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Supreme Court, U.S.
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No. ____-____

IN THE
Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY,
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS, INCORPORATED,
Respondent.

**On Petition for a Writ of Certiorari
to the Supreme Court of Illinois**

PETITION FOR A WRIT OF CERTIORARI

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January 22, 2016

QUESTION PRESENTED

Justice Lloyd Karmeier of the Supreme Court of Illinois declined to recuse himself from Philip Morris's appeal of a decision to reinstate a \$10.1 billion judgment in favor of petitioners and against respondent Philip Morris. Justice Karmeier won a close retention election in which Philip Morris had funded the organization responsible for most of the advertising in favor of his retention, and in which petitioners' attorneys had funded a group responsible for airing advertisements against Justice Karmeier. On election night, Justice Karmeier told a reporter that the size of attorneys' fees such as the award at stake was "distorting the system," accused petitioners' attorneys of attempting to "manipulate the system for their own personal gain," and commented that if he lost the election, there would be "one less judge to vote against" petitioners' judgment. Justice Karmeier cast a deciding vote to vacate the decision reinstating a \$10.1 billion judgment in favor of petitioners. The question presented is:

Whether it violates the Due Process Clause of the Fourteenth Amendment for a judge to participate in a case where the judge has made pejorative public statements about a litigant or an attorney, and there exists a reasonable public perception that one of the parties funded the judge's election campaign.

PARTIES TO THE PROCEEDINGS

Petitioners Sharon Price and Michael Fruth were the appellants in the Appellate Court of Illinois proceedings and the appellees in the Supreme Court of Illinois.

Philip Morris Incorporated was the appellee in the Appellate Court of Illinois proceedings and the appellant in the Supreme Court of Illinois.

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Sharon Price and Michael Fruth, individually and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

INTRODUCTION

The Supreme Court of Illinois issued a decision that effectively eliminated a \$10.1 billion judgment against respondent Philip Morris, Inc. (“Philip Morris”) on a procedural technicality in a decision that the two dissenting Justices concluded conflicted with the plain language of the governing statute and applicable precedent. One of the Justices who cast a deciding vote in favor of Philip Morris was Lloyd Karmeier. A year before the Supreme Court of Illinois’s decision, Justice Karmeier narrowly survived a retention election in which Philip Morris’s parent company funded a group that ran advertisements in favor of Justice Karmeier’s retention, and petitioners’ attorneys funded a group that aired advertisements critical of Justice Karmeier. On election night, Justice Karmeier told a reporter that large attorneys’ fee awards such as the petitioners’ award that was at stake were “distorting the system.”¹ According to Justice Karmeier, petitioners’ attorneys’ constitutionally protected political campaign speech was an attempt “to manipulate the system for their own financial gain.”² And he commented that if he were to lose the election, there would be “one less judge to vote against” the judgment in favor of petitioners.

¹ Sarah H. Graham, *Karmeier Retention Too Close To Call*, THE SOUTHERN ILLINOISAN, Nov. 5, 2014, http://thesouthern.com/elections/karmeier-retention-too-close-to-call/article_3863d73-d784-517e-a4de-eafc0dad9555.html.

² *Id.*

Under these circumstances, Justice Karmeier's participation in a decision vacating the judgment in favor of petitioners violated Due Process. Any reasonable observer would interpret Justice Karmeier's comments as indicating that he was biased against petitioners and their attorneys, and that he had already prejudged a pending case in favor of Philip Morris. This Court's precedents make clear that recusal is required either where a judge is actually biased or, under the objective circumstances, the probability of bias is too high to be constitutionally tolerable. Justice Karmeier's statements criticizing the fee award at stake, disparaging petitioners' attorneys, and indicating an intent to vote against petitioners easily surpass that threshold.

The lower courts have exhibited confusion regarding the relevance of pejorative public statements to the Due Process analysis. Several courts have properly held that recusal is required where a judge had made pejorative public statements about a litigant or attorney. Yet other courts and judges have brushed these concerns aside and decided cases (or permitted another judge to decide a case) despite such pejorative statements. This Court's intervention is necessary to clarify the confusion and provide guidance regarding the Due Process implications of pejorative public statements about litigants and their attorneys. The Court should grant the petition, or at a minimum, hold the petition pending the Court's resolution of *Williams v. Pennsylvania*, 136 S. Ct. 28 (2015) (Mem.), which presents similar issues.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois vacating the judgment of the Appellate Court of Illinois (App. 1a-64a) is not reported (but is available at 2015

IL 117687). The orders of Justice Karmeier (App. 65a, 66a-84a) denying petitioners' motions for recusal, and the orders of the Supreme Court of Illinois (App. 86a-89a) denying petitioners' motion for disqualification are unreported. The opinion of the Appellate Court of Illinois (App. 372a-402a) is reported at 9 N.E.3d 599. The opinion of the circuit court (App. 90a-147a) is unreported.

JURISDICTION

The Supreme Court of Illinois entered its judgment on November 4, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of the Fourteenth Amendment to the United States Constitution and the Illinois Code of Civil Procedure, 735 ILCS 5, are set forth at App. 403a-406a.

STATEMENT OF THE CASE

A. The Underlying *Price* Litigation

1. Petitioners are Philip Morris customers who brought a class action in the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, under the Illinois Consumer Fraud Act on behalf of all consumers who purchased Marlboro Lights or Cambridge Lights cigarettes ("Lights") in Illinois. App. 90a-91a. Petitioners proved at trial that Philip Morris engaged in one of the largest frauds in American history.

