

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF)
 THE NATIONAL ASSOCIATION FOR THE)
 ADVANCEMENT OF COLORED PEOPLE)
)
 v.)
)
 TIM MOORE, in his official capacity, PHILIP)
 BERGER, in his official capacity)

From Wake County

No. _____

MOTION OF BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL
 OF LAW FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Brennan Center for Justice at New York University School of Law (the “Brennan Center”) respectfully moves this Court, pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, for leave to file an *amicus curiae* brief addressing the questions posed by the Court in its Order of September 28, 2021. The Brennan Center is filing its *amicus curiae* brief conditionally along with this motion, pursuant to Rule 28(i)(2) of the North Carolina Rules of Appellate Procedure.

INTERESTS OF AMICI

The Brennan Center for Justice at N.Y.U. School of Law (the “Brennan Center” or the “Center”) is a nonprofit, non-partisan public policy and law institute seeking to improve our systems of government, eliminate participation barriers, and ensure public institutions reflect the

diverse voices and interests that make for a rich and energetic democracy. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, to eliminate and defend against barriers to full political participation, and to ensure that public policy institutions reflect the diverse voices and interests that make for a rich and energetic democracy.

REASONS WHY THE AMICUS BRIEF IS DESIRABLE

The questions posed by the Court's September 28, 2021 Order, and the issues it raises, have been researched by the Center as part of its Democracy Program and its work to hold the political institutions and laws of the United States accountable to the American ideals of democracy and equal justice.

ISSUES OF LAW ADDRESSED IN THE AMICUS BRIEF

As noted above, the Brennan Center will address the questions posed by the Court in its Order of September 28, 2021.

POSITION OF *AMICI* ON THE ISSUES

Based upon the U.S. and North Carolina Constitutions and the laws promulgated thereunder, and the overall trend among states that has been and continues to be toward subjecting recusal decisions to independent adjudication and review, the Center will urge this Court, as the highest in North Carolina, to put in place written procedures to ensure recusal decisions receive meaningful review by independent decision-makers.

CONCLUSION

For the foregoing reasons, the Brennan Center respectfully requests that the Court grant leave to file an *amicus curiae* brief addressing the questions and issues posed by the Court in its Order of 28 September, 2021.

Respectfully submitted this the 4th day of November, 2021.

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UNIVERSITY SCHOOL OF LAW IN SUPPORT OF NEITHER PARTY

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THE AMICI

The Brennan Center for Justice at N.Y.U. School of Law is a nonprofit, non-partisan public policy and law institute seeking to improve our systems of government, eliminate participation barriers, and ensure public institutions reflect the diverse voices and interests that make for a rich and energetic democracy.¹ This brief addresses the necessity of an impartial judiciary, and how independent and meaningful consideration of recusal motions can bolster the North Carolina Supreme Court’s high standards of impartiality.

ARGUMENT

I. THE INDEPENDENCE AND REPUTATION OF THE JUDICIARY IS CRITICAL TO THE RULE OF LAW.

“[I]t is of the utmost importance that every man should have a fair and impartial trial of his case, and that to secure this great boon two things are absolutely essential; an impartial jury and an unbiased judge.” *N.C. Nat. Bank v. Gillespie*, 291 N.C. 303, 311; 230 S.E.2d 375, 380 (1976). Preserving public confidence in fairness and impartiality is “a state interest of the highest order.” *Williams-Yulee v. Florida Bar*, 575 U.S. 433,446 (internal quotations and citations omitted).

Unlike the executive or the legislature, the judiciary ‘has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.’ The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary’s authority therefore depends in large measure on the public’s willingness to respect and

¹ No person or entity – other than the amicus curiae, its members, or its counsel – have directly or indirectly written the brief or contributed money for its preparation. This brief does not purport to convey the position of NYU School of Law.

follow its decisions. As Justice Frankfurter once put it for the Court, ‘justice must satisfy the appearance of justice.’

Id. at 445-46.

The mere appearance of bias can damage the judiciary’s capacity to perform its constitutional functions—as a multidisciplinary commission convened by North Carolina’s Chief Justice concluded, public perception that “certain groups generally receive better treatment than others in North Carolina courts . . . undermine[s] the Judicial Branch’s commitment to the fair administration of justice for all.” North Carolina Commission on the Administration of Law and Justice Public Trust and Confidence Committee, *Interim Report* (July 2016), p. 5, https://www.nccourts.gov/assets/inline-files/Public-Trust-and-Confidence_interim-report_NCCALJ.pdf?ay62sruAqO7Yt5fB0RJ1EgpByWIGD4IN. The report concluded that “[i]f justice is to be served without favor, denial, or delay, the Judicial Branch must create an atmosphere in which every person serving in the Judicial Branch understands the importance of bias-free behavior in the courts, and every person who interacts with the Judicial Branch experiences a bias-free environment.” *Id.* As the U.S. Supreme Court has stated, “[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.” *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016).

Unfortunately, for many Americans, the ideals of impartial justice and public legitimacy appear on the retreat. A 2021 Gallup poll found that only 54% of Americans have a great deal or fair amount of trust in the judiciary, down from an historical average of 68%. Megan Brennan, “Americans’ Trust in Government Remains Low,” (Sept. 2021), <https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx>. The

National Conference for State Courts found that, in 2019, only 65% of respondents had confidence in state courts, an 11% decrease from 2018. GBAO Strategies, “State of the State Courts – Survey Analysis,” (Jan. 2020), https://www.ncsc.org/data/assets/pdf_file/0018/16731/sosc_2019_survey_analysis_2019.pdf.

This decline was consistent across demographic and ideological lines. *Id.* Startlingly, less than half of respondents agreed that state courts are unbiased. *Id.*

News reports and studies illustrate the legitimacy of public concerns about conflicts of interest. *See, e.g.*, James Grimaldi, Coulter Jones, Joe Palazzolo, “131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest,” *Wall Street Journal*, (Sept. 2021); Newby Parton, *Judges Breaking the Law: An Empirical Study of Financially Interested Judges Deciding Cases*, 99 NCLR 1 (2020); Michael Berens and John Shiffman, “The Teflon Robe,” Reuters (2020), <https://www.reuters.com/investigates/section/usa-judges/>.

Through disqualification rules, the legal profession has attempted to limit circumstances that might further undermine public confidence. The American Bar Association (“ABA”) Model Code of Judicial Conduct requires disqualification whenever a “judge’s impartiality might reasonably be questioned” and provides guidance on circumstances likely to require recusal. *Model Code of Jud. Conduct*, Canon 2, Rule 2.11 (Am. Bar Ass’n 2020). The North Carolina Code of Judicial Conduct, Canon 3(C)(1), mirrors the Model Code, stating “a judge should disqualify himself/herself in a proceeding in which the judge’s impartiality may reasonably be questioned,” and providing specific circumstances warranting recusal. Every U.S. jurisdiction expects its judges to disqualify themselves in situations where good cause for doing so exists.²

² In states where recusal procedures are in place, recusal—even of multiple judges—can be seen as a minor issue. *See, e.g.*, Hayley Milon Bour, “Loudoun Judge Recuses Himself from Barts Recall Case,” LoudonNow (Sept. 13, 2021), <https://loudounnow.com/2021/09/13/loudoun-judge->

See 28 U.S.C. § 455; *see also* The Judicial Disqualification Resource Center, <https://www.judicialrecusal.com/state-law-judicial-disqualification/>.

Faced with the reality that Americans increasingly distrust the judiciary and that judges often face conflicts of interest, it is essential that courts adopt confidence-inspiring mechanisms for responding to such conflicts. If actual or perceived bias is not addressed by transparent recusal procedures, public confidence in the North Carolina Judiciary's ability to provide fair resolution of the people's legal affairs will diminish.

