George authorized releasing the documents to the Nevada Attorney General's Office and Gaming Control Board. *Id.* at 13.

No state charges were filed. Pet. App. 13. Lehman was thereafter appointed to the Eighth Judicial District Court of the State of Nevada.

B. Echavarria shoots Agent Bailey during a robbery attempt, and the FBI becomes extensively involved in the case.

1. In 1990, Jose Echavarria attempted to rob a bank in Las Vegas, Nevada. Pet. App. 3–4. Agent Bailey was at the bank on "unrelated FBI business." *Id.* at 3. Echavarria "tried to rob a teller at gunpoint," but, when she screamed, he abandoned the attempt and started walking out. *Id.* Bailey "drew his gun, identified himself as an FBI agent, and ordered Echavarria to stop." *Id.* at 4. Echavarria continued walking, however, and Agent Bailey "fired a shot" that shattered the bank's glass door. *Id.* Before he could be detained, Echavarria "knocked Agent Bailey to the ground," "retrieved his gun," and "shot [him] three times." *Id.* Carlos Gurry drove the "getaway car," but was captured by local authorities. *Id.* Echavarria fled to Juarez, Mexico. *Id.* Agent Bailey died at a hospital from his wounds.

2. The FBI was deeply invested in apprehending Echavarria. Pet. App. 4. Within a day, the FBI contacted Jose Rubalcava, Commandante of the Chihuahua State Judicial Police, for "assistance in locating and arresting Echavarria." *Id.* Rubalcava had a "longstanding cooperative arrangement with the FBI" and "assigned twenty-eight agents to the task." *Id.* Mexican authorities arrested Echavarria, and, that night, "four agents" from the FBI's office in El Paso, Texas "arriv[ed] at the Juarez police station." *Id.* at 4–5.

Echavarria testified that he was tortured by Mexican authorities. Pet. App. 6–9. Officers "hit him while he was in the car" being transported to the station. *Id.* at 6. On arrival, Rubalcava "advised [Echavarria] to cooperate, or else [his] former girlfriend" would "pay[] the consequences." *Id.* Echavarria refused. He was then "taken to the second floor of the police sta-

tion, where his clothes were taken off." *Id.* Echavarria was "told to spread his legs," and "[t]he Mexican police beat him in the face . . . and between the legs." *Id.* After about an hour, "the Commandante and two FBI agents" asked Echavarria if he was "ready to make a confession." *Id.* Echavarria refused again. He was taken back upstairs, where he was "stripped," "blindfolded," and "beaten in the face and between the legs." *Id.* Echavarria heard someone "cock a gun next to his ear" and was "told he would be shot and thrown in the river." *Id.* Echavarria also heard "what sounded like a welding machine," and "the officers shocked [his] 'private parts.'" *Id.* at 6–7. Echavarria was then taken to the basement, where his former girlfriend and her sister were being detained. *Id.* Officers threatened Echavarria's former girlfriend, claiming they would "beat" her and do "obscene things." *Id.*

Echavarria signed a written confession the next morning, which included information that he did not know. Pet. App. 5, 8–9. That day, Mexican authorities "formally" turned Echavarria over to the FBI at the border. *Id.* at 9. Agents processed Echavarria in El Paso and accompanied him to Las Vegas, where local authorities took custody. *Id.* FBI agents remained with Echavarria throughout booking. *Id.* Echavarria and Gurry were indicted in state court on five counts, including murder with a deadly weapon. *Id.* at 16.

3. The case was of "great importance" to the FBI because Agent Bailey was the victim. Pet. App. 4. The FBI was "involved in developing witness testimony." *Id.* at 9. Agents "interviewed about a dozen witnesses," including the bank teller and Echavarria's former girlfriend. *Id.* An FBI agent was present when the teller reviewed a "photographic lineup." *Id.* The FBI also "actively developed physical evidence" for the prosecution. *Id.* FBI agents executed a search war-

rant on Echavarria's "getaway vehicle," recovering "[g]lass fragments and fingerprints" that were "sent to the FBI laboratory in Washington." *Id.* An FBI fingerprint specialist "matched Echavarria's prints to those found in the car." *Id.* An FBI forensic geologist matched the glass fragments to those "from the shattered door of the bank." *Id.* at 9–10. An FBI ballistics expert "recovered [a] .38 caliber revolver and matched it to bullets removed from Agent Bailey's body." *Id.* at 10. And an FBI language specialist "translated Echavarria's confession from Spanish to English." *Id.*

C. Judge Lehman fails to recuse from the case, and Echavarria is convicted and sentenced to death.

1. In 1990, Judge Lehman presided over Echavarria's trial. Pet. App. 16. Before proceeding, Judge Lehman "held a conference call" with Deputy District Attorney William Henry and David Wall, counsel for co-defendant Gurry. *Id.* at 13. Echavarria's counsel was not included. Judge Lehman revealed that "a reporter had asked him whether he would recuse" because he was "a member of the [CRC] at the time it was investigated by the FBI." *Id.* at 13–14. Similarly, Judge Lehman's "wife had been approached . . . and told that [he] ought not to be presiding over the case." *Id.* at 14. Henry and Wall did not seek recusal, but it appears Judge Lehman "did not fully explain . . . the nature and extent of the FBI's investigation." *Id.*