In a March 21, 2003 decision following a bench trial, the trial judge found that Philip Morris marketed cigarettes with the representations "Lights" and "Lowered Tar and Nicotine" in order to deceive smokers into believing that Lights were safer than

regular cigarettes. App. 96a, 99a-100a. However, Philip Morris knew that Lights delivered just as much tar and nicotine to smokers as regular cigarettes, and were in fact more harmful than regular cigarettes because the smoke was more mutagenic. App. 108a, 111a, 112a. The trial court held that Philip Morris had violated the Illinois Consumer Fraud Act and awarded \$7.1005 billion in compensatory damages, which represented the lost economic value to the class from receiving fraudulent “Lights” cigarettes instead of the safer cigarettes they were promised. See App. 136a-137a. The trial court also awarded \$3 billion in punitive damages to the State of Illinois, and awarded attorneys’ fees to class counsel of 25 percent of the compensatory damages award, or \$1.775 billion. App. 140a, 144a-145a.³

2. Philip Morris appealed the trial court’s judgment, and the Supreme Court of Illinois heard the appeal directly. *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 6 (Ill. 2005) (“*Price I*”). Justice Robert Thomas recused himself from the appeal, *id.* at 55,

³ In a subsequent decision, a federal district court found that Philip Morris and other cigarette companies violated the Racketeering Influenced and Corrupt Organizations Act (“RICO”) by engaging in decades of fraud, including by making the representations about the health attributes of light cigarettes at issue in this case. See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 27, 860 (D.D.C. 2006), *aff’d in part, rev’d in part*, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam), *cert. denied*, 130 S. Ct. 3501 (2010) (Mem.). The district court enjoined Philip Morris from using the fraudulent light and low tar and nicotine descriptors. *Id.* at 27. The D.C. Circuit upheld the judgment of liability against Philip Morris in full, and upheld the injunctive relief against Philip Morris. *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1136-38, 1150 (D.C. Cir. 2009) (per curiam).

and has recused himself from all subsequent *Price* proceedings.⁴

The Supreme Court of Illinois voted 4-2 to reverse the trial court's judgment and remand for dismissal. In an opinion announcing the court's judgment, two Justices concluded that petitioners' claims were barred because the Federal Trade Commission ("FTC") "specifically authorized" Philip Morris to make the fraudulent misrepresentations at issue. *Id.* at 50. The FTC made this authorization through "informal regulatory activity," including two consent agreements with other cigarette companies. *Id.* at 46-47.

Justice Karmeier, joined by one other Justice, concurred specially, stating that he would reverse for the separate reason that "plaintiffs failed to establish that they sustained actual damages." *Id.* at 55 (Karmeier, J., specially concurring).

Two Justices dissented, arguing both that the FTC did not authorize Philip Morris's fraud, and that petitioners had proven all the elements of their claims. *Id.* at 60-84 (Freeman, J., dissenting); *id.* at 84-90 (Kilbride, J., dissenting).

3. Petitioners filed a petition for a writ of certiorari, which this Court denied on November 27, 2006. 549 U.S. 1054 (2006). The Supreme Court of Illinois issued its mandate on December 5, 2006. On December 18, 2006, the trial court entered final judg-

⁴ News reports have stated that Justice Thomas recused himself because he was once represented by one of petitioners' attorneys. See Jim Dey, *Philip Morris Case Lights Back Up*, THE NEWS-GAZETTE, May 17, 2015, <http://www.news-gazette.com/opinion/columns/2015-05-17/jim-dey-philip-morris-case-lights-back.html>.

ment in favor of Philip Morris dismissing the case. App. 6a.

B. Petitioners' Section 2-1401 Petition For Relief From Judgment

1. In 2008, new evidence emerged contradicting Philip Morris's contention (accepted by the Supreme Court of Illinois in *Price I*) that the FTC specifically authorized Philip Morris's fraudulent misrepresentations. In *Altria Group, Inc. v. Good*, this Court considered whether FTC regulatory actions preempted a lawsuit against Philip Morris's parent company under Maine's consumer protection statute for the same "Lights" and "Lowered Tar and Nicotine" representations at issue in this case. 555 U.S. 70 (2008). On June 18, 2008, the FTC submitted an *amicus* brief explaining that it had never authorized tobacco companies to use light or low tar descriptors, nor did it ever "[give] affirmative endorsement to such [light and low tar] descriptors, much less to their deceptive use." Brief of the United States as *Amicus Curiae* Supporting Respondents at 15, *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008) (No. 07-562), 2008 WL 2472389 (citation omitted).

On December 8, 2008, the FTC rescinded previous guidance stating that representations of cigarettes' tar and nicotine yields under the Cambridge Filter Method would not violate the FTC Act. Notice, *Rescission of FTC Guidance Concerning the Cambridge Filter Method*, 73 Fed. Reg. 74,500 (Dec. 8, 2008). In so doing, the FTC stated that its prior "guidance only addressed simple factual statements of tar and nicotine yields. *It did not apply to other conduct or express or implied representations, even if they concerned tar and nicotine yields.*" *Id.* at 74,501 (emphasis added).

On December 15, 2008, this Court decided *Altria Group, Inc. v. Good*, holding that the plaintiff's claims were not preempted. 555 U.S. at 90-91. Relying in part on the FTC's *amicus* brief and rescission of guidance, this Court concluded that "the FTC has in fact never . . . condoned representations of [tar and nicotine] yields through the use of 'light' or 'low tar' descriptors." *Id.* at 88.

2. On December 18, 2008, based on that new evidence of the FTC's intent, petitioners filed a petition with the trial court for relief from its final judgment (entered on remand after the Illinois Supreme Court's reversal) dismissing petitioners' original lawsuit. Petitioners sought relief pursuant to 735 ILCS 5/2-1401 ("Section 2-1401"), which authorizes Illinois trial courts to grant relief from final orders and judgments. Section 2-1401 abolished traditional common law writs for obtaining relief from judgment and replaced them with a statutory remedy, stating that such relief "shall be available in every case" 735 ILCS 5/2-1401(a). Petitioners argued that relief was warranted because the new evidence of the FTC's intent, as interpreted in this Court's *Good* decision, refuted the Supreme Court of Illinois's previous interpretation of the FTC's regulatory actions. See Petition for Relief from Judgment at 9, *Price et al. v. Philip Morris, Inc.*, No. 00-L-112 (Ill. Cir. Ct. filed Dec. 18, 2008).

3. The trial court dismissed petitioners' amended petition. App. 113a.⁵ It acknowledged that petition-

⁵ The trial court had dismissed the initial petition as untimely. App. 343a. The Appellate Court of Illinois reversed, holding that the petition was timely and remanding to the trial court for consideration of the petition's merits. App. 356a-357a. On remand, petitioners filed an amended petition, making some addi-

ers more likely than not would have defeated Philip Morris's specific authorization defense had the evidence of the FTC's petition been presented in the original litigation. App. 364a-366a. However, the court dismissed the petition because it held that petitioners had failed to prove that "it is *more probably true*" that they would have prevailed in the litigation, as it was "*equally as likely*" that the Supreme Court of Illinois would have ruled against petitioners for failure to prove damages. App. 369a-370a.