II. FAIR, TRANSPARENT, AND INDEPENDENT RECUSAL PROCEDURES ARE THE BEST MEANS TO PRESERVE AN IMPARTIAL JUDICIARY.

We address several of the Court's questions in this section: Question 1 in § A, Questions 4 and 5 in § B, and Questions 6 and 7 in § C. It is beyond the scope of this brief to respond to Questions 2, 3, and 8, or all of the subparts of some of Questions 1, 4, 5, 6, and 7.

A. Historical and Current Recusal Practices in Courts of Last Resort Vary, But the Trend Across States is to Recognize the Importance of Independent Review.

Judicial recusal is as ancient as the requirement of impartiality. "Under the Roman Code of Justinian, a party could disqualify a judge who was under suspicion of bias." Matthew Menendez and Dorothy Samuels, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, Brennan Center for Justice, at 3 (2016) (hereinafter the "Brennan Report").³

[recuses-himself-from-barts-recall-case/](#) (noting a judge recused himself from case against a school board member because the judge had school-aged children) and Jill Tatge-Rozell, "Judges Recused from County Map Redistricting Case," KENOSHA NEWS (Sept. 24, 2021), https://www.kenoshanews.com/news/local/judges-recused-from-county-map-redistricting-case/article_6d7f8f95-304c-57d1-9045-dac1ac73d9c1.html (suggest inserting a parenthetical summary here).

³ The Brennan Report is available at https://www.brennancenter.org/sites/default/files/2019-08/Report_Judicial_Recusal_Reform.pdf and is attached to this brief as Appendix A.

In the Anglo-American legal tradition's early development, judges with financial interests in cases were required to recuse. *Id.* Over time, accepted grounds warranting recusal broadened and were encoded into law through codes of judicial conduct, statutes, constitutional provisions, and court rules and decisions in the states. *Id.*

The evolution in recusal procedures reflects an understanding that both substantive and procedural guarantees are necessary to avoid the reality and perception of bias. At the time of the Brennan Report, 26 states allowed for independent review of motions to recuse in at least some circumstances. *Id.* at 9, 11. In some states, challenged judges do not participate in their recusals; in others, judges may respond to recusal motions. *Id.* Fifteen states provided for independent review of motions to recuse in their highest courts at the time of the Brennan Report. *Id.* at 11. In states that do not allow for such review, a challenged justice's ruling on their own recusal motion is only reviewable through certiorari to the U.S. Supreme Court based on a claim that due process or other federal rights were violated. *See Williams*, 136 S.Ct. at 1908 ("due process demarks only the outer boundaries of judicial disqualification") and U.S. Const. Art. III § 2.

While the status quo varies, the trend toward independent review was hastened by the U.S. Supreme Court's decisions in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, (2009), and *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). In both cases, high court judges failed to recuse themselves when required to evaluate their own potential biases, despite both states' codes of judicial conduct requiring judges to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." 556 U.S. at 888 and 136 S. Ct. 1908. Also in both cases, the Court ruled that recusal was necessary to comport with due process. These cases illustrate that judges, like all people, are ill-suited to effectively analyze their own

impartiality. As Justice Kennedy wrote for the Court, “[b]ias is easy to attribute to others and difficult to discern in oneself.” 136 S. Ct. at 1905.

In the immediate wake of *Caperton*, Michigan and Tennessee adopted procedures for independent review of recusal decisions in their supreme courts. Mich. Court Rule 2.003; Tenn. Sup. Ct. R. 10B 3.03 (allowing an appeal to the full court if a challenged justice denied a recusal motion); *see also* Order Adopting Amendment of MCR 2.003 (Mich. Nov. 25, 2009) (Kelly, C.J., concurring) (noting “an independent inquiry into a challenged justices’ refusal to recuse may be necessary to satisfy due process”).

National organizations of judges and attorneys followed suit, stressing the importance of independent review. The ABA urged states to adopt disqualification procedures that “include a mechanism for timely review of denials to disqualify or recuse that is independent of the subject judge.” ABA Resolution 105C (Aug. 2014) at 1. The Conference of Chief Justices pressed courts to “establish procedures that incorporate a transparent, timely, and independent review” when determining a motion for disqualification or recusal, citing the need for a fair and impartial judiciary to preserve due process. Conference of Chief Justices, Res 8: *Urging Adoption of Procedures for Deciding Judicial Disqualification/Recusal Motions: Ensuring a Fair and Impartial Process* (2014). The Institute for the Advancement of the American Legal System recommended, “as a general rule, that states not grant judges the authority to deny motions seeking their recusal.” Russell Wheeler and Malia Reddick, “Judicial Recusal Procedures: A Report on the IAALS Convening” at 6 (2017), [hereinafter the “IAALS Report”](https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf)), https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf.

This move toward independent review is also consistent with a growing body of social science and empirical evidence suggesting that judges, like all people, have difficulty

recognizing their own biases. Brennan Report, pp. 4-5. Empirical psychologists have documented the phenomenon of a “bias blind spot,” where people see their own connections to an issue as sources of useful information improving the accuracy of their decisions rather than of possible bias.⁴ *Id.* In one study, ninety-seven percent of judges believed they were above average in avoiding bias in the courtroom. *Id.* Instead of expecting judges to overcome human nature, state courts increasingly rely on methods that help remove bias blind spots and independent review of recusal motions at lower and higher courts. Brennan Report, pp. 9-11.

B. Independent and Transparent Recusal Rules Are Needed at All Levels of the Judiciary.

While different logistical considerations apply to the recusal in lower courts versus courts of last resort, the underlying principles remain the same. Challenged judges should not have the final word on assessing their own potential bias.

Caperton and *Williams* are illustrative of this principle. Both cases involved elected state justices, and the U.S. Supreme Court found that the justices did not accurately perceive their own actual or apparent bias. A judge’s sitting in a panel rather than alone does not mitigate this harm—the Court in *Williams* found that failure to recuse by an appellate judge with an apparent conflict of interest is not harmless error, because perceptions of fairness could be injured by the participation of challenged judges even if their votes are not dispositive. *Williams*, 136 S.Ct. 1899, 1909.

⁴ For a discussion of the ‘bias blind spot’ within the context of recusal, see Melinda Marbes, *Refocusing Recusals*, 32 St. Louis U. Pub. L. Rev. 235, 250 (2013); see also Richard West, Russell Meserve, and Keith Stanovich, “Cognitive Sophistication Does Not Attenuate the Bias Blind Spot,” *J Pers Soc Psychol*, (Sept. 2012) <https://pubmed.ncbi.nlm.nih.gov/22663351/> (finding “that none of these bias blind spots were attenuated by . . . cognitive ability or thinking dispositions related to bias. . . . a larger bias blind spot was associated with higher cognitive ability.”)

When considering recusal motions in both lower courts and courts of last resort, the best methods to eliminate actual and perceived bias are the provision of independent decision-makers and meaningful review of denials, and inclusion of reasons for or against recusal in the record. States have relied on these principles when adopting transparent methods at both lower and higher courts—where they are arguably of paramount importance, given the only practical remaining route of appeal is on due process grounds by certiorari to the U.S. Supreme Court.

However, recusal of appellate judges involves distinct considerations. Unlike in lower courts, where cases may be reassigned, courts of last resort have fewer options. Brennan Report at 13. Failing to replace judges, however, may create a risk of tie votes or loss of a quorum. *Id.* States have addressed these concerns at the high court level by establishing clear, practical mechanisms for replacing disqualified justices. Most states, including North Carolina,⁵ authorize the chief justice to select replacement justices, while some states authorize the governor, legislature, or the entire court to select replacements. *Id.* at 14. To avoid any appearance of gamesmanship in the selection of replacement justices, a court can adopt transparent replacement procedures which remove the discretion as to who will be selected as a replacement justice. *See IAALS Report* at 13; *see also Florida Supreme Court Manual of Internal Operating Procedures(X)(D)* (providing a recused justices to be automatically replaced by the chief judge of the district court to which the challenged justice is assigned).