Less than a month later, FBI agents met with District Attorney Rex Bell and Henry to "provide[] information about [their] investigation of Judge Lehman." Pet. App. 14. Bell and Henry were advised about the investigation to "evaluate its impact for use by the defense counsel . . . based on due process . . . considerations and claiming judicial bias." *Id.* Henry "suggest[ed] a chambers meeting to discuss

this with all counsel present." *Id.* at 15. But no meeting took place, and it is undisputed that Echavarria "did not learn about the FBI's investigation of Judge Lehman until well after trial and sentencing." *Id.*

About a week later, the FBI wrote a "follow-up memorandum summarizing the information it had compiled about Judge Lehman" regarding "the CRC, the bank, and Lehman's testimony before the Gaming Control Board." Pet. App. 15. The memorandum contained other information about an allegedly "fraudulent land sale," where Lehman was part of a buying group that "stood to 'collect on title insurance as an innocent buyer once the fraud was divulged.'" *Id.* The memorandum also noted "a complaint alleging that Lehman, acting for the CRC, extended a time limit for an airport project 'so that another firm with whom [he] had an interest could obtain the contract.'" *Id.*

2. Before trial, Echavarria filed a motion to suppress. Pet. App. 16. Echavarria claimed Mexican authorities coerced his confession through torture, and the FBI was complicit. *Id.* at 6–9. During the hearing, a former DEA employee testified that torture was a "regular technique" Mexican authorities used to "induce [a] person to say what they wanted." *Id.* at 5. An FBI agent also testified that Juarez authorities had a reputation for "obtaining statements through torture." *Id.* at 5–6. Still, FBI agents claimed they only "interviewed Echavarria for about thirty minutes" and saw no "indications of physical abuse." *Id.* at 7–8. Judge Lehman denied the motion. *Id.* at 16.

Echavarria was convicted and sentenced to death. Pet. App. 16. He moved for a new trial based on juror misconduct, and, in response, Judge Lehman "threatened to file a bar complaint against Echavarria's counsel for interviewing jury members in connection with the motion." *Id.* Judge Lehman then recused

himself from hearing the motion, and another judge denied Echavarria's new-trial request. *Id.*

3. The Nevada Supreme Court affirmed Echavarria's conviction and sentence. *Echavarria* v. *State*, 839 P.2d 589 (Nev. 1992) (per curiam). Echavarria asserted various claims on direct appeal, including "actual judicial bias" based on Judge Lehman's "hostility" and "enraged rebukes" to counsel. Pet. App. 16. At this stage, "Echavarria did not yet know of any connection between Judge Lehman and Agent Bailey." *Id.* Without specifically addressing judicial bias, the court rejected Echavarria's claim. *Echavarria*, 839 P.2d at 599. This Court denied certiorari. *Echavarria* v. *Nevada*, 508 U.S. 914 (1993) (mem.).

D. Echavarria's petitions for state post-conviction relief are denied, and the Nevada Supreme Court affirms.

1. Judge Lehman denied Echavarria's first petition for post-conviction relief. Pet. App. 17. The Nevada Supreme Court dismissed his appeal and denied rehearing. *Id.* Next, Echavarria filed a *pro se* petition for a writ of habeas corpus in the U.S. District Court for the District of Nevada. *Id.* The district court appointed counsel, and Echavarria filed an amended petition. *Id.* Echavarria then learned, for the first time, about Agent Bailey's investigation of Judge Lehman "through discovery in th[e] federal habeas action." *Id.* at 51. The court "allowed Echavarria to subpoena the FBI," and stayed proceedings to "allow him to present to the state court the evidence he discovered about the investigation." *Id.* at 17.

With this evidence, Echavarria filed a second petition for post-conviction relief in state court. Pet. App. 17. Echavarria claimed that "the trial court's bias" deprived him of the "federal constitutional guaran-

tee[] of due process." Pet. for Writ of Habeas Corpus at 81, *Echavarria* v. *McDaniel*, No. 90-C-95399-C (Nev. Dist. Ct. May 10, 2007). As "supporting facts," Echavarria provided an extensive discussion of Agent Bailey's investigation of Judge Lehman for corruption, fraud, and perjury. *Id.* at 81–94. The court denied relief based on "the law of the case doctrine." Pet. App. 17. Echavarria then filed a third petition for post-conviction relief, which was also denied. *Id.*

2. The Nevada Supreme Court affirmed the denial of Echavarria's second and third petitions for post-conviction relief. Pet. App. 126–45. On appeal, Echavarria again pressed his judicial-bias claim. C.A. Doc. 12-31 at 174–89. He maintained the FBI's investigation created a potential for bias, *e.g.*, Judge Lehman's rulings "can best be explained by a desire to appear as a law and order judge to Agent Bailey's employer." *Id.* at 185. To support his claim (*id.* at 184–85), Echavarria cited *Richardson* v. *Quarterman*, 537 F.3d 466 (5th Cir. 2008), and *Bracy* v. *Schomig*, 286 F.3d 406 (7th Cir. 2002) (en banc). As the Seventh Circuit held, this Court's "cases tell us that ordinarily 'actual bias' is not required, the appearance of bias is sufficient to disqualify a judge." *Bracy*, 286 F.3d at 411; see also *Richardson*, 537 F.3d at 475.