The Appellate Court of Illinois reversed. App. 402a. The appellate court agreed that the evidence of the FTC's intent undermined the Supreme Court of Illinois's conclusion that the FTC specifically authorized Philip Morris's fraud. App. 395a-399a. But the appellate court held that the trial court erred by engaging in a "speculative" exercise of predicting how the Supreme Court of Illinois would have ruled on damages. App. 400a. The appellate court reversed the trial court's denial of the petition, and reinstated the original trial verdict. App. 399a-402a.

4. Philip Morris sought review from the Supreme Court of Illinois in two ways. *First*, Philip Morris moved for a supervisory order, urging summary reversal of the appellate court's decision. On May 28, 2014, petitioners filed a motion requesting that Justice Karmeier recuse himself from participation in the case or that the Supreme Court of Illinois disqualify him. *See infra*, p. 16. On September 24, 2014, Judge Karmeier denied the recusal motion and announced that the Supreme Court of Illinois had decided not to disqualify him. App. 84a. That same

tional allegations but raising the same arguments. First Amended Petition for Relief from Judgment, *Price et al. v. Philip Morris, Inc.*, No. 00-L-112 (Ill. Cir. Ct. filed Feb. 15, 2012).

day, the court issued an order stating that the motion for a supervisory order was effectively denied with “[n]ot four votes to allow,” with Justice Thomas recused. *See* App. 85a.⁶

Philip Morris also filed a petition for leave to appeal, which the Supreme Court of Illinois granted. On February 9, 2015, petitioners filed another motion seeking the recusal or disqualification of Justice Karmeier. *See infra*, p. 17. The Supreme Court denied the request to disqualify and referred the recusal motion to Justice Karmeier. App. 86a. On May 19, 2015, the day of oral argument, petitioners filed a renewed motion for recusal or disqualification, for the sole purpose of preserving their continued objection to Justice Karmeier’s participation.

On November 4, 2015, Justice Karmeier issued a brief order denying the motion for recusal and renewed motion for recusal. App. 65a. That same day, the Supreme Court voted 4-2 (with Justice Thomas recused) to vacate the appellate court’s judgment and dismiss the Section 2-1401 petition. App. 34a. Justice Karmeier joined the majority opinion and cast the necessary fourth vote. The court held that Section 2-1401 could not provide relief from a trial court judgment entered at the direction of a reviewing court. App. 28a. Instead, the court held that the only avenue to seek relief from a reviewing court’s decision is to file a motion with the reviewing court to recall its mandate. App. 20a-21a. Previously, the Appellate Court of Illinois had held that Section 2-1401 was the appropriate procedural vehicle for setting aside a judgment entered at the direction of a review-

⁶ Under the Illinois Constitution, “[f]our Judges constitute a quorum [on the Supreme Court of Illinois] and the concurrence of four is necessary for a decision.” Ill. Const. art. VI, § 3.

ing court, and the Supreme Court of Illinois allowed that decision to stand. *Klose v. Mende*, 882 N.E.2d 703 (Ill. Ct. App. 2008), *appeal denied*, 889 N.E.2d 1116 (2008) (Table). As the *Price* decision itself notes, “no Illinois Supreme Court rule addresses the general power of a reviewing court to recall its mandate.” App. 21a. Moreover, neither the petitioners nor Philip Morris had briefed the issue of whether a motion to recall the mandate would be available. The court recognized this new remedy *sua sponte*.

Two Justices dissented, arguing that the plain language of Section 2-1401 made relief available “*in every case * * * regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered.*” The statute does not create an exception for judgments entered at the direction of this court.” App. 45a (quoting 735 ILCS 5/2-1401(a)) (citation omitted). The dissent also described how the only Illinois appellate decision to address the question had held that a trial court could grant Section 2-1401 relief from a judgment entered at the direction of a reviewing court. *See* App. 52a-55a (citing *Klose v. Mende*, 882 N.E.2d 703). The dissent concluded that “the facts here cry out for equitable relief” given Philip Morris’s “appalling” “misconduct.” App. 57a, 59a-60a.

On November 17, 2015, petitioners filed a motion with the Supreme Court of Illinois to recall its mandate and simultaneously filed a motion for Justice Karmeier to recuse himself or for the Supreme Court of Illinois to disqualify him. On January 11, 2016,

the Supreme Court of Illinois denied both motions in a one-page order without opinion. App. 87a.⁷

C. Factual Background Of Recusal Motions

1. In Illinois, Supreme Court Justices are elected for 10-year terms from one of five judicial districts. See Ill. Const. art. VI, §§ 2, 3, 10, 12(a). At the conclusion of their terms, Justices may seek another term through a retention election, at which approval of three-fifths of those voting on the question is necessary for retention. *Id.* § 12(d).

In 2004, while *Price* was on appeal to the Supreme Court of Illinois for the first time, Justice Karmeier (then a trial judge in Illinois) ran for the Supreme Court of Illinois in the fifth judicial district as a Republican. The election became the most expensive judicial election in American history, with more than \$4.8 million spent in support of Justice Karmeier and nearly as much spent in support of his opponent. Memorandum in Support of Motion for Recusal or Disqualification at 3-4, 11, *Price et al. v. Philip Morris, Inc.*, No. 117687 (Ill. filed May 28, 2014). Most of the money spent in support of Justice Karmeier came from pro-business organizations in which Philip Morris or its affiliates were members. *Id.* at 4-6. In September and October 2004, the U.S. Chamber of Commerce donated \$2.05 million to the Illinois Republican party, which contributed \$1.92 million to the Karmeier campaign over that same time frame. *Id.* at 4. State and local affiliates of the U.S. Chamber contributed \$284,000 to the Karmeier campaign.

⁷ The next day, the Supreme Court of Illinois issued a corrected order clarifying that the full court with (Justice Karmeier and Justice Thomas not participating) denied the motion to disqualify Justice Karmeier, and Justice Karmeier alone denied the request for recusal. App. 88a-89a.