Differences among various court levels may also warrant different approaches to the provision of independent review of recusal motions. Several states allowing independent review of recusal motions at trial and supreme court levels (including, at the time of the Brennan Report,

⁵ North Carolina's Constitution authorizes the General Assembly to recall retired judges. N.C. CONST. ART. IV, § 8. The General Assembly in turn has authorized the Chief Justice to select replacements. NC Gen Stat. §§ 7A-10.1 and 7A-39.14.

those in Alaska, California, Georgia, Louisiana, Michigan, Montana, Nevada, Texas, Utah, and Vermont) adopt different approaches for providing independent review at different levels of their courts. Brennan Report pp. 6-11. In Michigan, for example, if a challenged lower court judge denies a recusal motion, the chief judge of that court reviews the motion *de novo*, while denials by supreme court justices are reviewed by the entire court. Mich. Ct. R. 2.003(D)(3). These independent review processes, tailored for the level of the proceedings, take into account scarce judicial resources while promoting impartiality. *Id.*, p. 8. These methods' ultimate aim is to provide a fair hearing on recusal motions at all levels in the court system and to do so, in part, by removing the challenged judge from decision-making.

C. The Duty to Sit Does Not Conflict with Transparent, Written Recusal Procedures.

As stewards of the courts, judges have a 'duty to sit,' prohibiting them from refusing to hear a case without justifiable cause. This duty also arises from concerns that judges may avoid difficult or undesirable cases or ones in which a decision might garner public criticism. Brennan Report, p. 3. North Carolina's Code of Judicial Conduct contains provisions that reflect the duty to sit, stating that the "judicial duties of a judge take precedence over all the judge's other activities" and that a "judge should be unswayed by partisan interests, public clamor, or fear of criticism." N.C. Code Jud. Conduct, Canons 3 and 3(A)(1).

The duty to sit coexists with other, equally important duties in the N.C. Judicial Code of Conduct, including the duty to recuse.⁶ N.C. Code Jud. Conduct, Canon 3(C) (noting "a judge

⁶ Recusal issues at hand here do not implicate the Rule of Necessity, which is implicated when all or a significant portion of judges would be disqualified, such as the case in *United States v. Will*, 449 U.S. 200 (1980). For most recusal motions, it is unlikely that all, or a significant portion of the remaining justices on the bench would be conflicted out. The Rule of Necessity contemplates that rare circumstance.

should disqualify himself/herself in a proceeding in which the judge’s impartiality may reasonably be questioned”). According to several federal circuit courts, the duty to sit does not trump the duty to refuse to sit when disqualified by bias. Charles Geyh, *Judicial Disqualification: An Analysis of Federal Law*, 15 (2018); see also 28 U.S.C. § 455 (discussing similar decisions in the First, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits). The Fourth Circuit noted that current recusal standards “abolish[] the rule that courts should resolve close questions of disqualification in favor of a judge’s so-called duty to sit.” *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998) (internal quotation marks omitted) (evaluating 28 U.S. Code § 455 on the disqualification of federal judges).

The tension between the duty to sit and the duty to recuse can be mitigated for a judge—whether elected or appointed⁷—by independent review and written rules governing recusal, as no judge has a duty to hear a case in violation of the rules governing a court’s proceedings. Entrusting other judges to determine whether a conflict exists ensures that challenged judges cannot invoke recusal to avoid difficult or controversial cases. In addition, written rules are in accord with ABA Resolution 105C, which calls upon states to adopt transparent recusal procedures. Brennan Report, p. 11. Written, transparent explanations of recusal standards increase public confidence in the judiciary and can reduce perceptions of gamesmanship and political influence impacting recusal decisions. Brennan Report, p. 13.

⁷ While opponents of recusal of elected judges have argued that recusal deprives citizens who contribute to judicial campaigns of access to the judges they help elect, *Caperton* makes clear that no one has a right to access a judge that trumps due process and the judiciary’s interest in preserving public confidence. Brennan Report at 15.

III. THE BRENNAN CENTER'S PROPOSED RECUSAL GUIDELINES SUGGEST MECHANISMS FOR MEANINGFUL INDEPENDENT CONSIDERATION OF RECUSAL MOTIONS

The Brennan Center has proposed procedural guidelines that, while not purporting to address every implementation detail, address best practices for recusal procedures. Brennan Report, pp. 6-17. These proposals focus on providing an independent decision-maker, meaningful review of recusal denials, and a record of recusal decision reasoning.

A. Provide Independent Review of Recusal Motions or Meaningful Review of Recusal Denials.

Recent developments in recusal procedures demonstrate a growing recognition of the need to safeguard the public's confidence by preserving the principle 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."⁸ *Williams*, 136 S. Ct. at 1905-06. Moreover, "it is well-established in [North Carolina] that a trial judge should either recuse himself or refer a recusal motion to another judge if . . . a reasonable man . . . would have doubts about the judge's ability to" decide the recusal motion impartially. *State v. Poole*, 289 S.E.2d 335, 343 (N.C. 1982) (internal quotation marks omitted).

To maintain public confidence and judicial independence, this Court should adopt rules formally extending these principles to the state Supreme Court. There are several ways the court can provide for independent review of recusal motions at the state Supreme Court. The Brennan Center has noted Texas's approach, which provides that challenged justices must either remove themselves from the case or refer the matter to the remainder of the court for *en banc* review, excluding the challenged justice. Tex. R. App. P. 16.3. In the alternative, this Court may also

⁸ North Carolina's Code of Judicial Conduct reflects the importance of safeguarding public confidence and allowing no one to try cases where they have an interest throughout, by, for example, requiring judges to uphold the Judiciary's integrity (Canon 1), perform their duties impartially (Canon 3), and file compensation reports (Canon 4).

adopt an approach that takes the matter entirely out of the hands of the challenged justice. *See, e.g., Nev. Rev. Stat. 1.225(4)* (automatically referring recusal motions to the remaining justices of the Supreme Court, without giving the challenged justice an opportunity to grant the motion). In Michigan, if a challenged justice denies the motion for disqualification, “a party may move for the motion to be decided by the entire Court,” including the challenged justice. While this approach allows for review of denials of recusal motions, it does not heed the Supreme Court’s conclusion in *Williams* that any participation by a conflicted judge on a panel of judges undermines the appearance of that panel’s impartiality. *Williams*, 136 S. Ct. at 1909. Finally, the Court could allow for review of recusal motions by an independent body, which can mitigate concerns about collegiality and perceptions of gamesmanship, although no state has adopted such an approach yet. Brennan Report, p. 10.

B. Require Judges to Issue Reasoned, Transparent Recusal Decisions in Writing or on the Record.

Written, transparent disposition of recusal decisions would increase confidence in the judiciary, not only furthering accountability but also increasing judges’ critical thinking about the decision as they put pens to paper to explain their reasoning. *See IAALS Report* at 10. Written decisions also promote due process by demonstrating that decisions are “well-reasoned rather than arbitrary.” *Id.* Such written decisions can also be helpful to other judges, by establishing “common law interpretations of vague or ambiguous recusal requirements and ease the process for appellate review of denials.”⁹ Several states require written recusal decisions. *See Id.* at 22 (providing examples from Georgia, Maine, Michigan, and Tennessee).

⁹ Recusal procedures would also benefit from written memorialization. “It is axiomatic that a process designed to assure fairness and impartiality in the judiciary must be spelled out with sufficient specificity and concreteness that no one could complain afterwards that no understandable path to raise the issue and see it resolved exists.” ABA Resolution 105(C).

CONCLUSION

Judicial independence and impartiality are bedrocks of our legal system—both in North Carolina and throughout the United States. The trend among states is to refer recusal decisions for independent adjudication and review. This Court, as the highest in North Carolina, should adopt clear, written standards that ensure recusal decisions are made by independent decision-makers and that denials are meaningfully reviewed.