The Nevada Supreme Court acknowledged that Echavarria "did not learn of Agent Bailey's investigation until well after trial," but stated that "the incidents he identifies as evidence of judicial bias were largely raised on direct appeal and rejected summarily by this court." Pet. App. 138–39. The court characterized Echavarria's arguments as "[n]ew information as to the source of the alleged bias" and "not so significant . . . [to] abandon the doctrine of the law of the case." *Id.* at 139. This Court denied certiorari. *Echavarria* v. *Nevada*, 563 U.S. 922 (2011) (mem.).

E. The district court grants Echavarria's federal habeas petition, and the Ninth Circuit affirms.

1. The district court granted Echavarria's petition for a writ of habeas corpus. Pet. App. 32–123. Back in federal court, Echavarria filed a second amended habeas petition. *Id.* at 39. He claimed two bases for judicial disqualification: (1) Judge Lehman's disparaging comments amounted to actual bias; and (2) Agent Bailey's investigation of Judge Lehman created an intolerable risk of bias. *Id.* at 49. As the State recognized, Echavarria claimed "the FBI investigation of the CRC creates an appearance of impropriety that required disqualification of the trial judge." C.A. Doc. 12-31 at 142. The State did not argue procedural default or failure to exhaust remedies. *Id.* at 140–45.

The district court found that the Nevada Supreme Court ruled "on the merits" of Echavarria's actual-bias claim, and its decision "appear[ed] objectively reasonable." Pet. App. 51. But the court also found the Nevada Supreme Court's denial of Echavarria's risk-of-bias claim was "objectively unreasonable." *Id.* at 52–57. As the district court explained, the Nevada Supreme Court "did not consider" the risk of judicial bias—*i.e.*, "whether the relationship between the trial judge, the FBI and the murdered FBI agent, and the FBI's involvement in the case would give rise to a possible temptation to the average judge to not hold the balance nice, clear and true." *Id.* at 57.

The district court thus applied *de novo* review to Echavarria's risk-of-bias claim, and concluded Judge Lehman's failure to recuse violated due process. *Id.* For the court, it was an "inescapable conclusion that the risk of bias on the part of the trial judge in this case was too high to allow confidence that the case was adjudicated fairly, by a neutral and detached ar-

biter, consistent with the Due Process Clause." *Id.* at 59. The court ordered retrial or release, and stayed its judgment pending appeal. *Id.* at 122.[1]

2. The Ninth Circuit affirmed. Pet. App. 1–31. The court first recognized that AEDPA requires "significant deference to the state court's last reasoned decision." *Id.* at 24. But such deference only applies to claims "adjudicated on the merits in State court proceedings." *Id.* (quoting 28 U.S.C. § 2254(d)). The Nevada Supreme Court's "explanation of its decision on state habeas shows that it adjudicated only Echavarria's claim of actual bias," not "his distinct claim of risk of bias." *Id.* at 24–25. By invoking "law of the case" from direct appeal, the court logically "could not have addressed Echavarria's distinct and later-raised claim of risk of bias, based on Agent Bailey's investigation." *Id.* at 25–26. Thus, like the district court, the Ninth Circuit applied *de novo* review. *Id.* at 27.

Next, reciting this Court's precedents, the Ninth Circuit explained that due process prohibits both actual bias and "the *probability* of unfairness." Pet. App. 22 (quoting *Murchison*, 349 U.S. at 136). The court emphasized it need not conclude a judge was actually biased. *Id.* at 23 (citing *Aetna*, 475 U.S. at 825). Rather, courts must ask whether "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* (quoting *Hurles* v. *Ryan*, 752 F.3d 768, 788 (9th Cir. 2014)). An "undue risk of bias" is sufficient. *Id.* (citing *Caperton*, 556 U.S. at 881). The court also

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[1] The district court also reviewed Echavarria's claim that his confession was coerced through torture. Pet. App. 61–83. Given Judge Lehman's connection to the FBI, the court would have reviewed this claim *de novo*. *Id.* at 87. Ultimately, the court denied Echavarria's coerced confession claim without prejudice. *Id.*

identified that Echavarria claimed "a constitutionally intolerable risk of bias, based on FBI Agent Bailey's criminal investigation of Judge Lehman." *Id.* at 24.

The Ninth Circuit concluded that Echavarria was denied due process. Pet. App. 29. The court explained that "Judge Lehman personally had been criminally investigated by the very FBI agent that Echavarria was accused of killing, and the case required Judge Lehman to determine, *inter alia*, whether FBI agents had known about or been involved in the use of torture in obtaining Echavarria's confession." *Id.* at 30. "An average judge in [Lehman's] position," the court emphasized, "would have feared that rulings favoring Echavarria, tipping the outcome towards acquittal or a sentence less than death, could cost him his reputation, his judgeship, and possibly his liberty." *Id.* at 29. Under those circumstances, the court found the risk of bias "extraordinary in both its nature and severity." *Id.* at 30. The court also stated that, even "addressing the question under the deferential standard of AEDPA," it would "hold that Echavarria's right to due process was violated." *Id.* at 29.

The State did not seek rehearing en banc.