Id. JUSTPAC, a political action committee for the Illinois Civil Justice League (“ICJL”), contributed nearly \$1.2 million. *Id.* at 5. The president of ICJL served as an informal campaign manager for Karmeier. *Id.* at 5.

Justice Karmeier won the 2004 election with 54.7% of the vote. See Illinois State Board of Elections, General Election Results (Nov. 2, 2004), <https://www.elections.il.gov/ElectionResultsJudicial.aspx?ID=16>. Widespread public perception existed that Philip Morris indirectly contributed much of the funding for Justice Karmeier’s campaign in an effort to influence *Price*’s outcome. For example, the ST. LOUIS POST-DISPATCH⁸ published an editorial headlined “Buying Justice” that stated: “Big business won a nice return on a \$4.3 million investment in Tuesday’s election. It now has a friendly justice on the Illinois Supreme Court.” Editorial, *Illinois Supreme Court: Buying Justice*, ST. LOUIS POST-DISPATCH, Nov. 5, 2004, <https://unreportednews.wordpress.com/2004/11/05/illinois-supreme-court-buying-justice/>. The editorial noted that “[b]ig money flowed into the Karmeier-Maag race because even bigger money is at stake. That includes a \$10 billion judgment against a tobacco company from Madison County that is on appeal.” *Id.* A political cartoon published in the ST. LOUIS POST-DISPATCH shortly after the election depicted Justice Karmeier as the Marlboro man, riding a horse-drawn wagon carrying sacks of money with the Philip Morris name under a mock pack of cigarettes labeled “Karmeier Lights,” with the slogan: “More freedom from class action lawsuits.” R.J. Mattson, *Karmeier Lights*, ST. LOUIS POST-DISPATCH, Dec. 20,

⁸ Illinois’s fifth judicial district covers southern Illinois, including parts of the St. Louis metropolitan area.

2005, <http://www.rjmatson.com/cgi-bin/framesdisplay.cgi?image=STL109.jpg&date=12/20/2005&title=KARMEIER%20LIGHTS&pub=STL109>.

The perception that Philip Morris financed Justice Karmeier's campaign to procure a favorable decision in *Price* has persisted in the legal community. After this Court decided *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), Justice O'Connor gave a speech to the Chicago Bar Association in which she commented: "In 2004, there was a race for the Illinois Supreme Court, right here. It cost just over \$9 million for that race. As you might have guessed, the winner of that race got his biggest contributions from a company that had an appeal pending before the Illinois Supreme Court. You like that? . . . Sounds a lot like the Caperton case, doesn't it?" Abdon M. Pallasch, *O'Connor Urges Illinois to Select Judges by Merit*, CHICAGO SUN-TIMES, May 20, 2010, 2010 WLNR 10390792.

2. Justice Karmeier's retention election occurred in November 2014. At the time of his election, the Appellate Court of Illinois's reinstatement of the \$10.1 billion verdict against Philip Morris was on appeal to the Supreme Court of Illinois.

Between March 2013 and July 2014, Philip Morris's parent company Altria gave \$231,000 in scattered donations to the Republican State Leadership Committee ("RSLC"), a group that supports Republican candidates in Illinois. Appellees' Memorandum in Support of Motion for Recusal or Disqualification at 2-3, *Price et al. v. Philip Morris, Inc.*, No. 117687 (Ill. filed Feb. 9, 2015). Altria donated \$250,000 to RSLC on October 6, 2014 and another \$250,000 on October 8, 2014, for a total of \$731,000 in donations to RSLC over the course of 2013 and 2014. *Id.* at 3.

On October 23, 2014, the RSLC transferred \$950,000 to an affiliate, which that same day transferred \$950,000 to a media company to air television advertisements in support of Justice Karmeier. *Id.* at 3-4. In addition, Justice Karmeier's campaign spent about \$286,000 over the course of the election. *Id.* at 9 n.3. The amount that Altria donated to RSLC was approximately 60% of the total amount spent in support of Justice Karmeier's retention. *Id.* at 9.

On approximately October 18, 2014, a group called "Campaign for 2016" began airing television advertisements criticizing Justice Karmeier's judicial record. Philip Morris USA Inc.'s Memorandum in Opposition to Motion for Recusal or Disqualification at 6, *Price et al. v. Philip Morris, Inc.*, No. 117687 (Ill. filed Feb. 26, 2015). The group spent approximately \$2 million on those advertisements. Law firms representing the petitioners and attorneys in those law firms contributed \$1.76 million to Campaign for 2016. The week before the election, Justice Karmeier's campaign manager accused petitioners' attorneys of engaging in "an eleventh-hour attempt to smear the justice's impartiality, integrity and fairness," stating that petitioners' attorneys "stand to gain close to \$2 billion in lawyers' fees and want to make an investment of about \$2 million to take the judge out. . . . For these firms this amounts to a business transaction." Ameet Sachdev, *Outside Money Pouring Into State Supreme Court Race*, CHICAGO TRIBUNE, Oct. 29, 2014, <http://www.chicagotribune.com/business/ct-karmeier-supreme-court-1029-biz-20141027-story.html>.

3. Justice Karmeier received 60.8% of the vote, barely surpassing the 60% required for retention. Illinois State Board of Elections, General Election

Results (Nov. 4, 2014), <http://www.elections.il.gov/ElectionResultsSpecifyRace.aspx?ID=43>. On election night, when preliminary results showed that he would likely win a narrow victory, he spoke with a newspaper reporter, who published an article stating:

[Justice Karmeier] said the lawyers could stand to gain financially if he were ousted from the bench. One less judge to vote against a judgment in either case could net plaintiffs' a substantial sum – \$1.77 billion in legal fees for a \$10 billion settlement.

"It's the size of these fees that is distorting the system," Karmeier said. "The money is so substantial."

Sarah H. Graham, *Karmeier Retention Too Close To Call*, THE SOUTHERN ILLINOISAN, Nov. 5, 2014. The "\$1.77 billion in legal fees" referred to in the article matched the attorneys' fee award at stake in *Price*.

The next day, the same reporter wrote another article that stated:

A \$10.1 billion verdict is at stake in the Philip Morris case. One less judge voting against a judgment could net plaintiffs a substantial sum – \$1.77 billion in legal fees, Karmeier said.

"It's the size of these fees that is distorting the system," Karmeier said. "The money is so substantial.