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**APPENDIX TO
BRIEF FOR AMICI CURIAE BRENNAN CENTER FOR
JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF
LAW IN SUPPORT OF NEITHER PARTY (No. 216A18-3):**

Judicial Recusal Reform:
Toward Independent Consideration
of Disqualification
By Matthew Menendez and Dorothy Samuels

BRENNAN

CENTER

FOR JUSTICE

TWENTY
YEARS

Judicial Recusal Reform: Toward Independent Consideration of Disqualification

By Matthew Menendez and Dorothy Samuels

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our system of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from ending mass incarceration to preserving Constitutional protections in the fight against terrorism. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, the courts, and in the court of public opinion.

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INTRODUCTION¹

This report examines an important but underscrutinized challenge for fair and impartial courts. The procedural rules governing judicial disqualification in many state court systems fail to provide for meaningful independent consideration of recusal decisions by judges. While it is widely recognized that “no man should be a judge in his own case,” this standard often is not applied to judicial disqualification.

In some 35 states, state supreme court justices decide their own recusal motions with no opportunity for review short of the U.S. Supreme Court, which hears very few cases. In the majority of states, trial judges whose impartiality is challenged are permitted to rule on the motion themselves. On appeal, the review can be inappropriately deferential. Reform is required to bolster public confidence in judicial integrity and ensure that all litigants receive unbiased resolution of their cases.

Motions calling for a judge to step down in a particular case effectively place the judge and the validity of the judicial process on trial. Absent searching independent consideration, challenged judges themselves determine whether there are adequate grounds to question their own impartiality — a task for which, research and common-sense suggest, they are wholly unsuited. For a judge to ignore that simple truth would, as James Madison wrote more than 200 years ago in the Federalist Papers, “bias his judgment, and not improbably, corrupt his integrity.” That wisdom holds today.

Over the past twenty years, the Brennan Center has documented a variety of threats to fair and impartial courts. This new analysis is occasioned in part by the Supreme Court’s June 2016 ruling in *Williams v. Pennsylvania*,² the second major opinion on an important recusal question by the nation’s highest court in just a few years. Like the Court’s 2009 ruling, in *Caperton v. Massey*, the 5-3 *Williams* decision declared that the Due Process Clause of the Fourteenth Amendment requires a judge to step aside when the circumstances of a case present a “serious risk of actual bias.”

In *Williams* the conflict of interest stemmed from an appellate judge’s participation in a case he oversaw in his prior job as district attorney. In *Caperton*, the conflict arose from massive campaign spending by a corporate litigant’s CEO in support of one of the judges hearing his company’s case. *Caperton* valuably highlighted the importance of recusal as a tool to protect judicial impartiality in the current judicial election environment, marked by massive amounts of spending (often through independent expenditures paid for by lawyers, frequent litigants, and groups with interests in the outcome of judicial decisions) and an escalation in inflammatory attack ads.

In both *Williams* and *Caperton*, notably, the Court did not address the inherent procedural conflict of allowing judges facing a recusal motion to be its sole decider — our prime focus here. In these opinions, both written by Justice Anthony Kennedy, the Court established a due process floor below which the risk of actual bias becomes constitutionally intolerable. The Court did not grapple with whether a credible and impartial mechanism to resolve recusal disputes is also an essential element of due process. Although the Court made clear that states are free to adopt rules providing more protection against real or apparent bias than is constitutionally required, and many have, too few states have moved to mandate consideration of recusal motions by a neutral, uninvolved judge.

But regardless of where states set their standard for recusal — whether at the constitutional floor (a “serious risk of actual bias”) or the more protective standard adopted by almost every state mandating recusal in “any proceeding in which the judge’s impartiality might reasonably be questioned” — it is critical that the determination of whether a judge is and appears to be impartial not be left to the challenged judge. So the Brennan Center argued in an amicus brief submitted in the *Williams* case.³

Recusal at the U.S. Supreme Court level itself presents unique constitutional considerations, and is the subject of much debate. While the issue is beyond the scope of this report, we note that, unlike other federal judges, justices of the Supreme Court are not bound by the federal Code of Judicial Conduct, and there is no mechanism to require Supreme Court justices to recuse themselves against their will.

The egregious facts in both *Caperton* and *Williams* made it plain to the public, legal experts, and a majority of the U.S. Supreme Court that the impartiality of the challenged state court justices was very much in doubt.⁴ Somehow, though, it was not obvious to the judges themselves, both of whom publicly protested that they harbored no bias whatsoever.⁵ In the *Williams* opinion, Justice Kennedy seemed to refer to this ethical blind spot, observing that “[b]ias is easy to attribute to others and difficult to discern in oneself.”⁶ Justice Kennedy did not elaborate on that observation, which suggests, at least, the logical next step of foreclosing states from granting a challenged judge the final word on whether his impartiality may reasonably be questioned.

To begin our examination, this report reviews the crucial role of judicial recusal as a mechanism for safeguarding the reality and perception of judicial integrity. It then considers the risks of allowing judges to determine their own impartiality. Finally, the report offers a framework for strengthening independent review of recusal motions without unduly burdening already-scarce judicial resources, and examines the extent to which current state procedural rules provide — or fail to provide — meaningful independent review of recusal motions, thereby fulfilling the promise of due process.

These proposals will not answer every question, or address each potential scenario that may arise in different states using varied approaches for handling recusal motions. But individually and together, these simple principles can guide states in bolstering the integrity of the court system and public trust. Our proposed approach, detailed beginning on page 6, has five parts:

1. In the first instance, assign recusal motions to a judge who is not the subject of the motion.
2. Require judges to commit recusal decisions in writing, allowing for adequate review on appeal.
3. Provide for de novo review of denials of recusal motions, particularly when the challenged judge decided the initial motion.
4. Establish a clear, practical mechanism within the judicial system for replacing disqualified justices on state courts of last resort.
5. Allow one preemptory strike of an assigned judge at the trial level.

I. JUDICIAL RECUSAL: AN OVERVIEW

Judicial recusal, a concept that dates back to antiquity,⁷ refers to a judge stepping aside from hearing a case, either under their own initiative, or in response to a litigant’s motion.⁸ Recusal protects against the possibility that a judge may not be impartial in a given case. While it is generally presumed that judges will perform their duties diligently and fairly,⁹ recusal rules acknowledge there are some instances when a judge’s participation in a case would be inappropriate.¹⁰ The paramount importance of a neutral adjudicator requires a confidence-inspiring mechanism to address situations when questions regarding a judge’s impartiality arise.

Under the Roman Code of Justinian, a party could disqualify a judge who was under suspicion of bias.¹¹ In the Anglo-American legal tradition, judicial recusal was initially required only where a judge had a financial interest in the outcome of a case.¹² Over time, other grounds for recusal have been added, through state codes of judicial conduct, statutes, state constitutional provisions, state court rules, and, of course, by decisions by the U.S. and state supreme courts.¹³

In 1972, the American Bar Association issued its first Model Code of Judicial Conduct, updated periodically and adopted in some form by every state. The Code provides that “a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to” specific circumstances such as having a bias concerning a party, personal knowledge of disputed evidentiary facts in the dispute, a financial interest in the dispute, or a close relation who is a party or lawyer in the proceeding.¹⁴

As with other areas of law, the rules that apply to recusal decisions may be substantive or procedural.¹⁶ Substantive rules specify the circumstances when a judge must be disqualified — for example, requiring disqualification when a judge has a financial interest in the outcome of a case, or a close relative is a lawyer or litigant in a matter.

Another factor sometimes mentioned in discussions about recusal, namely the interplay of judicial recusal and the principle known as a judge’s “duty to sit.” The notion of a judge’s duty to sit is driven by a concern that some jurists might step down from difficult or undesirable cases, or ones in which a decision in the case might garner public criticism.¹⁵ But changes to federal law and codes of judicial conduct have clarified that the duty to sit is inapplicable where disqualification is warranted due to a conflict of interest.