REASONS FOR DENYING THE PETITION

I. THE PETITION DOES NOT PRESENT ANY ISSUE THAT WARRANTS THIS COURT'S REVIEW.

Petitioners do not argue that the Ninth Circuit's decision presents a circuit split, demonstrate any conflict with this Court's precedents, or claim this case presents an important federal question.[2] Instead,

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[2] Petitioners suggested a "hold" for *Gordon* v. *Lafler*, No. 17-1404. They did not support that contention—let alone claim the

they claim the decision below "is in conflict with the record" (Pet. 14), and invite this Court to engage in "application of the principles . . . outlined for applying AEDPA" (*id.* at 2). For this reason alone, certiorari should be denied. See *City & Cty. of S.F.* v. *Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part) ("[W]e are not, and for well over a century have not been, a court of error correction."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). But there are additional reasons to deny review: (1) petitioners' question presented rests on false premises; and (2) this case is a poor vehicle for further review.

A. Petitioners' question presented rests on mistaken legal and factual bases.

1. Petitioners insist that *Bracy*, 520 U.S. 899, demands "a showing of actual bias to prevail on a theory of compensatory bias." Pet. 20; *id.* at 15 ("[A]ll *Bracy* required of the state court when addressing a theory of compensatory bias was to determine whether Echavarria showed actual bias in his case."). Based on this premise, petitioners contend "the Ninth Circuit wrongly determined that the Nevada Supreme Court did not decide Echavarria's compensatory bias claim." *Id.* at 21. Petitioners misstate the law.

Federal courts conduct an "objective" inquiry into judicial bias under the Due Process Clause, as the Ninth Circuit did here (Pet. App. 22–23). This Court has recognized "various situations . . . [where] experience teaches that the probability of actual bias on the

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issues in *Gordon* are sufficiently important and recurring. Pet. 14 n.3. In any event, this Court denied certiorari in *Gordon*, 139 S. Ct. 785 (2019) (mem.), and should deny this petition too.

part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47.

Moreover, there is no confusion in the lower courts on the legal standard. Every circuit to consider judicial-bias claims has recognized that evidence of actual, subjective bias is not necessary. See, *e.g.*, *Rivera* v. *Superintendent Houtzdale SCI*, 738 F. App'x 59, 64 (3d Cir. 2018); *Alston* v. *Smith*, 840 F.3d 363, 368 (7th Cir. 2016); *Norris* v. *United States*, 820 F.3d 1261, 1265–66 (11th Cir. 2016); *Coley* v. *Bagley*, 706 F.3d 741, 750 (6th Cir. 2013); *United States* v. *Basciano*, 384 F. App'x 28, 33 (2d Cir. 2010); *In re Morgan*, 573 F.3d 615, 624 (8th Cir. 2009); *United States* v. *Nickl*, 427 F.3d 1286, 1298 (10th Cir. 2005); *United States* v. *Couch*, 896 F.2d 78, 82 (5th Cir. 1990); *Aiken Cty.* v. *BSP Div. of Envirotech Corp.*, 866 F.2d 661, 678 (4th Cir. 1989).

The absence of a split is unsurprising, given this Court's clear guidance. Due process demands "[a] fair trial in a fair tribunal." *Murchison*, 349 U.S. at 136. This includes "an absence of actual bias in the trial of cases"—but our system also "endeavor[s] to prevent even the probability of unfairness." *Id.* The standard is whether an interest "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true." *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). This may "sometimes bar trial by judges who have no actual bias." *Murchison*, 349 U.S. at 136; see also *Aetna*, 475 U.S. at 825 ("[W]e are not required to decide whether in fact [the judge] was influenced.").

This Court's decision in *Caperton* reiterated the principle that a "serious risk of actual bias" is sufficient to violate due process. 556 U.S. at 884. There was no need to consider "subjective findings of impartiality." *Id.* at 882. Instead, "the Due Process Clause

has been implemented by objective standards that do not require proof of actual bias." *Id.* at 883. The question was whether, "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 883–84 (quoting *Withrow*, 421 U.S. at 47).[3]

Bracy therefore was not the "preeminent decision" governing Echavarria's claim. Pet. 1. Nor did it hold that, absent a showing of actual bias, "compensatory bias" theories are "too speculative." *Id.* at 18. This Court granted certiorari in *Bracy* to consider whether the "petitioner should have been granted discovery under Habeas Corpus Rule 6(a)." 520 U.S. at 903. He alleged that the judge presiding over his criminal trial regularly accepted bribes from defendants, which "induced a sort of compensatory bias against *defendants* who did *not* [pay]." *Id.* at 905. This Court held that the petitioner "establish[ed] 'good cause' for discovery," even noting there was objective testimony from another trial—concerning the judge's potential

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[3] Petitioners insist that some circuits recognize due process violations only where there is actual bias, or in limited circumstances "compelling disqualification." Pet. 15–16 n.4, 24. But petitioners' cases all recognize that actual bias is not necessary to violate due process. *See Whisenhant* v. *Allen*, 556 F.3d 1198, 1209 (11th Cir. 2009) (noting probability of actual bias sufficient); *Buntion* v. *Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) ("Almost every bias case before the Supreme Court that has found a due process violation has done so based on presumptive bias."); *Railey* v. *Webb*, 540 F.3d 393, 399–400 (6th Cir. 2008) (noting examples where this Court recognized "that something less than actual bias violates constitutional due process"); *Kinder* v. *Bowersox*, 272 F.3d 532, 540 (8th Cir. 2001) (noting "the likelihood of appearance of bias, even in the absence of actual bias, may prevent a defendant from receiving a fair trial").

for engaging in "retaliat[ion]"—that gave "support to petitioner's compensatory-bias theory." *Id.* at 905 n.5, 909. Putting any "difficulties of proof aside," this Court said "there is no question" compensatory bias "would violate the Due Process Clause." *Id.* at 905.

