No. 261A18-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff-Appellant v. TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, Defendants-Appellees.	)	From Wake County

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BRIEF FOR AMICI CURIAE SCHOLARS OF JUDICIAL ETHICS AND PROFESSIONAL RESPONSIBILITY IN SUPPORT OF MOVANT

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BRIEF FOR AMICI CURIAE SCHOLARS OF JUDICIAL ETHICS AND PROFESSIONAL RESPONSIBILITY IN SUPPORT OF MOVANT

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are scholars and professors of judicial ethics and professional responsibility from universities across the nation. They have published numerous articles, books, and treatises studying judicial ethics and disqualification, and file this brief in support of Plaintiff-Appellant's motion to disqualify to encourage this Court to safeguard the bedrock principle of judicial impartiality. In addition to addressing aspects of the first, second, third, sixth, and seventh questions included in this Court's September 28, 2021 Order, *Amici* offer the historical and doctrinal foundations for the ethical obligations that movant invokes. A full list of *Amici* is attached as an Appendix.

[1] No person or entity other than *amici curiae* and their counsel, directly or indirectly, either wrote this Brief or contributed money for its preparation.

ARGUMENT

I. DEEPLY ROOTED PRINCIPLES OF JUDICIAL IMPARTIALITY ARE AT STAKE IN THE DISQUALIFICATION MOTION

A. Judicial Impartiality Is Foundational To The Rule Of Law And Its Importance Has Been Recognized For Millenia

Plaintiff-Appellant's disqualification motion invokes two rules in the N.C. Code of Judicial Conduct—one forbidding judges from hearing cases in which they have "a personal bias or prejudice concerning a party," and another forbidding judges from presiding where a relative "within the third degree of relationship … is a party to the proceeding …." Canon 3(C)(1)(a), (d)(i). Both rules entrench a fundamental maxim: no person may judge their own case.

That principle has a lengthy history. "[E]dicts designed to ensure judicial impartiality have been recorded since ancient times." Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 7 (3d ed. 2017). Under Roman law, the Justinian Code provided litigants the right to petition for judicial disqualification: "because … all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue be joined." Geyh, *Why Judicial Disqualification Matters. Again.*, 30 Rev. Litig. 671, 677

(2011); *see also* Flamm at 7. Lord Edward Coke's 1609 admonition in *Dr. Bonham's Case* invokes the same principle that "no man shall be a judge in his own case"—which "ultimately became one of the guiding precepts of Anglo-American jurisprudence." Flamm at 9. The Founders too subsequently embraced that "guiding precept"; as James Madison explained: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist Papers No. 10 (James Madison, 1787).

The N.C. Code's extension of this principle to cases involving a judge's relatives enjoys a similar pedigree. "[F]ew principles are more fundamental to the integrity of the judiciary" than recusing in matters involving one's family, because presiding over a relative's case "not only creates an appearance of impropriety and an obvious potential for abuse, but threatens to undermine the public's confidence in the judiciary." Flamm at 406. Under early Jewish law, for example, a judge could not participate in cases where a litigant was a "kinsman." Flamm at 7 (citing The Code of Maimonides). And English philosopher and jurist Jeremy Bentham proposed disqualifying judges "who were

exposed to any cause of partiality, including intimate acquaintance and family relationship." Flamm at 11.

B. Principles Of Judicial Impartiality Are Embedded In Federal Law

These principles have also long been embedded in federal law. In 1792, Congress enacted a judicial disqualification statute (the predecessor to 28 U.S.C. § 455) calling for disqualification if a judge was "concerned in interest" or was a lawyer for either party. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79 (1792). Congress has since repeatedly amended the legislation to "broaden[] the grounds" for disqualification. Flamm at 19. In 1821, for example, the statute expanded the grounds for disqualification to include a judge's relationship to a party. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643 (1821). Congress acted again in 1974, expanding the grounds for disqualification to better align with the 1972 American Bar Association ("ABA") Model Code of Conduct, thereby "promot[ing] confidence in the judiciary by eliminating even the appearance of partiality or impropriety." Flamm at 28-29. The 1974 amendments were also intended to correct the "problem" that arose in *Laird v. Tatum*, 409 U.S. 824 (1972), when Justice Rehnquist refused to disqualify himself despite having given prior official congressional

testimony about the government program at issue in the case. S. Rep. No. 93-419, at 6 (1973). To guard against similar refusals in the future, the 1974 expansion of § 455 made disqualification mandatory in "any proceeding in which [a judge's] impartiality might reasonably be questioned." It further required disqualification when a judge's relative "within the third degree of relationship" is a party and when the judge "has a personal bias or prejudice concerning a party." 28 U.S.C. § 455; *see also* S. Rep. No. 93-419, at 4 (1973).