"Maybe this will be a signal that people should not try to manipulate the system for their own financial gain," he added.

Sarah H. Graham, *Karmeier Confident He Will Be Retained*, THE SOUTHERN ILLINOISAN, Nov. 6, 2014, http://thesouthern.com/news/local/karmeier-confident-he-will-be-retained/article_53f43640-5ee9-5dd2-8788-c6178cb2f902.html.

D. Petitioners' Recusal Motions

1. Petitioners' first recusal motion was briefed in mid-2014, before the retention election, and therefore addressed only the 2004 election. In support of that motion, petitioners argued that under *Caperton*, the large donations to the Karmeier campaign in 2004 by groups affiliated with Philip Morris – which petitioners contended came indirectly from Philip Morris – required Justice Karmeier's recusal.

On September 24, 2014, Justice Karmeier wrote an opinion denying the recusal motion. He first concluded that petitioners had forfeited their arguments relating to the 2004 election by failing to raise them earlier, but stated that those arguments would also fail on the merits. App. 68a-69a. Justice Karmeier stated that where recusal is not required, there is a "duty to sit" that is "[a]mplifi[ed]" by the "rule of necessity." App. 70a. He asserted that the concerns underlying the rule of necessity were "not limited to situations where all members of a tribunal are otherwise subject to disqualification," but applied also where a substitute judge could not be appointed, and elimination of a judge "could prevent the Court from achieving the number of votes required by the [Illinois] constitution to render a decision." App. 71a-72a.

Justice Karmeier then concluded that the claim that Philip Morris was "responsible for 'bankrolling'" his 2004 election "has no factual support" and "is based entirely on conjecture, innuendo and speculation which, once started, took on a life of its own for awhile in the press." App. 74a, 76a. He acknowledged that press accounts portrayed an "appearance of partiality" on his part, but he contended that those accounts were "unreasonable" in light of their sup-

posed “inaccuracies and mischaracterizations.” App. 79a. Justice Karameier speculated that petitioners sought his recusal because they “perhaps surmised that I would continue to vote against them now,” and that “removing me from the case would seem, from respondents’ position, to be a promising strategy indeed for helping to revive the multi-billion dollar judgment they lost when this Court ruled against them eight years ago.” App. 80a. Justice Karameier noted that he referred the motion to the full Court, which “elected to take no action” to disqualify him. App. 84a.

2. Petitioners’ second recusal motion was aimed primarily at the events surrounding the 2014 retention election. Petitioners argued that Justice Karameier’s comments that petitioners’ attorneys “could stand to gain financially if he were ousted from the bench” – and that petitioners’ attorneys’ fees were “distorting the system,” Graham, *supra* – would lead a reasonable observer to conclude that Justice Karameier was biased. Petitioners also argued that Altria’s outsized contributions to the group that funded Justice Karameier’s pro-retention advertisements required recusal under *Caperton*.

The full court denied the motion to disqualify Justice Karameier without opinion. App. 86a. Justice Karameier denied the recusal motion with an order that read in full:

Appellees’ motion for recusal having been referred to me following the full court’s denial, on March 11, 2015, of appellees’ latest motion to disqualify me from further participation in this litigation; objections having been filed; a reply to the objections having been allowed; and the court being fully advised in the premises;

IT IS HEREBY ORDERED that, based on the principles set forth in my prior order of Sept. 24, 2014, in Cause No. 117689, the motion for recusal is denied.

IT IS FURTHER ORDERED that appellees' "renewed" motion for recusal [is] also denied.

App. 65a. As Justice Karmeier's September 2014 opinion was issued before the 2014 election, Justice Karmeier never addressed petitioners' specific recusal arguments surrounding the 2014 election.

REASONS FOR GRANTING THE PETITION

I. UNDER THIS COURT'S PRECEDENTS, DUE PROCESS REQUIRED JUSTICE KARMEIER'S RECUSAL

A. Recusal Is Required When A Judge Is Actually Biased Or Circumstances Create A High Probability Of Bias

1. This Court's precedents require recusal when a judge is actually biased, or when a reasonable observer would conclude that there is a high probability the judge may be biased. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal, Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Murchison*, 349 U.S. at 136.

The universe of circumstances requiring recusal "cannot be defined with precision. Circumstances and relationships must be considered." *Id.* Actual bias, however, is not required. "Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

2. Although the recusal inquiry is necessarily fact-specific, this Court has outlined a number of situations in which Due Process requires recusal. *First*, recusal is required where the judge "has a direct, personal, substantial pecuniary interest" in the outcome of a case. *Tumey*, 273 U.S. at 523. Thus, it violated Due Process in *Tumey* for a mayor to adjudicate

liquor violations, where the mayor received additional compensation only if he convicted the defendant. *Id.* at 531-32.

Second, an indirect pecuniary interest of sufficient magnitude may require recusal. Thus, in *Ward v. Village of Monroeville*, recusal was required where the mayor adjudicated local ordinance violations, and the fines produced by such violations funded a large percentage of the village's budget. 409 U.S. 57, 58-60 (1972); see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (judge required to recuse himself from case that would establish precedent affecting the value of a similar pending lawsuit in which he was a plaintiff); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("[T]he financial stake need not be as direct or positive as it appeared to be in *Tumey*").

Third, entanglement with a litigant in prior judicial proceedings could create a sufficient probability of bias to require recusal. Thus, in *Murchison*, when a judge acted as a "one-man grand jury" responsible for bringing charges against defendants, he could not try the resulting cases against those defendants. 349 U.S. at 137. The Court held that "[a] single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Id.* (footnotes omitted). Similarly, in *Mayberry v. Pennsylvania*, this Court held that where a trial judge charged a defendant with con-

tempt for a series of “highly personal aspersions” against the judge, Due Process required that the defendant be given a trial on the contempt charge “before a judge other than the one reviled by the contemnor.” 400 U.S. 455, 466 (1971).

Fourth, under certain circumstances, large and disproportionate contributions or expenditures in support of a judge’s election by a litigant in a pending case, or a person affiliated with that litigant, may require recusal. As this Court held in *Caperton*, “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.” 556 U.S. at 884.

Those categories are not exhaustive. Rather, “[a]s new problems have emerged that were not discussed at common law, . . . the Court has identified additional instances which, as an objective matter, require recusal.” *Id.* at 877.