Rippo v. *Baker*, 137 S. Ct. 905 (2017) (per curiam), is instructive. There, a criminal defendant learned that the presiding judge was targeted by a "federal bribery probe," and believed the prosecutor's office was involved in both matters. *Id.* at 906. The defendant moved for disqualification, claiming the "judge could not impartially adjudicate a case in which one of the parties was criminally investigating him." *Id.* The Nevada Supreme Court "likened" the claim to compensatory bias, and denied an evidentiary hearing because the defendant could not show the judge was "actually biased in [his] case." *Id.* at 907 (quoting *Rippo* v. *State*, 368 P.3d 729, 744 (Nev. 2016)).

This Court summarily vacated the Nevada Supreme Court's judgment because it "applied the wrong legal standard." *Rippo*, 137 S. Ct. at 907. "Under our precedents," this Court said, "the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias.'" *Id.* (quoting *Aetna*, 475 U.S. at 825). Recusal 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.'" *Id.* (quoting *Withrow*, 421 U.S. at 47). This Court further explained that "*Bracy* is not to the contrary," and "did not hold that a litigant must show as a matter of course that a judge was 'actually biased in [the litigant's] case.'" *Id.* (quoting *Rippo*, 368 P.3d at 744). The question is simply "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Id.* Put simply, in *Rippo*, the Nevada Supreme Court im-

properly re-characterized a risk-of-bias claim as a compensatory-bias claim. Petitioners implicitly attempt the same maneuver in this case, but any such re-characterization would be equally inappropriate.

Petitioners discount *Rippo* because it came down "after the Nevada Supreme Court rejected Echavarria's claim." Pet. 20 n.6. That misses the point: the Nevada Supreme Court's judgment was summarily vacated for failing to ask "the question [this Court's] precedents require." *Rippo*, 137 S. Ct. at 907. This "reflects the feeling of a majority of the Court that the lower court result [wa]s . . . clearly erroneous, particularly if there is controlling Supreme Court precedent to the contrary." S. Shapiro et al., *Supreme Court Practice* § 5.12(a), at 345 (10th ed. 2013); see also *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) ("[S]ummary reversal is . . . usually reserved . . . for situations in which the law is settled and stable."). Thus, *Rippo* simply confirmed what this Court's precedents had already established. 137 S. Ct. at 907 (discussing *Bracy*, 520 U.S. 899, *Aetna*, 475 U.S. 813, and *Withrow*, 421 U.S. 35).

2. Petitioners nevertheless insist the Nevada Supreme Court was not required to apply an "objective" standard. Pet. 21. In their view, Echavarria developed "a new theory for relief on appeal," and the Ninth Circuit addressed a claim that was "not actually present[ed]" in state or federal court. *Id.* at 1, 12. On that premise, petitioners fault the Ninth Circuit for treating Echavarria's direct-appeal claim as one of "actual bias," and his collateral claim as one of "implied bias." *Id.* at 12. Petitioners misstate the record.

Habeas petitioners must fairly present the "substance" of their federal claims to state courts. *Picard* v. *Connor*, 404 U.S. 270, 278 (1971). This "exhaustion" requirement gives state courts a "'fair oppor-

tunity' to apply controlling legal principles to the facts bearing upon [a] constitutional claim." *Anderson* v. *Harless*, 459 U.S. 4, 6 (1982) (per curiam). Claims are exhausted whether or not the state court "chooses" to address all of petitioner's theories. See *Smith* v. *Digmon*, 434 U.S. 332, 333 (1978) (per curiam).

Echavarria fairly presented his risk-of-bias claim. After learning about Agent Bailey's investigation, Echavarria filed a second petition for post-conviction relief in state court. Pet. App. 39–40. Echavarria claimed "the trial court's bias" deprived him of the "federal constitutional guarantee[] of due process," and, as "supporting facts," provided evidence of the FBI's investigation into Judge Lehman for corruption, fraud, and perjury. Pet. for Writ of Habeas Corpus, *supra*, at 81–94. Likewise, on appeal to the Nevada Supreme Court, Echavarria pressed his judicial-bias claim. C.A. Doc. 12-31 at 174–86. Among other authorities, Echavarria cited a federal appellate decision (*id.* at 184–85) explaining that "ordinarily 'actual bias' is not required, the appearance of bias is sufficient to disqualify a judge." *Bracy*, 286 F.3d at 411.

On this record, the Nevada Supreme Court had a fair opportunity to adjudicate Echavarria's risk-of-bias claim and correct the constitutional defect. Nothing more was required to fairly present the claim. See *Dye* v. *Hofbauer*, 546 U.S. 1, 3–4 (2005) (per curiam) (holding due process claim was fairly presented where petitioner's "brief set[] out the federal claim," "[o]utlin[ed] specific allegations of prosecutorial misconduct," and "cite[d] . . . federal cases").