These principles are not just creatures of statute. An early case on disqualification, *Tumey v. State of Ohio*, makes clear that there is a constitutional due process right to "an impartial judge." 273 U.S. 510, 535 (1927). In holding that due process was violated when a state judge had a "direct, personal, substantial pecuniary interest," the Court noted "[t]he general rule" at common law "certainly is that justices of the peace ought not to execute their office in their own case." *Id.* at 523, 525 (citing Hawkins, 2 Pleas of the Crown). Later decisions have only reinforced these due process guardrails on impartiality. *Infra* pp. 8-11.

C. These Core Principles Of Judicial Impartiality Are Further Reflected In The ABA's Model Code of Judicial Conduct

More modern treatments of judicial impartiality and disqualification remain committed to these key principles. The ABA Model Code of Judicial Conduct, which North Carolina and nearly every other state has largely adopted, continues to preclude a judge from hearing his or her own case. *See* Rule 2.11(A) (embedded in N.C. Canon 3(C)(1)) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned …."), Rule 2.11(A)(1) (embedded in N.C. Canon 3(C)(1)(a)); Geyh, Alfini, & Sample, Judicial Conduct and Ethics, § 4.05 (5th ed. 2018) ("The starting point in the Model Code's disqualification rule is with the appearance of partiality."). This includes hearing a case in which a person within the third degree of relationship with the judge is involved. *See* Rule 2.11(A)(2)(a) (embedded in N.C. Canon 3(C)(1)(d)(i)); Geyh, Alfini, & Sample, § 4.11(1) (noting that the prohibition on hearing a relative's case is a core rule in the Model Code and state judicial codes of conduct).

This continuity demonstrates that judicial impartiality remains critical, for several reasons. First, as the *Tumey* Court emphasized, rules requiring an impartial judge protect litigants' due process rights to a fair hearing; that constitutional bedrock is undermined by a biased judicial officer. Second, judicial impartiality and the appearance of impartiality preserve the legitimacy of the courts themselves. Lastly, judicial impartiality protects the rule of law. *See* ABA Model Code of Judicial Conduct (2011 ed.), Preamble ¶ 1 ("The United States legal system is based upon the principle that an independent, impartial, and competent judiciary … will interpret and apply the law that governs our society."). These pillars of our system of government require vigilant protection.

II. STATE COURTS MAY, AND SHOULD, PROMULGATE MANDATORY RULES TO PRESERVE JUDICIAL IMPARTIALITY

A. The U.S. Supreme Court Has Found Disqualification Necessary Over The Objections Of Conflicted Judges

Courts too have long protected these principles of judicial impartiality, and have developed rules requiring judicial disqualification even when conflicted judges have declined to recuse. In *Caperton v. A.T. Massey & Company*, for example, the U.S. Supreme

Court held that the federal Constitution's Due Process Clause required recusal of a state supreme court justice who refused to recuse from an appeal in which the appellant's CEO was the justice's largest campaign supporter. 556 U.S. 868, 886 (2009). The Court emphasized the importance of impartiality to judicial legitimacy and public trust: "The citizen's respect for judgments depends … upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Id.* at 889 (internal quotation marks and citation omitted). It then held that due process required disqualification under an objective standard that did not turn on the affected judge's own views of the conflict. The Court instead considered whether "the *average* judge in [the justice's] position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 881 (emphasis added) (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971)). Given the judge in question's dependence on the support of the appellant's CEO for his election, the Court concluded there would be "a serious risk of actual bias—based on objective and reasonable perceptions," if he heard the appeal. *Id.* at 884.

Other decisions reinforce that due process may override an individual judge's decision whether to recuse. In *Aetna Life Insurance Co. v. Lavoie*, the Court cited long-established precedent "recogniz[ing] that under the Due Process Clause no judge can be a judge in his own case." 475 U.S. 813, 822 (1986) (internal quotation marks omitted). And the Court extended this line of reasoning in *Williams v. Pennsylvania*, holding that a state supreme court's chief justice violated the Due Process Clause by presiding over a case in which he had previously participated as a government official. 136 S. Ct. 1899, 1905-06 (2016) (reiterating the "due process maxim that no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome" (internal quotations and citations omitted)).