B. Justice Karmeier’s Recusal Was Constitutionally Required Under The Circumstances Of This Case

1. Under this Court’s precedents, the circumstances of this case required Justice Karmeier’s recusal. On the night of his retention election, Justice Karmeier criticized the size of the attorneys’ fee award at stake, and personally attacked petitioners’ attorneys for supposedly attempting to “manipulate the system for their own financial gain.” Graham, *supra*. He and his campaign manager each suggested that petitioners’ attorneys funded advertisements against him because he was likely to rule for Philip

Morris. And the prevailing public perception – echoed specifically by Justice O'Connor – holds that Philip Morris indirectly funded one or both of Justice Karmeier's election campaigns. Given those facts, a reasonable observer would conclude that a high probability existed that Justice Karmeier was biased against petitioners and their attorneys, and that he had prejudged the pending case in favor of Philip Morris. Justice Karmeier's public comments – reflecting a personal distaste not only for petitioners' attorneys, but for the very fee award at stake in the case he was charged with evaluating – revealed "a possible temptation . . . not to hold the balance nice, clear, and true." *Tumey*, 273 U.S. at 532.

2. This case presents a combination of the concerns motivating recusal in the contempt cases and in *Caperton*. For example, in *Offutt v. United States*, 348 U.S. 11, 16-17 (1954), a trial judge convicted a litigant's attorney of contempt after a trial in which the judge had repeatedly expressed personal animosity toward the attorney. *See id.* at 16 n.2, 17 n.3 (judge threatened to "have the Marshal stick a gag in your mouth" and told the jury they had "been compelled to sit through a disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession"). The Court held that the judge could not constitutionally adjudicate the contempt charge because he had "permitted himself to become personally embroiled with the petitioner," thereby failing to "represent[] the impersonal authority of law." *Id.* at 17. So too, here, Justice Karmeier became embroiled in a personal controversy with petitioners' attorneys, in which he and his campaign repeatedly disparaged petitioners' attorneys to the press by accusing them

of “distorting the system,” “manipulat[ing] the system for their own financial gain,” and engaging in a “smear” campaign. Graham, *supra*.⁹

Justice Karmeier fueled the appearance of bias by suggesting that he had already decided to rule for Philip Morris before even viewing the briefs. He suggested to a reporter that if he had lost the retention election, there would be “[o]ne less judge voting against a judgment [that] could net plaintiffs a substantial sum – \$1.77 billion in legal fees.” Graham, *supra*. Recusal is required where a judge makes public statements suggesting that he has prejudged the matter in question. See *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 541 U.S. 913, 916 (2004) (Scalia, J.) (acknowledging that in *Elk Grove Unified School District v. Newdow*, 540 U.S. 945 (2003), he had “said or done something which require[d]” recusal).¹⁰

3. Finally, under *Caperton*, recusal is required because there is a widespread and reasonable public perception that Philip Morris indirectly contributed disproportionate amounts to one or both of Justice Karmeier’s election efforts. Although Justice Karmeier stated he personally disbelieved the re-

⁹ Justice Karmeier’s public criticism of petitioners’ attorneys was unwarranted considering that in *Offutt*, the attorney had engaged in a series of inappropriate courtroom outbursts, 348 U.S. at 15, whereas here petitioners’ attorneys have merely engaged in their constitutionally protected right to fund political speech regarding the record of an elected official. See *Citizens United v. FEC*, 558 U.S. 310, 339-40 (2010).

¹⁰ In *Newdow*, Justice Scalia recused himself after he made comments at a public event indicating he believed the lower court’s decision under review was wrongly decided. See Suggestion for Recusal of Justice Scalia, at 3-4, *Newdow v. U.S. Congress*, No. 03-7 (U.S. filed Sept. 9, 2003).

ports that Philip Morris bankrolled his 2004 campaign, App. 74a-75a, *Caperton* teaches that a judge cannot make recusal decisions based solely on his subjective beliefs. See *Caperton*, 556 U.S. at 886. Moreover, the evidence that Philip Morris financially supported Justice Karmeier's 2014 election is even stronger, as Philip Morris's parent company gave \$500,000 to an Illinois Republican campaign group just four weeks before the election and just two weeks before that group purchased advertisements in support of Justice Karmeier.

To be sure, Philip Morris argued below that the temporal proximity between its financial contributions and the pro-Karmeier advertisements was a mere coincidence. Philip Morris USA Inc.'s Memorandum in Opposition to Motion for Recusal or Disqualification at 21-23, *supra*. Although such assertions that Philip Morris did not financially support Justice Karmeier's retention strain credulity, it is not necessary to decide whether Philip Morris actually funneled money to the Karmeier election effort. The fact that a reasonable and widespread public perception exists that Philip Morris funded Justice Karmeier's election efforts causes a severe risk of bias, just as Don Blankenship's contributions in support of Justice Benjamin did in *Caperton*.

II. THIS CASE DEEPENS CONFUSION IN THE LOWER COURTS REGARDING THE DUE PROCESS IMPLICATIONS OF PEJORATIVE PUBLIC STATEMENTS ABOUT A LITIGANT OR ATTORNEY

Since *Caperton*, lower courts have examined recusal motions with newfound scrutiny, yet they have struggled to apply this Court's precedents consistently to new factual situations. In particular,

federal and state courts have been inconsistent in handling claims that recusal was required because a judge made pejorative statements about a litigant or attorney. Several courts have required recusal in such situations, while others have denied such requests.

A. The Ninth Circuit, Kansas Supreme Court, And Michigan Court Of Appeals Have Required Recusal Based On Pejorative Public Statements

The decision below to allow Justice Karmeier to participate conflicts with decisions of the Ninth Circuit, Kansas Supreme Court, and Michigan Court of Appeals. Those courts have held that a judge erred in declining to recuse himself or herself where he or she had made pejorative public statements about an attorney or litigant.