Petitioners concede that Echavarria's state-court brief contained a "statement about implied bias" and "reference to a case addressing principles of implied bias." Pet. 9, 20. Moreover, in the federal habeas proceedings, petitioners acknowledged that Echavarria

asserted such a claim. The State's answer to Echavarria's second amended habeas petition explained that he "seeks to establish that the FBI investigation of the CRC creates an appearance of impropriety that required disqualification of the trial judge." C.A. Doc. 12-31 at 142. Without raising an exhaustion defense, the State further argued that Agent Bailey's investigation "does not in any way establish an appearance that the trial judge would be biased." *Id.*

B. This case is an exceedingly poor vehicle for further review.

1. Petitioners' question presented is premised on Echavarria's purported failure to "actually present" his judicial-bias claim in state court. Pet. 1. Although their view of the record is mistaken, petitioners nevertheless suggest that the Ninth Circuit erred in granting habeas relief because Echavarria's risk-of-bias claim was "procedurally defaulted." *Id.* at 12. This contention was waived long ago.

Procedural default is an affirmative defense. *Gray* v. *Netherland*, 518 U.S. 152, 165–66 (1996) (recognizing state's "obligat[ion] to raise procedural default as a defense, or lose the right to assert the defense thereafter"). Once waived, affirmative defenses are "exclu[ded] from the case" and "cannot be asserted on appeal." *Wood* v. *Milyard*, 566 U.S. 463, 470 (2012) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1278, pp. 644–45 (3d ed. 2004)).

Petitioners did not assert procedural default in the district court, nor did they raise the issue in their opening brief before the Ninth Circuit. Instead, the State argued Echavarria's risk-of-bias claim was procedurally defaulted for the first time in its reply brief. C.A. Doc. 63 at 14. Echavarria therefore did not have a meaningful opportunity to address the issue, and

the Ninth Circuit did not pass on the State's untimely argument. See *Martinez* v. *Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991) (finding waiver where state "advanced [a] new argument" for the first time "in its reply brief"). Thus, petitioners waived any contention based on procedural default. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (explaining the "traditional rule" precluding certiorari when "the question presented was not pressed or passed upon below").

2. Additionally, this Court's review would have no practical impact on the judgment below. Any opinion concerning the question presented—whether the Nevada Supreme Court's decision was "an adjudication of Echavarria's compensatory bias claim on the merits" (Pet. i)—would be advisory. The Ninth Circuit alternatively determined that, even "addressing the question under the deferential standard of AEDPA," it would have held "Echavarria's right to due process was violated." Pet. App. 29.

Contrary to petitioners' suggestion, the Ninth Circuit's and the district court's decisions are harmonious. Pet. 15. The Ninth Circuit properly reviewed the district court's order *de novo*, see *Hurles*, 752 F.3d at 777, and alternatively found that Echavarria would have been entitled to relief under AEDPA. Even assuming the Nevada Supreme Court adjudicated Echavarria's risk-of-bias claim on the merits (as the district court thought), the decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." See 28 U.S.C. § 2254(d).

Both lower courts recognized that the Nevada Supreme Court's ruling was unsustainable because it misapplied the legal standard. The court deemed Echavarria's new evidence "insufficient" because it only considered whether "Judge Lehman was actually bi-

ased." Pet. App. 26; see also *id.* at 57 ("The Nevada Supreme Court did not consider whether there was unconstitutional implied judicial bias."). By only considering actual bias, the Nevada Supreme Court failed to consider whether there was an objective, intolerable risk of bias. Contra *Caperton*, 556 U.S. at 883; *Aetna*, 475 U.S. at 825; *Withrow*, 421 U.S. at 47. That application of this Court's jurisprudence was "so lacking in justification" that the error was "well understood and comprehended in existing law beyond any possibility for fairminded disagreement." See *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011).

Petitioners nevertheless claim the Ninth Circuit "inverted" its AEDPA analysis. Pet. 1 (quoting *Sexton* v. *Beaudreaux*, 138 S. Ct. 2555 (2018) (per curiam)). This is an imagined error, and, in any event, *Sexton* is inapposite. In that case, the Ninth Circuit began its analysis of an ineffective assistance of counsel claim, see *Strickland* v. *Washington*, 466 U.S. 668 (1984), by "evaluat[ing] the merits *de novo*." *Sexton*, 138 S. Ct. at 2560. The court's memorandum disposition ignored reasonable grounds supporting the state court's summary decision, and only addressed AEDPA at the "end of its analysis." *Id.*; see *Beaudreaux* v. *Soto*, 734 F. App'x 387, 390–91 (9th Cir. 2017).

The decision below does not remotely resemble *Sexton*. Echavarria did not assert "a *Strickland* claim," where "deference to the state court should have been near its apex." *Sexton*, 138 S. Ct. at 2560. The Nevada Supreme Court did not issue a "summary decision" (Pet. App. 126–145), and the Ninth Circuit did not consider arguments Echavarria "never even made in his state habeas petition." *Sexton*, 138 S. Ct. at 2560. Moreover, the Ninth Circuit did not "tack[] on a perfunctory statement at the end of its analysis" regarding AEDPA. *Id.* The Ninth Circuit appropriately be-

gan its AEDPA analysis with the question of whether the Nevada Supreme Court adjudicated Echavarria's risk-of-bias claim on the merits. Pet. App. 24–27.