Procedural rules dictate how, and by whom, those substantive rules are applied, the proper standard for appellate review, and the mechanism for replacing disqualified judges. Both substantive and procedural rules differ from state to state and at the federal level.¹⁷ But for (all) litigants, there is a constitutional baseline (or due process minimum) protected by the Due Process clause of the Fourteenth Amendment.

A critical caveat. An effective recusal system is a necessary component of a greater constellation of protections designed to guarantee litigants an impartial adjudicator. But recusal alone it is not enough to ensure due process or judicial integrity. Even if there were a perfect way to screen against all risk of real and apparent bias, which of course there is not, judicial integrity and trust in the courts is also undermined in other ways, calling for other systemic reforms. For example, judicial selection and reselection reforms are necessary to reduce the role of monied special interests in judicial elections, and to select highly qualified judges that fully reflect the nation’s diversity.¹⁸ Reports and other resources pertaining to fair and impartial courts are available on the Brennan Center’s website.¹⁹

II. THE IMPORTANCE OF INDEPENDENT CONSIDERATION OF RECUSAL

Caperton and *Williams* demonstrate how challenged judges, viewing the alleged grounds suggesting they harbor real or apparent bias in a particular case, are ill-suited to effectively analyze the situation. Rather than placing the burden on the challenged judge of deciding, objectively,²⁰ whether there is a reasonable question as to their own impartiality, courts should create sensible mechanisms for independent consideration by someone other than the challenged judge.

In some cases, the question of recusal requires little judicial discretion. The Code of Judicial Conduct includes some bright-line rules, such as the requirement that a judge recuse herself when she has a financial interest in the outcome of a case or when a close family member is involved.²¹ But not all recusal requests are as straight-forward or easily resolved. Often recusal determinations require a judge to assess, in most instances, whether her “impartiality might reasonably be questioned.” This standard, adopted by the vast majority²² of states from the Rule 2.11(A)²³ of the ABA’s Model Code,²⁴ leaves much to the discretion of the decider.

Numerous social science studies have shown that judges, like all people, are prone to certain cognitive errors, including a tendency to see oneself and one’s conduct in the best light. For example, in an empirical study of federal magistrate judges, 87.7% of the 155 judges surveyed believed that they were reversed on appeal less often than the average magistrate judge.²⁵ As explained by Professor Chris Guthrie, judges, like most people, “genuinely believe that they are better than average at a variety of endeavors.”²⁶

Recusal uniquely challenges the judge’s reputational interest in being (and being seen as) impartial, and thus offers an unconscious motivation to vindicate herself. Studies have shown that individuals believe that they are objective, and view themselves as more fair and ethical than others.²⁷

All people, including judges, are inherently disadvantaged at recognizing bias in themselves.²⁸ Judges are likely to believe that their “judgments are less susceptible to bias than the judgments of others.”²⁹ Empirical psychologists refer to the the “bias blind spot” — studies show that individuals perceive their personal connections to a given issue as a source of useful information improving accuracy, while viewing the personal connections of others as evidence of bias.³⁰ As explained by Judge Richard Posner, “we use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behavior to identify bias in others.”³¹ Professor Steven Lubet terms this “introspection deficit disorder.”³²

Recusal rules are often spelled out in judicial codes of conduct, which also require judges to recuse themselves on their own initiative where appropriate. This places a judge in a difficult position when faced with a recusal motion, as — unless the motion presents information previously unknown to the judge — she is being asked to admit that she has already failed in her ethical obligation to recuse herself.³³ In an empirical study of federal administrative law judges (ALJ’s), more than ninety-seven percent believed they were in the top fifty percent for avoiding bias.³⁴ “Not a single ALJ placed herself in the bottom quartile.”³⁵

Therefore, another judge personally removed from the situation is in a better position³⁶ to more accurately assess whether a request for another judge’s recusal is warranted.³⁷

Despite the many reasons why independent consideration of recusal motions should be the standard, judges are often asked to decide their own recusal motions. In 29 states, trial court judges decide recusal motions

themselves rather than referring them to another judge. In 35 states, state supreme court justices decide recusal motions themselves rather than allowing the full state supreme court to consider the motion.

The five procedural recusal reforms this report recommends would go far in addressing these concerns. Those reforms would also implement principles articulated in the ABA's most recent resolution regarding recusal.

In 2014, the ABA passed Resolution 105C, calling upon states to improve their recusal procedures.³⁸ This resolution was the product of years of debate within the ABA following *Caperton*, as various entities within the ABA struggled to update the Model Code of Judicial Conduct to address the modern realities of judicial elections, including the massive rise in independent expenditures.³⁹ Unable to reach consensus on specific language, Resolution 105C identified four areas where reform is needed, including transparent and independent review of recusal motions, and urges states to adopt procedures to effectuate them.

Resolution 105C

RESOLVED, That the American Bar Association urges that states and territories adopt certain judicial disqualification procedures which: (1) take into account the fact that certain campaign expenditures and contributions, including independent expenditures, made during judicial elections raise concerns about possible effects on judicial impartiality and independence; (2) **are transparent**; (3) provide for the timely resolution of disqualification and recusal motions; and (4) **include a mechanism for the timely review of denials to disqualify or recuse that is independent of the subject judge**; and

RESOLVED FURTHER, That the American Bar Association urges all states and territories to provide guidance and training to judges in deciding disqualification/recusal motions.

The Conference of Chief Justices has also urged courts to “establish procedures that incorporate a transparent, timely, and independent review for determining a party’s motion for judicial disqualification/recusal.”⁴⁰

III. IMPROVING PROCEDURAL RECUSAL RULES

The reforms recommended here aim to would provide meaningful independent consideration of recusal motions. They do not purport to address each and every implementation detail.

These proposed procedural changes would not alter the grounds for recusal, but rather how recusal requests get decided. While substantive changes to recusal rules are also warranted, particularly vis-à-vis whether and how states that utilize judicial elections address recusal based on campaign support,⁴¹ improving procedural rules to ensure independent review deserves high priority.

1. Refer recusal motions to an independent judge in the first instance

Removing the challenged judge from the recusal decision-making process is the simplest method to ensure meaningful independent review of recusal motions. Because trials are generally heard by one judge, while cases at the highest court are decided by a panel of judges, we recommend states adopt recusal rules tailored to the level of the proceeding.⁴²

- At the trial court, the challenged judge would either grant the motion or refer the motion to a neutral judge.
- At the state’s highest court, motions seeking recusal of a state supreme court justice would be resolved in one of two ways:
 - hear the motion en banc without the challenged judge, or
 - establish an independent commission to consider recusal requests.

A. At the trial court level, allow the challenged judge to either grant the recusal motion or refer it to an independent judge⁴³

This report recommends a rule providing that a trial court judge confronted with a recusal motion either grant the recusal motion and step aside, or else transfer the motion to an independent judge. States should adopt language along the lines of Utah’s rule, provided on the following page, which grants the challenged judge no role in denying recusal, but protects against gamesmanship by subjecting the party and attorney to sanctions for filing motions for improper purposes such as harassment, delay, or needless increase in the cost of litigation.

In states with large judiciaries, routing all recusal motions through the state’s supreme court may be unduly burdensome. In those states, the authority to assign a recusal motion to an independent judge could be vested in the district’s chief judge.

Utah R. Civ. P. 63 (Disqualification for cause)

(b) Motion to disqualify; affidavit or declaration.

(b)(1) A party to an action or the party's attorney may file a motion to disqualify a judge. The motion must be accompanied by a certificate that the motion is filed in good faith and must be supported by an affidavit or declaration under penalty of Utah Code Section [78B-5-705](#) stating facts sufficient to show bias, prejudice or conflict of interest. The motion must also be accompanied by a request to submit for decision.

(b)(2) The motion must be filed after commencement of the action, but not later than 21 days after the last of the following:

(b)(2)(A) assignment of the action or hearing to the judge;

(b)(2)(B) appearance of the party or the party's attorney; or

(b)(2)(C) the date on which the moving party knew or should have known of the grounds upon which the motion is based.