These cases demonstrate the necessity of rigorous state court processes for judicial disqualification. Indeed, both *Caperton* and *Williams* praised states' efforts to formulate rules to address the appearance of judicial partiality. *See Williams*, 136 S. Ct. at 1908 ("Most questions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case."); *id.* (noting "the

utility of statutes and professional codes of conduct that 'provide more protection than due process requires'" (quoting *Caperton*, 556 U.S. at 890)); *Caperton*, 556 U.S. at 888. And, most relevant here, both opinions concluded—without reference to any particular statutory authority—that the constitutional rights of litigants provide courts with the power to order disqualification even when the conflicted judge declines to recuse. *E.g. Caperton*, 556 U.S. at 888 ("[T]he Constitution [can] require[] recusal."); *Williams*, 136 S. Ct. at 1908-09 (the "guarantee of due process" can "forbid[]" a judge's "participation").

B. Concerns Over Impartiality Require Independent Consideration Of Potential Disqualification

The lessons of these cases apply to the issues identified in this Court's September 28 Order. Specifically, state courts need not, and indeed should not, rely *exclusively* on a potentially conflicted judge to decide whether to recuse. Although most states permit individual judges to deny motions seeking their disqualification,[2] that norm

[2] As of 2016, 29 states allow trial judges to deny motions seeking their recusal and 35 states allow supreme court justices to do so. *See* Brennan Center for Justice, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, 4-5 (2016) ("Brennan Center Report").

presupposes judges will follow their ethical obligations and operate within the confines of the Due Process Clause. But *Caperton* and *Williams* (to say nothing of *Laird*) demonstrate that conflicted judges are not necessarily equipped to analyze their own actual or perceived biases objectively. *See* Brennan Center Report at 4. More importantly, these cases demonstrate that there are situations in which a judge's failure to follow his or her ethical obligations in fact *requires* action by fellow jurists, grounded (as described above) in the constitutional rights of the litigants at bar.

More, *Williams* and *Caperton*—along with a growing body of evidence—demonstrate that overreliance on self-adjudication of recusal represents particular concerns this Court should consider. First, judges incorrectly denying their own disqualification motions will impact the public's confidence in the rule of law, undermining the critical state interest in maintaining the integrity of the judiciary. *See State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 775-76 (1987) ("The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts." (citation

omitted)). It is not enough for individual justices to profess neutrality when deciding whether to hear a case—whatever processes a court employs to decide disqualification must also ensure the "appearance of neutrality" to provide due process and maintain public faith in the judicial process. *Williams*, 136 S. Ct. at 1909; *Caperton*, 556 U.S. at 888; *see also Knight v. Higgs*, 189 N.C. App. 696, 702, 659 S.E.2d 742, 746 (2008) ("An unbiased impartial decision-maker is essential to due process. Not only unfairness, but the very appearance of unfairness, is to be avoided." (citation omitted)). A mechanism to disqualify judges who do not follow their ethical obligations is thus especially important, because it reduces the risk that a judge who discards his or her duties will affect the legitimacy of the judiciary as a whole.

Second, unconscious bias impedes challenged judges' ability to decide their own disqualification motions impartially. Substantial research on unconscious bias demonstrates that judges are "overly confident in their ability to be impartial in potential conflict situations." Institute for the Advancement of the Am. Legal Sys., *Judicial Recusal Procedures*, 5, *available at* https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf. *See*

generally Bassett, *Three Reasons Why the Challenged Judge Should Not Rule on a Judicial Recusal Motion*, 18 N.Y.U. J. Legis. & Pub. Policy 659, 668-70 (2015); Geyh, 30 Rev. Litig. at 708-09. The bias "blind spot," in which individuals can identify biases in others much more than themselves, exacerbates unconscious bias. Bassett, *Three Reasons* at 670-71; *accord Williams*, 136 S. Ct. at 1905 ("Bias is easy to attribute to others and difficult to discern in oneself."). The use of other judges in deciding a disqualification motion minimizes this risk.

At least six jurisdictions already require a separate judge or panel to hear motions to disqualify a potentially conflicted judge. *See* Alaska St. 22.20.020(c) ("If a judicial officer denies disqualification the question shall be heard and determined by another judge …."); Cal. Code Civ. P. 170.3(c) ("A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification … [and] the question of disqualification shall be heard and determined by another judge[.]"); La. Prac. Civ. P. art. 160 ("When a written motion is filed to recuse a judge of a court of appeal, he may recuse himself or the motion shall be heard by the other judges on the panel to which the cause is assigned, or by all judges of the court, except the judge sought to be recused, sitting en

banc"); Tex. R. Civ. P. 18a (requiring a challenged judge to either recuse or enter "an order referring the motion to the regional presiding judge"); Utah R. Civ. P. 63 (requiring the judge the subject of a disqualification motion to "enter an order granting the motion or certifying the motion and affidavit or declaration to a reviewing judge").