II. THE DECISION BELOW IS CORRECT.

Petitioners repeatedly argue that the Ninth Circuit erred "[b]y concluding that the Nevada Supreme Court never addressed the underlying claim on the merits." Pet. 16. Petitioners are wrong, and, by addressing the merits at such length, they betray the uncertworthiness of their petition. See *Ross* v. *Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). In any event, there was no error: the Ninth Circuit correctly applied *de novo* review and faithfully followed this Court's precedents. Pet. App. 22–31.

A. The Ninth Circuit correctly applied *de novo* review.

1. Petitioners claim the Ninth Circuit made an "end-run" around AEDPA's constraints. Pet. 16. Not so. The Ninth Circuit acknowledged that AEDPA requires federal courts "to give significant deference to the state court's last reasoned decision." Pet. App. 24. But that limitation only "applies to claims that were 'adjudicated on the merits in State court proceedings.'" *Id.* (quoting 28 U.S.C. § 2254(d)).

A decision is "on the merits" when the court actually "*evaluated* the evidence and the parties' substantive arguments." *Johnson* v. *Williams*, 568 U.S. 289, 302 (2013). When state courts fail to "reach the merits" of a federal claim, habeas review is "not subject to the deferential standard that applies under AEDPA." *Cone* v. *Bell*, 556 U.S. 449, 472 (2009). Instead, the claim is reviewed *de novo*. *Id.*

The Nevada Supreme Court did not adjudicate Echavarria's risk-of-bias claim on the merits. Pet. App. 24–27. Evidence "related to Agent Bailey's investigation," the court said, was "not so significant" to abandon law of the case. *Id.* at 139. Under the law-of-the-case doctrine, "a court involved in later phases of a lawsuit" cannot "re-open questions decided . . . by that court or a higher one in earlier phases." *Recontrust Co.* v. *Zhang*, 317 P.3d 814, 818 (Nev. 2014). But this only applies where the court "actually address[ed] and decide[d] the issue explicitly or by necessary implication." *Dictor* v. *Creative Mgmt. Servs., LLC*, 223 P.3d 332, 334 (Nev. 2010) (en banc). Logically, the Nevada Supreme Court "could not have addressed Echavarria's distinct and later-raised claim of risk of bias, based on Agent Bailey's investigation, because Echavarria had made no such claim on direct appeal." Pet. App. 26.

The Nevada Supreme Court's reasoning confirms that it never considered Echavarria's risk-of-bias claim. See *Johnson*, 568 U.S. at 302–03 ("If a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of the matter."). The court acknowledged that Echavarria "did not learn of Agent Bailey's investigation until well after trial," but incorrectly claimed the issue was "raised on direct appeal and rejected summarily." Pet. App. 138–39; see *Recontrust*, 317 P.3d at 818 ("Subjects an appellate court does not discuss, because the parties did not raise them, do not become the law of the case by default."). Because the court believed that Echavarria "merely refined" his original claim with "[n]ew information as to the source of the alleged bias" (Pet. App. 139), it only considered whether Judge Lehman was "actual-

ly, subjectively biased" (*id.* at 26). Accordingly, the Ninth Circuit correctly applied *de novo* review.

2. Petitioners claim the decision below cannot be "squared" with this Court's decision in *Johnson* v. *Williams*. Pet. 2. According to petitioners, the Ninth Circuit "sidestepped" *Johnson* by "concluding that the Nevada Supreme Court never decided Echavarria's claim." *Id.* at 15. But there is no "conflict" with *Johnson*, let alone one that would merit this Court's review. Shapiro, *Supreme Court Practice* § 4.5, at 251 ("To justify a grant of certiorari, the conflict must truly be direct and must be readily apparent from the lower court's rationale or result.").

At any rate, petitioners' invocation of *Johnson* is misplaced. True, this Court has held that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." *Johnson*, 568 U.S. at 301. But this presumption is rebuttable, and the "[m]ost important" consideration is whether the decision shows that the state court "understood itself" to be deciding a federal claim. *Id.* at 304–05. Thus, in *Johnson*, this Court held that the California Court of Appeal did not "overlook[]" a Sixth Amendment claim where it "discuss[ed]" a case that included lengthy analysis of relevant federal appellate decisions. *Id.* at 304–05.

The Nevada Supreme Court did no such thing here. Petitioners assert that, "[w]ithout engaging in a specific analysis," the court "described the nature of [Echavarria's] claim and denied it by citing its summary denial of [his] claim of bias from direct appeal." Pet. 14–15. That is incorrect. The Nevada Supreme Court did not cite or discuss any of this Court's precedents, any federal appellate decisions, or even mention Echavarria's risk-of-bias claim. Pet. App. 138–39. If an-

ything, the decision shows that the Nevada Supreme Court only understood itself to be adjudicating Echavarria's actual-bias claim. *Id.*

Petitioners also claim "*Richter* should apply" because the Nevada Supreme Court's "application of the law of the case to a prior summary denial should itself be viewed as a summary denial." Pet. 22. That is implausible. *Richter* cannot apply here because the Nevada Supreme Court's decision simply was not a summary disposition, *i.e.*, one "without opinion." *Wilson* v. *Sellers*, 138 S. Ct. 1188, 1195 (2018); see also *Richter*, 562 U.S. at 98 (discussing whether AEDPA applies when a state decision is "unaccompanied by an opinion explaining the reasons relief has been denied"). The court rendered a lengthy reasoned opinion in this case (Pet. App. 126–145), and the Ninth Circuit properly "review[ed] the specific reasons given by the state court." *Wilson*, 138 S. Ct. at 1192.