1. In *Hurles v. Ryan*, the Ninth Circuit reversed a denial of habeas corpus to a defendant who was sentenced to death by a judge who had made negative statements about the defendant and his attorney in a legal brief. 752 F.3d 768, 792 (9th Cir.), *cert. denied*, 135 S. Ct. 710 (2014) (Mem.). The defendant, Hurles, was accused of murder and sought appointment of an additional trial counsel, which Judge Hilliard denied. *Id.* at 775. Hurles appealed the denial, and Judge Hilliard was named as a nominal respondent under Arizona law. *Id.*

Judge Hilliard filed a brief with the Arizona Court of Appeals defending her ruling on the basis that the murder was “brutal,” and “the state’s case against Hurles [was] ‘very simple and straightforward, compared to other capital cases’ and [she] predicted that it would not involve an inordinate amount of witness testimony.” *Id.* at 775-76. Judge Hilliard further ar-

gued that “if defense counsel believed that she could not render competent representation, she was bound to withdraw and, quite possibly, to withdraw her name from the list of attorneys who contracted with the county to serve as appointed counsel. Judge Hilliard concluded, ‘Clearly there are other attorneys who provide contract services for Maricopa County who would be able to provide competent representation in a case as simple as this.’” *Id.* at 776. After this briefing, Judge Hilliard presided over Hurles’s trial. A jury convicted Hurles of first-degree murder and other crimes, and Judge Hilliard sentenced him to death. *Id.* at 776-77. Judge Hilliard also presided over and denied two petitions for post-conviction review. *Id.* at 777.

The Ninth Circuit held that Hurles had stated a valid claim for relief. The Ninth Circuit reasoned that Judge Hilliard’s brief “by itself, suggests strongly that the average judge in her position could not later preside over Hurles’s guilt phase, penalty trial and post-conviction proceedings while holding ‘the balance nice, clear and true’ between the state and Hurles.” *Id.* at 792 (quoting *Tumey*, 273 U.S. at 532). The Ninth Circuit remanded to the district court to engage in factfinding to determine whether Judge Hilliard “commissioned or authorized the responsive pleading or provided any input on the brief,” holding that “[s]uch evidence certainly would show an unconstitutional risk of actual bias.” *Id.*

In *Stivers v. Pierce*, the Ninth Circuit similarly held that pejorative public statements about an applicant by a licensing board member, in conjunction with other evidence, raised a genuine factual issue as to whether the applicant was denied Due Process. 71 F.3d 732, 753-54 (9th Cir. 1995). The board member

had previously made derogatory statements about the applicant, Stivers, including that “‘everybody knew [he] had shot himself’” after he was shot while investigating a burglary. *Id.* at 744. Although the court found that the statement was insufficient by itself to require recusal, it “len[t] some support to the view that his opposition to the plaintiffs’ application was the consequence of his hostility toward Stivers.” *Id.* The court decided that this statement, in conjunction with other evidence, “create[d] a triable issue of fact as to whether Stivers was denied a fair hearing before an impartial tribunal.” *Id.* at 746.

2. In *State v. Sawyer*, the Supreme Court of Kansas held that a trial judge violated Due Process for failing to recuse himself in a criminal trial after making negative comments about the defendant in an earlier trial. 305 P.3d 608, 616 (Kan. 2013). The trial judge had recused himself from one trial involving the defendant because he believed that some of his previous dealings with the defendant created a risk of bias. *Id.* at 610. But he presided over a second trial, in which he told the defendant “to ‘be quiet’ and ‘shut up’ during the sentencing hearing,” which led an appellate court to admonish him for failing to display judicial decorum. *Id.* at 614. The same judge then presided over a third trial of the same defendant. However, the Kansas Supreme Court held that Due Process required the judge to recuse himself, because of his admitted bias in the first trial and his “intemperate demeanor” toward the defendant in the second trial. *Id.* In so holding, the Court noted that “*Caperton* did not say that its list of four types of cases in which due process would require recusal was exclusive. Indeed, its analysis and language demonstrate the opposite.” *Id.*

3. In *People v. Navoy*, the Michigan Court of Appeals affirmed an order disqualifying a judge who had made public statements and rulings suggesting that he was biased against the defendant and had prejudged an issue in dispute. No. 311069, 2013 WL 6037167, at *5-6 (Mich. Ct. App. Nov. 14, 2013) (per curiam). The defendant was charged with marijuana possession and sought to defend on the basis of a state medical marijuana law (“MMMA”). *Id.* at *3-4. The trial judge had previously ruled that the MMMA was unconstitutional, despite the lack of any precedents so holding. *Id.* at *4. The Michigan Court of Appeals held that “it appears that Judge Somers prejudged defendant’s intended defense under the MMMA, and the probability of actual bias on the part of Judge Somers is too high to be constitutionally tolerable.” *Id.* The court independently held that recusal was required because in past cases, Judge Somers had “allegedly referred to marijuana as, ‘devil’s weed’ and ‘satan’s surge,’” and had “allegedly lectured the defendants who appeared before him in marijuana cases, stating that they have contributed to drug cartels and homicides in Mexico and other related areas.” *Id.* at *5. This created “the ‘appearance of impropriety’ in regard to cases involving marijuana and the MMMA.” *Id.*

These cases held that pejorative statements about a litigant or attorney, or statements indicating that a judge has prejudged a pending case, created an unconstitutional risk of bias. Justice Karmeier’s statements that petitioners’ attorneys’ fee award was “distorting the system,” that petitioners’ attorneys were “manipulat[ing] the system for their own financial gain,” and that his election defeat would have provided “[o]ne less judge voting against” petitioners

were at least as suggestive of bias and prejudice as the statements in these cases. *Graham, supra*. Accordingly, if the Supreme Court of Illinois had engaged in the type of analysis performed in these cases, it would have required Justice Karmeier's recusal or disqualification.

4. To the extent Justice Karmeier relied on the "rule of necessity" to justify his participation, see App. 70a-72a, his ruling would also conflict with the law of multiple circuits. The Fifth and the Ninth Circuits have held that the rule of necessity does not permit a judge to decide a case despite a conflict that would ordinarily require recusal, unless every possible judge is disqualified or so many judges are disqualified that the litigants would be denied a forum to decide their dispute. See *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1032 (5th Cir. 1998) (holding that a litigant may not invoke the rule of necessity until she "demonstrates that every judge available to her" is conflicted); *United States v. Jaramillo*, 745 F.2d 1245, 1249 (9th Cir. 1984) ("The Rule of Necessity was applied in [*United States v.*] *Will*[], 449 U.S. 200 (1980)] because a contrary holding would have denied the parties in that matter any forum because all federal judges were similarly interested in the outcome of the case. *Jaramillo*, however, was not denied the right to any forum by Judge Claiborne's disqualification.") (citation omitted).¹¹

¹¹ That Justice Karmeier's recusal would not contravene the rule of necessity is underscored by the fact that Justice Thomas has recused himself consistently from the proceedings below.