If the last event occurs fewer than 21 days before a hearing, the motion must be filed as soon as practicable.

(b)(3) Signing the motion or affidavit or declaration constitutes a certificate under Rule [11](#) and subjects the party or attorney to the procedures and sanctions of Rule [11](#).

(b)(4) No party may file more than one motion to disqualify in an action, unless the second or subsequent motion is based on grounds that the party did not know of and could not have known of at the time of the earlier motion.

(b)(5) If timeliness of the motion is determined under paragraph (b)(2)(C) or paragraph (b)(4), the affidavit or declaration supporting the motion must state when and how the party came to know of the reason for disqualification.

(c) Reviewing judge.

(c)(1) The judge who is the subject of the motion must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit or declaration to a reviewing judge. The judge must take no further action in the case until the motion is decided. If the judge grants the motion, the order will direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(c)(2) If the reviewing judge finds that the motion and affidavit or declaration are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so.

Utah R. Civ. P. 63 (Disqualification for cause)(cont'd)

(c)(3) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion an affidavit or declaration responding to questions posed by the reviewing judge.

(c)(4) The reviewing judge may deny a motion not filed in a timely manner.

By allowing a judge the opportunity to step aside voluntarily when presented with a compelling recusal motion, the proposed rule conserves scarce judicial resources by saving the courts the administrative costs of referring a motion the challenged judge would grant anyway. Moreover, this rule ensures that no recusal motion will be denied by the judge whose impartiality has been called into question, the essential problem posed by allowing review by the challenged judge.

There are two alternatives currently in practice in some states. In the majority of states, the challenged judge decides the recusal motion on the merits. For all of the reasons discussed in the previous section, this approach should be avoided.

In a few states, the challenged judge may first review the motion only for timeliness and facial sufficiency. If these are satisfied, the challenged judge either grants the motion or refers the motion to an independent judge for determination on the merits.⁴⁴ This approach is clearly preferable to allowing the challenged judge to deny a recusal motions on the merits, but in offering the judge an opportunity to dismiss a motion on technical grounds, the judge's participation may be perceived by the public as more self-interested than the approach limiting the judge's role to either granting or referring the motion. That said, in systems where it is unusually costly⁴⁵ to refer a motion to another judge — for example, a rural area with few other available judges — conservation of judicial resources may weigh in favor of allowing the challenged judge to weed out untimely or facially deficient motions.

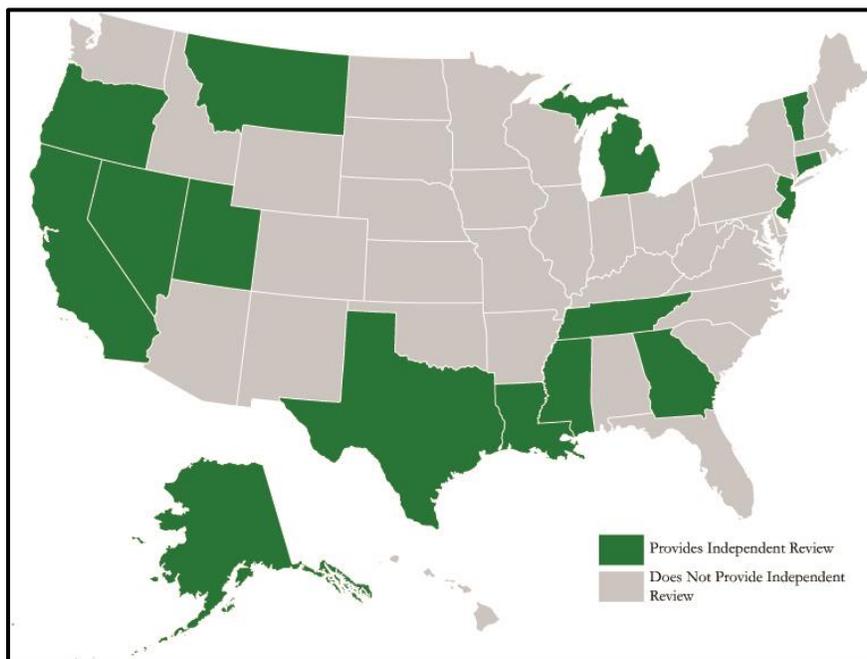
Alternatively, states could establish an independent judicial recusal commission to decide recusal motions. While independent commissions to consider recusal motions have not yet been established in any states, there is precedent to allow independent commissions to consider judicial conduct. For example, some states have independent commissions to review judicial performance to aid voters in deciding whether to re-elect the judge.⁴⁸ Some states utilize independent commissions to monitor judicial campaign conduct and impose discipline when campaign activity violates the state code of judicial conduct.⁴⁹ And every state has established some sort of judicial conduct organization to “to investigate claims of misconduct; to bring and to prosecute formal charges; to hold an adjudicative hearing and to make findings of fact; and to recommend or to order a final disposition.”⁵⁰

Though untested, an independent commission offers some advantages because it could remove the interpersonal challenges presented by en banc review. On some courts, the ongoing relationships between justices and need for collegiality may lead judges to be hesitant to vote for recusal when it is warranted. On the other hand, on courts where there is a lack of collegiality, granting en banc consideration could lead to perceptions of gamesmanship. For example, a Louisiana Supreme Court justice has filed suit in federal court alleging that his colleagues improperly removed him from a case.⁵¹

The efficacy of an independent panel would depend on how its members are chosen. For example, some judicial discipline bodies include non-judges and non-attorney members.⁵² In the recusal context, including non-judges could bring valuable perspective to discussions regarding the appearance of impartiality. Selection should also provide the members with some political independence, while retaining a measure of accountability. While the Brennan Center is not aware of any states that employ a formal commission to independently determine recusal motions, it remains an interesting option worthy of further consideration.⁵³

Currently, in 35 states, the justice whose recusal is sought decides the motion in the first instance. In most of these states, the challenged judge’s ruling on the recusal motion is final, and is not reviewable by other state judges. In these states, the only possibility of independent review of denial of a recusal motion is through certiorari to the U.S. Supreme Court, which is rarely granted and is unsuited for error-correction in all but the most egregious cases.

States Providing Independent Review of Recusal Motions in Courts of Last Resort



2. Require judges to issue reasoned, transparent recusal decisions in writing or on the record

States should require that judges issue transparent, reasoned, decisions in writing or on the record when disposing requests for disqualification.

Requiring written recusal decisions is in accord with the ABA’s 2014 Resolution 105(C), which calls upon states to adopt recusal procedures that “are transparent.”⁵⁴ Written, transparent disposition of recusal methods increase public confidence in the judiciary. As explained in the commentary to 105(C):

It is axiomatic that a process designed to assure fairness and impartiality in the judiciary must be spelled out with sufficient specificity and concreteness that no one could complain afterwards that no understandable path to raise the issue and see it resolved exists. Nor should a litigant or counsel have to guess at the process by which a decision on a motion to disqualify is considered. Transparency is both an end itself and a means by which fairness and efficiency is promoted. It assures that reviewable reasons are expressed on the recusal decision.⁵⁵

Transparent, reasoned, written decisions — or at the very least, decisions with reasons committed to record — preserve judicial legitimacy, by requiring officials to give public reasons for their actions.⁵⁶ They also encourage judges to fully engage with the reasons offered in support of the recusal request and facilitate the creation of precedent to guide judges who face similar motions. Written decisions are particularly important in the context of recusal, as a recusal request is not always subject to adversarial testing.⁵⁷ An adequate record is also necessary to facilitate appellate review.