B. The Ninth Circuit correctly concluded that Echavarria was denied due process.

Petitioners do not dispute that, on *de novo* review, the Ninth Circuit correctly held that Judge Lehman's failure to recuse created a constitutionally intolerable risk of bias. Pet. 16–26.

The Ninth Circuit applied the correct legal standard. Pet. App. 22–23, 27–28. As this Court has explained, "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias." *Caperton*, 556 U.S. at 883. The Ninth Circuit accordingly asked whether "the average judge in [Lehman's] position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 881. The court conducted a "realistic appraisal of psychological tendencies and human weakness," *Withrow*, 421 U.S. at 47, focusing on

whether the disqualifying interest "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true," *Tumey*, 273 U.S. at 532.

The Ninth Circuit correctly concluded that Echavarria was denied due process. Pet. App. 29. The potential for bias "was obvious to all who had complete information about Agent Bailey's investigation," including Judge Lehman and the FBI. *Id.* at 30. Before trial, Judge Lehman informed the State and Gurry's counsel about Agent Bailey's investigation. *Id.* at 13. Judge Lehman revealed that "a reporter had asked him whether he would recuse," and that his "wife had been approached . . . and told that [he] ought not to be presiding over the case." *Id.* at 13–14. The FBI even advised prosecutors about Agent Bailey's investigation so "they could evaluate its impact . . . based on due process . . . considerations and claiming judicial bias." *Id.* at 14. Nevertheless, Echavarria was not informed "about the FBI's investigation of Judge Lehman until well after trial and sentencing." *Id.* at 15.

Judge Lehman was also keenly aware of "the FBI's efforts to ensure Echavarria's conviction" for Agent Bailey's murder. Pet. App. 28. Indeed, an FBI agent testified that the case was of "great importance" to his office. *Id.* at 4. Agents worked closely with Mexican officials to capture Echavarria, obtain a written confession, and translate the document into English. *Id.* at 4–9. The FBI's presence was so pervasive that Commandante Rubalcava "later believed that he needed to 'have a clearance' from the FBI in order to speak with Echavarria's counsel." *Id.* at 28. FBI agents were also "deeply involved in developing witness testimony" and "actively developed physical evidence" for the prosecution. *Id.* at 9. All-in-all, "twenty

employees of the FBI testified during proceedings before Judge Lehman, many of them stressing the fact that Agent Bailey was an FBI agent." *Id.* at 28.

Under these unique circumstances, the average judge in Lehman's position "would have understood the risk entailed in making rulings favorable to Echavarria." Pet. App. 28. As the Ninth Circuit recognized, the potential for bias was "extraordinary in both its nature and severity." *Id.* at 30. The average judge in Lehman's position "would have feared that rulings favoring Echavarria, tipping the outcome towards acquittal or a sentence less than death, could cost him his reputation, his judgeship, and possibly his liberty." *Id.* at 29. For example, the FBI might have "reopen[ed] its investigation or renew[ed] its advocacy for state prosecution." *Id.* at 29–30.[4] Considering "psychological tendencies and human weakness," *Withrow*, 421 U.S. at 47, there was an intolerable risk that the average judge in Lehman's position would not "hold the balance nice, clear, and true," *Tumey*, 273 U.S. at 532.

Petitioners nonetheless argue that a "closed investigation is simply too remote to establish a disqualifying interest in the outcome of the case." Pet. 25. They claim judges cannot be "afraid to rule against law enforcement merely from fear that an investigation against them might be instigated." *Id.* at 26. Those

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[4] Petitioners assert that any potential perjury charge "would have been barred by the statute of limitations." Pet. 25 n.8. But the FBI investigated Judge Lehman for additional crimes (C.A. Doc. 12-31 at 208–10, 219–22), and, in any event, an average state-court judge in his position would have also feared reputational and political harm. Pet. App. 29. Moreover, apart from potential liability, Judge Lehman was "so enmeshed" in these matters that it was "appropriate for another judge to sit." *See Johnson* v. *Mississippi*, 403 U.S. 212, 215 (1971) (per curiam).

policy concerns are overstated and, in any event, ignore the extreme factual circumstances of this case.

As the Ninth Circuit explained, "Judge Lehman personally had been criminally investigated by the very FBI agent that Echavarria was accused of killing, and the case required Judge Lehman to determine, *inter alia*, whether FBI agents had known about or been involved in the use of torture in obtaining Echavarria's confession." Pet. App. 30. An average judge in these circumstances would harbor the potential for bias. A hypothetical demonstrates the point: if Echavarria was *acquitted*, and journalists later revealed the details of Agent Bailey's investigation, a judge in Lehman's position would undergo intense scrutiny. Questions of impartiality would abound, and the judge would have feared for "his reputation, his judgeship, and possibly his liberty." *Id.* at 29. That psychological weakness created the risk for an average judge in Lehman's position to overcompensate in favor of the prosecution, rather than hold the balance. This is precisely why the Ninth Circuit held that Echavarria was "deprived . . . of the fair tribunal to which he was constitutionally entitled." *Id.* at 31.

CONCLUSION

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

Respectfully submitted,

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April 12, 2019