Jurisdictions have restricted judges on courts of last resort from hearing their own disqualification motions as well. For example, in Texas, Supreme Court justices either must grant a recusal motion or refer it to the entire court to decide *en banc*, without the participation of the challenged justice. Tex. R. App. P. 16.3; *see also* Nev. Rev. St. 1.225(4) (requiring that disqualification motions of a Supreme Court justice be heard "before the other justices of the Supreme Court"). This rule gives effect to the Court's observation in *Williams* that an appellate judge should not join colleagues in deciding a matter involving his potential conflict even if his vote may not determine the outcome. *See* 136 S. Ct. at 1909 ("The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position," which "does not lessen the unfairness to the affected party.").

North Carolina similarly should have a process for independent consideration of a motion to disqualify an appellate judge. It already is well-established in North Carolina that a trial judge must recuse or refer a recusal motion to another judge if there is a reasonable concern over his or her impartiality. *State v. Poole*, 305 N.C. 308, 320, 289 S.E.2d 335, 343 (1982); *cf.* N.C.G.S. § 5A-15 ("If the [alleged indirect] criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge."). The force behind this rule should apply equally to appellate courts to give full effect to N.C. Canon 3(C)(1)—and has been implemented in several other jurisdictions across the country. *See Judicial Recusal Procedures*, *supra* p. 13, app. B.II.A. Such a rule would promote the neutrality and integrity of the court, prevent overreliance on judges correctly deciding their own disqualification issues, and avoid situations in which judges refuse to recuse despite their ethical obligations. Only through such a mechanism can the Court give full effect to the authorities and principles cited above, and make sure no man judges his own case.

This Court, moreover, has the power to implement such a rule. As described above, the federal constitution provides a basis for ordering involuntary recusal when a conflicted judge's participation would threaten the due process rights of litigants. The N.C. Code provides an additional ground for promulgating a rule on involuntary recusals, because it grants the Court the ability "to prescribe standards of judicial conduct for the guidance of all *justices* and judges" in the North Carolina judiciary. N.C.G.S. § 7A-10.1 (emphasis added). A rule permitting disqualification of a justice by the other members of the Court would fall within that expansive grant of authority.

The North Carolina Constitution provides this Court with additional, independent authority for establishing a rule permitting disqualification of a justice by the other members of the Court. The North Carolina Declaration of Rights promises North Carolinians that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. The North Carolina Constitution gives this Court the ability to fulfill that promise through its "exclusive

authority to make rules of procedure and practice for the Appellate Division." N.C. Const. art. IV, § 13. In other areas of law, such as criminal appellate jurisdiction, this Court has decided that it has independent constitutional authority to supervise the lower courts and decide for itself how to carry out its Article IV duties. *See, e.g.*, *State v. Todd*, 369 N.C. 707, 709-10, 799 S.E.2d 834, 837 (2017) (holding that the Court would exercise its supervisory power to decide postconviction matter). The same is true with respect to the disqualification issues presented here. *See In re Brown*, 358 N.C. 711, 713, 599 S.E.2d 502, 503 (2004) (holding that the North Carolina Supreme Court has "the constitutional authority [pursuant to N.C. Const. art. IV, § 13] and the statutory duty [pursuant to N.C.G.S. § 7A-33] to adopt rules of procedure for the administration of justice in the appellate courts of this state").

III. THE DUTY TO SIT POSES NO BARRIER TO RECUSAL WHEN DISQUALIFICATION IS OTHERWISE REQUIRED

Judges, whether elected or appointed, are bound to uphold and follow the law. That means that where the law requires a judge to step aside, he or she must do so. In such circumstances, a judge's duty to decide a pending case—often referred to as the "duty to sit"—is of no

moment. Put another way, the duty to sit extends only to those cases a judge may properly hear.