3. Provide meaningful review of denials of recusal motions on appeal or reconsideration en banc

Another way to ensure adequate independent review is through the standard of review used when a recusal decision is considered on appeal or reconsideration en banc. When a trial court judge denies a request to recuse herself, the appellate court should approach the decision with fresh eyes, as the challenged judge had an interest in justifying why her impartiality could not reasonably be questioned. A judge denying a recusal motion is in a meaningful sense not a neutral arbiter, and their determination does not merit the normal deference given to trial court decisions on appeal.⁵⁸ The same analysis applies when a court of last resort reconsiders, en banc, an initial denial of a recusal motion by a challenged judge on the court.

Currently, many states apply a deferential standard of review when the denial of a recusal motion is considered on appeal. This is particularly problematic in the 29 states where the initial determination is left to the challenged judge. In these states, a recusal motion can be denied without ever receiving a hard look from a neutral judge.

Appellate courts normally review a trial court's determinations of law "de novo," meaning the court considers the case as if it were the first court to review the matter, affording no deference to the legal conclusions made by the trial court. Appellate courts generally review a trial court's determinations of fact using a more deferential standard, reversing the lower court's findings only where the trial judge clearly erred or abused her discretion.⁵⁹ This differentiation between standards of review reflects a recognition that judicial resources are limited, and that searching appellate review can be costly. It is also generally assumed that the trial court, having considered all the evidence firsthand, is in a better position to reach factual conclusions than appellate courts. On some occasions, appellate courts will consider questions that present a mix of law and facts using an intermediate level of scrutiny that is often murky in practice.⁶⁰

Courts nationwide have disagreed about whether a denial of a recusal motion presents a question of law, of fact, or a mix thereof. Some state courts have determined that "[w]hether a trial judge is impartial, that is, a neutral and detached decision maker, is a question of law, which we review de novo."⁶¹ More frequently, state courts have held that recusal lies within the discretion of the challenged judge, and will review denials of recusal motions only for abuse of discretion.⁶² And a few courts have applied an intermediate standard.⁶³

If a recusal motion is considered in the first instance by a neutral judge, the standard of review on appeal or reconsideration is less important, because the motion already received independent consideration. But even when the original determination was made by an independent judge, de novo review remains preferable. If one independent judge determines that there is no reasonable basis to question the challenged judge's impartiality, but another judge or judges considering an appeal or motion for reconsideration disagrees, it would be better practice to recuse the challenged judge to promote public confidence in judicial impartiality.⁶⁴ And such practice could remedy the lesser appearance of preferential treatment that may arise when the initial determination was made by a judge sitting in the same court as the challenged judge.

The main counterargument to de novo review in this circumstance is that it wastes judicial resources, as the appellate court has less familiarity with the underlying facts than the judge who presided over the motion. But there is no reason to believe that the lower court judge is in a better position than the appellate court to determine whether there exists a reasonable question as to the challenged judge's impartiality.⁶⁵ And if the decision below is based on written affidavits, rather than full hearings, the loss of appellate resources should be minimal, as the reviewing court will have the same access to the limited record at issue.⁶⁶

4. Establish a clear, practical mechanism within the judicial system for replacing disqualified justices on state courts of last resort⁶⁷

Just as meaningful independent review of recusal motions is important, states also must have a clear process for replacing recused judges. To replace recused trial court judges, cases can be reassigned as a matter of course using the assignment wheel. For courts of last resort, some states do not replace judges, risking tie votes or loss of a quorum. In other states, the replacement mechanism raises concerns about strategic behavior. For these courts, which sit as a panel, states should have a regular, predictable process to replace disqualified judges,⁶⁸ such as Florida's:

Florida Supreme Court Manual of Internal Operating Procedures(X)(D)

Associate justices shall be the chief judges of the district courts of appeal selected on a rotating basis from the lowest numbered court to the highest and repeating continuously. A district court shall be temporarily removed from the rotation if the case emanated from it. If more than one associate justice is needed, they shall be selected from separate district courts according to the numerical rotation. If the chief judge of a district court who would be assigned under this procedure is recused from the case or otherwise unavailable, the next most senior judge on that court (excluding senior judges) who is not recused shall replace the chief judge as associate justice.

Florida's system ensures that the state's highest court will have a full roster of judges to hear each case if any member is recused. The pre-existing selection system is automatic, insulating the court against charges that replacement judges may have been chosen based on how they would decide a particular case.

Looking at existing practice, Florida is in the minority in providing for an automatic process. In many states, the chief justice is authorized to select replacement judges when supreme court justices are recused. This system is preferable to not allowing replacement of disqualified judges because it avoids the risk of tie votes or the loss of quorum. It allows the chief judge to select qualified judges from the existing pool. But it also risks the perception that the selection of a replacement judge may be manipulated to increase the likelihood of a particular outcome preferred by the chief justice.⁶⁹

States where the Governor Selects Replacement Justices

Arkansas: If a justice is disqualified, the Chief Justice certifies the fact to the Governor, who appoints replacements. (Ar, Const. Amend. 80 § 13).

Kentucky: if two justices recuse themselves, or are recused, then the Chief Justice must certify this fact to the Governor, who appoints replacements. (KY. CONST. § 110)

Mississippi: If a justice of the Supreme Court is disqualified, the governor may appoint a replacement. (MISS. CONST. ART. VI, § 165)

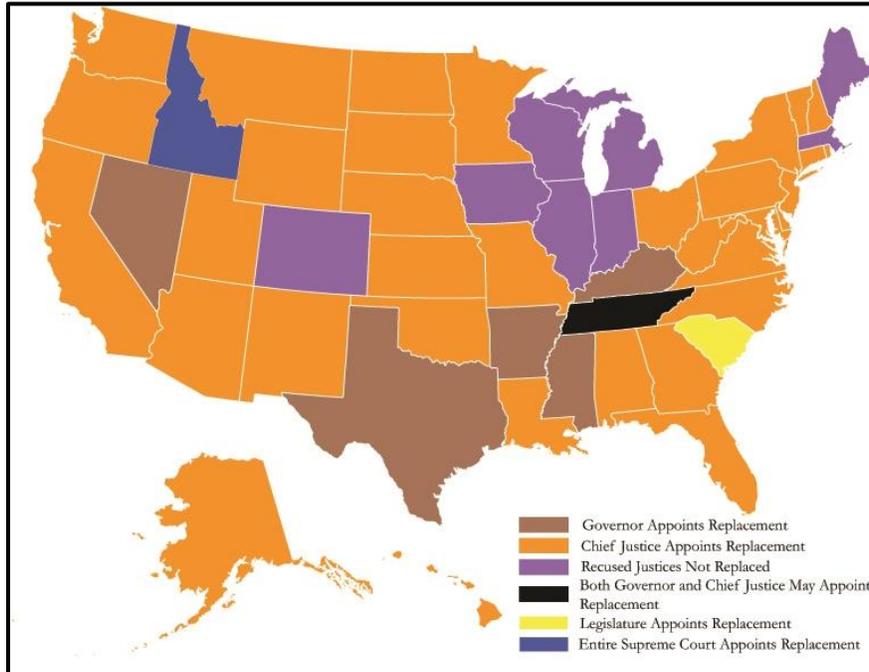
Nevada: If the Chief Justice or one (or two) of the associate justices is recused, the Nevada Constitution authorizes the Governor to designate a district judge or judges to replace the recused justices. (NEV. CONST. ART VI, § 4)

Texas: The chief justice may certify to the governor when one or more justices of the supreme court have recused themselves to appoint replacements from active appellate or district court justices or judges to obtain the requisite number of justices to determine the case. (TEX. GOV'T CODE ANN. § 22.005)

In Arkansas, Kentucky, Mississippi, Nevada, and Texas, the governor selects a replacement justice when a high court justice is disqualified. Allowing a governor to select a judge in a politically charged case, or a case where the state is a party, could undermine public confidence in the court's impartiality. As Justice Kennedy explained in *Caperton*, “[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias can arise when — without the consent of the other parties — a man chooses the judge in his own cause.”⁷⁰

For example, in a recent high-profile legal dispute regarding whether Kansas legislation stripping the state supreme court of authority to administer the state's unified court system violated the separation of powers, the Chief Justice of Kansas recused himself from the case.⁷¹ In Kansas, recused high court judges may be replaced by retired judges designated by the state supreme court.⁷² Had the court split evenly or decided the case by a one-vote margin, the replacement of the Chief Justice by the governor could have raised profound separation of powers problems.