B. The Supreme Court of Pennsylvania And Mississippi Court Of Appeals Have Rejected Recusal Motions Based On Pejorative Public Statements

In contrast to the cases above, and in accordance with Justice Karmeier and the Supreme Court of Illinois, the Chief Justice of the Pennsylvania Supreme Court and the Mississippi Court of Appeals have rejected recusal requests where a judge made pejorative public statements about a litigant.

1. In a case in which this Court has granted review, *Commonwealth v. Williams*, 105 A.3d 1234 (Pa. 2014), *cert. granted sub nom. Williams v. Pennsylvania*, 136 S. Ct. 28 (2015) (Mem.), Chief Justice Roland Castille participated in a decision upholding petitioner Williams's death sentence despite having personally approved seeking death against Williams as a prosecutor and having frequently made statements in support of his Supreme Court election about having sent many defendants, including Williams, to death row as a prosecutor. See Petition for Writ of Certiorari at 11-12, 14-15, *Williams v. Pennsylvania*, No. 15-5040 (U.S. filed June 12, 2015), 2015 WL 5783073. In particular, during his campaign, Chief Justice Castille repeatedly "bragged that he sent 45 people to death row when he was a prosecutor" and stated, "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." *Id.* at 14-15. On the same day that Williams submitted a motion seeking Chief Justice Castille's recusal from review of his death sentence, Chief Justice Castille denied the motion in a one-sentence order and

refused to refer the motion to the full court. *Id.* at 15.

2. In *Slade v. State*, 42 So. 3d 25 (Miss. Ct. App. 2009), *cert. granted*, 34 So. 3d 1176 (Miss. 2010) (Table), *cert. dismissed as improvidently granted*, No. 2007-CT-01844-SCT (Miss. Aug. 5, 2010), the Mississippi Court of Appeals held that recusal was not required where the trial judge had made pejorative statements to the defendant in his previous position as a prosecutor. The trial judge had previously represented the defendant as a defense attorney and prosecuted him as an assistant district attorney. *Id.* at 29. The defendant claimed that when acting as a prosecutor, the judge had told him, “if it was left up to me, I would throw you away.” *Id.* The trial judge disputed making this statement but admitted he probably told the defendant after making a plea bargain that if the defendant were charged with a crime again, “you should be a man about it and stand up and take the max.” *Id.* The court concluded that despite the disputed statement and the judge’s prior relationships with the defendant, “the trial judge’s impartiality as to sentencing cannot be reasonably questioned.” *Id.* at 30.

Four judges dissented, arguing that recusal was appropriate under either version of the disputed statement by the trial judge. *Id.* at 31. The dissenters cited *Caperton* and noted that this Court “explained that the objective inquiry is not whether the judge was actually biased, but whether the average judge in his position is likely to be neutral or whether an unconstitutional ‘potential for bias’ exists.” *Id.* at 32 (quoting *Caperton*, 556 U.S. at 881).

III. THIS CASE PRESENTS AN IMPORTANT VEHICLE FOR THIS COURT TO ADDRESS AN IMPORTANT QUESTION

This case presents a question that is important and recurring: the relevance of a judge's pejorative public statements about a litigant or their attorneys to the Due Process analysis. As the above cases show, judges make public statements about litigants and attorneys in a variety of contexts, including election advertisements, statements to journalists, legal filings, public speeches, prior careers as prosecutors, and other cases involving the same litigant or similar legal issues. Guidance from this Court on how such statements affect the inquiry of whether Due Process requires recusal would greatly assist the lower courts.

This case is an ideal vehicle for the Court to provide such guidance. Using this case to clarify the standard for when pejorative public statements require recusal would be in line with this Court's practice in recusal cases of granting petitions presenting "extreme facts" and using those cases to "articulate[] an objective standard to protect the parties' basic right to a fair trial in a fair tribunal." *Caperton*, 556 U.S. at 887. Moreover, the violation of Due Process clearly affected the outcome, as Justice Karmeier provided the necessary fourth vote to reverse the lower court's judgment. *See* Ill. Const. art. VI, § 3.

For those reasons, the Court should grant certiorari to resolve the conflict and clarify the uncertainty over the relevance of pejorative public statements to the Due Process analysis.

IV. AT A MINIMUM, THIS COURT SHOULD HOLD THE PETITION PENDING THE RESOLUTION OF *WILLIAMS V. PENNSYLVANIA*

If the Court does not grant the petition, it should at a minimum hold the petition pending the resolution of *Williams v. Pennsylvania*. In *Williams*, this Court granted certiorari to decide whether Due Process required recusal under the facts of that case. As stated in the question presented, the facts involved a judge reviewing the death sentence of the petitioner, where in his election campaign he had “expressed strong support for capital punishment, with reference to the number of defendants he had ‘sent’ to death row, including Petitioner.” Petition for Writ of Certiorari at i, *Williams, supra*; see also Petitioners’ Merits Brief at 8-9, *Williams, supra*, (U.S. filed Nov. 30, 2015) (describing statements made by Chief Justice Castille in election campaign touting how many people he sent to death row).

The Court’s ruling in *Williams* is likely to clarify the general Due Process standard for recusal and provide guidance on the relevance of statements suggestive of bias made in the context of an election campaign. The Court routinely holds petitions that implicate similar issues as pending cases before the Court, to ensure that similar cases will be resolved in a consistent manner. If the Court decides not to grant the petition outright, the Court should hold this case for *Williams*. If the Court reverses in *Williams*, the Court should grant the petition, vacate the Supreme Court of Illinois’s judgment, and remand to the Supreme Court of Illinois for reconsideration of the appeal of the Appellate Court of Illinois’s judgment in light of this Court’s decision in *Williams*.

Such an outcome would be consistent with this Court's general practice. See *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) ("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a re-determination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.").

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition pending the Court's decision in *Williams v. Pennsylvania*.

Respectfully submitted,

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