The duty to sit arises out of the commonsense proposition that judges should not disqualify themselves unnecessarily. As a result, although "[i]t is a judge's duty to refuse to sit when he is disqualified, … it is equally his duty to sit when there is no valid reason for recusation." *Edwards v. United States*, 334 F.2d 360, 362 n.2 (5th Cir. 1964); *see also* Canon 3A(2) of Code of Conduct for United States Judges ("[A] judge should hear and decide matters assigned, unless disqualified[.]"). Then-Justice Rehnquist relied in part on this concept when declining to recuse himself in *Laird*, describing the federal courts of appeals as uniformly "conclud[ing] that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified." 409 U.S. at 837.[3]

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[3] Chief Justice Rehnquist also suggested that judges on courts of last resort may be subject to an "even stronger" duty to sit, given that an evenly divided court might find itself unable to resolve the dispute at hand. *Laird*, 409 U.S. at 837-38. But such concerns sound in the rule of necessity—a common law concept that a judge's ethical obligations may give way if there is no other judge available to hear the case, *see United States v. Will*, 449 U.S. 200, 213 (1980)—rather than the duty to sit. Here, the rule of necessity is not implicated because the

The obligation to hear cases is therefore subject to an important qualification: a judge has a duty to sit only "where not disqualified." *Laird*, 409 U.S. at 837. That limit has been repeatedly reinforced in the years since *Laird*. For example, the 1974 amendments to § 455, *supra* pp. 5-6, were "generally seen as qualifying, if not ending," any broader understanding of the duty to sit by adopting both a mandatory, objective standard for disqualification, and granting judges significant leeway to recuse when it would be "improper, in [their] opinion" to participate in the case. Geyh, *Judicial Disqualification: An Analysis of Federal Law*, at 6-7 (3d ed. 2018); *see also* S. Rep. No. 93-419 at 5 (1973) ("This language also has the effect of removing the so called 'duty to sit[.]' … Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system."); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 871 (1988) (Rehnquist, C.J., dissenting) ("The amended statute also had the effect of removing the so-called

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disqualification motion would leave the Court with a quorum even if granted in full.

'duty to sit,' which had become an accepted gloss on the existing statute."). As understood today, the duty to sit thus "simply [] underscore[s] that … disqualification should not be used as an excuse to … dodg[e] difficult or unpleasant cases." Geyh, *Judicial Disqualification* at 16 & n.45 (collecting cases so describing the duty); Geyh, Alfini, & Sample, § 4.03 ("[A]bolishing the duty to sit did not liberate judges to disqualify themselves whenever they please.").[4]

These principles support scrupulous adherence to the ethical obligations set forth in the N.C. Code, and pose no obstacle to the adoption of a mechanism for involuntary disqualification. If a disqualifying conflict exists, the recusal inquiry simply ends. Nothing about any general duty to hear cases can overcome—or even affects—a

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[4] Courts and scholars are divided on whether the duty to sit has been abolished or modified, but all agree that it has no significance where disqualification is required. *Compare, e.g.*, *United States v. Snyder*, 235 F.3d 42, 46 n. 1 (1st Cir. 2000) ("Section 455(a) modified, but did not eliminate, the duty to sit doctrine. The duty to sit doctrine originally not only required a judge to sit in the absence of any reason to recuse, but also required a judge to resolve close cases in favor of sitting rather than recusing." (citation omitted)), *with* Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 Buff. L. Rev. 813, 958 (2009) ("The duty to sit is an outdated, problematic doctrine unhelpful to twenty-first century questions of disqualification …. The ABA, the states, the judiciary and the legal profession should affirmatively declare that close questions be decided in favor of recusal.").

judge's specific, overriding obligation to follow the law. Similarly, a procedure for involuntary recusals that permits disqualification in cases involving violations of a jurist's ethical obligations would never be in tension with the duty to sit. That is because, again, such a duty at most extends to those cases a judge may properly hear.

This Court also asked whether the fact that its members are elected affects the duty to sit. *Amici* are aware of no such distinction—regardless of the mechanism through which a judge is selected, once seated, his or her duty is to follow the law. And when the law requires disqualification, any duty to sit must give way.

CONCLUSION

This Court should protect the bedrock principle of judicial impartiality by adopting processes and rules to review a fellow justice's non-recusal. These processes are particularly important when a justice's impartiality could reasonably be questioned based on his or her relation to a party or the legislation under review.

This the 4th day of November, 2021.

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The undersigned hereby certifies that on this date the foregoing brief was filed electronically with the Supreme Court of North Carolina and served upon the attorneys of record by electronic mail, addressed to:

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APPENDIX

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APPENDIX

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- **Professor Stephen Gillers**, Elihu Root Professor of Law, New York University School of Law
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