System of Replacement for Recused Justices on Courts of Last Resort



Several states do not replace disqualified high court judges at all, risking tie votes or even loss of a quorum.⁷³ For example, Wisconsin's constitution does not permit replacing State Supreme Court justices.⁷⁴ As a result, in 2011 the court was unable to make a quorum to consider disciplinary charges against then-Justice David Prosser, who allegedly choked another justice, Ann Bradley, because a majority of the supreme court justices recused themselves from consideration of the dispute.⁷⁵

One argument against recusing and replacing judges is articulated in the commentary to the recusal rules adopted by the Wisconsin Supreme Court. In the Comment to Rule 60.04(7) of the Wisconsin Rules of Judicial Conduct, the court emphasizes Wisconsin's tradition of electing judges, and argues that recusal based on campaign support "would deprive citizens who lawfully contribute to judicial campaigns, whether individually or through an organization, of access to the judges they help elect." The commentary also argues that such recusal would impact individuals who do not contribute to judicial campaigns, as state supreme court decisions often have repercussions beyond the particulars of an individual case.

This argument is unpersuasive. States, of course, are free to choose judges through elections, but that does not in any way suggest that judicial recusal is inappropriate for jurists who reached the bench via election. To the contrary, the U.S. Supreme Court in *Caperton* made clear that recusal may be required based on substantial election spending without violating the First Amendment. And in a system that depends on the public's confidence in judicial impartiality, the ability of judicial election spenders to appear before judges who may feel a debt of gratitude must take a back seat to the guarantee of equal treatment before the law for all, including those without the means to spend significant amounts of money in support of a judge's election. The possibility that a replacement judge might approach a case differently than a judge with a conflict of interest does not justify the harm posed by a biased adjudicator's participation.

The absence of a method for replacing justices heightens the conflict between the need to protect the reality and appearance of impartial judges and a justice’s countervailing “duty to sit.” Courts have ruled that, when no “uninterested” judge is available to hear a case, “the rule of necessity may override the rule of disqualification,” allowing an “interested” judge to take part.⁷⁶ In Wisconsin, where supreme court justices determines their own motions for disqualification and cannot be replaced, this conflict of duty almost always ends with the challenged justice hearing the case.⁷⁷

5. Allow a peremptory strike at the trial level

Finally, in addition to reforming the process for hearing recusal motions, states should also consider allowing litigants to exercise a single peremptory strike of a trial judge. A peremptory strike allows a litigant who files within the prescribed time limit to remove that judge from their case without the need to prove bias or partiality. Seventeen states, mostly in the western U.S., offer litigants this option.⁷⁸ Across these states, there are differences in the types of cases in which strikes can be used, filing requirements, and limits on when and how often strikes can be invoked.

Peremptory strikes allow reassignment with little expense to the litigant, and reduce the chances that a litigant will hesitate to file a meritorious recusal motion due to cost, or out of concern that the judge may retaliate at the perceived insult. Compared to resolving recusal motions, and their potential appeals, the administrative burden on the court is slight. And in the unlikely event that a litigant has a reasonable basis to question the impartiality of the subsequently-assigned judge, they may still file a motion seeking recusal for cause.⁷⁹ States should consider adopting a rule such as New Mexico’s, which provides an easy and efficient reassignment of a case:

N.M. Stat. Ann. § 38-3-9 (West): Peremptory challenge to a district judge

A party to an action or proceeding, civil or criminal, including proceedings for indirect criminal contempt arising out of oral or written publications, except actions or proceedings for constructive and other indirect contempt or direct contempt shall have the right to exercise a peremptory challenge to the district judge before whom the action or proceeding is to be tried and heard, whether he be the resident district judge or a district judge designated by the resident district judge, except by consent of the parties or their counsel. After the exercise of a peremptory challenge, that district judge shall proceed no further. Each party to an action or proceeding may excuse only one district judge pursuant to the provisions of this statute....

IV. CONCLUSION

There is significant work to do in improving procedural recusal rules at the state level. States should adopt the measures described herein to protect the fundamental promise that every litigant receives a fair trial before a fair judge. Procedural recusal rules that provide meaningful independent review will do much to protect the integrity of the judiciary and the public's confidence in the courts.

ENDNOTES

¹ A note on terminology – this report uses the terms “recusal” and “disqualification” interchangeably. Technically, there is a difference – disqualification is mandatory, recusal is voluntary – but the difference is often blurred in practice.

² *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016).

³ Brief for Brennan Center for Justice at NYU School of Law and Justice at Stake as Amici Curiae Supporting Petitioner, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) No. 15-5040, 2015 WL 8138320.

⁴ *See id.*; *see also* Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, (2009) (No. 08-22), 2009 WL 45978; Press Release, Justice at Stake, Poll: Huge Majority Wants Firewall Between Judges, Election Backers, Justice at Stake (Feb. 22, 2009), http://www.justiceatstake.org/newsroom/press_releases.cfm/poll_huge_majority_wants_firewall_between_judges_election_backers?show=news&newsID=5677.

⁵ *See* Adam Liptak, *Supreme Court, in Recusal Case, May Find Itself Looking Inward*, N.Y. TIMES (Jan. 4, 2016), <http://www.nytimes.com/2016/01/05/us/politics/supreme-court-in-recusal-case-may-find-itself-looking-inward.html> (“Mr. Castille said last week, there was no reason for him to recuse himself. ‘I didn’t try the case,’ he said. ‘I wasn’t really involved in the case except as the leader of the office.’”); *see also* Nina Totenberg, *W.Va. Case Tests When Judges Should Step Aside*, NAT’L PUB. RADIO (Mar. 3, 2009), <http://www.npr.org/templates/story/story.php?storyId=101368723> (“The fact that Mr. Blankenship or anybody else supported my campaign, I appreciate them, but it doesn’t change the way I believe.”).

⁶ *Williams*, 136 S. Ct. at 1905.

⁷ *See* Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. OF LIT. 671, 677-8 (2011) (identifying recusal rule in ancient Roman law); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.2, at 5 (2d ed. 2007).

⁸ As an editorial note, recusal is traditionally a voluntary removal while disqualification is a mandatory one. For the purposes of this paper, recusal and disqualification will be used interchangeably.

⁹ *See, e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (holding that there is “a presumption of honesty and integrity in those serving as adjudicators.”)

¹⁰ *See, e.g.*, Dmitry Bam, *Recusal Failure*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 631, 644, *available at* <http://www.nyuilpp.org/wp-content/uploads/2015/11/Bam-Recusal-Failure-18nyuilpp631.pdf> (“After all, judges are human beings subject to the same temptations and influences as all of us.”).

¹¹ *See* FLAMM, *supra* note 7, § 1.2 at 5.

¹² *See* *Thomas Bonham v. College of Physicians*, (1608) 77 Eng. Rep. 638, 8 Co. 114a (K.B.); FLAMM, *supra* note 7, § 1.2 at 6 n.7.

¹³ *See* FLAMM, *supra* note 7, § 1.4 at 9 (detailing expansions of grounds for recusal under federal statute and discussing their significance); *see also* Charles Geyh, Myles Lynk, Robert S. Peck & Hon. Toni Clark, *The State of Recusal Reform*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 515, 517 (2015).

¹⁴ MODEL CODE OF JUDICIAL CONDUCT Canon 3(C) (AM. BAR ASS’N 2011).

¹⁵ *Cf.* CHARLES GARDNER GEYH, FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 12–13 (2d ed. 2010) (discussing the so-called duty to sit as it relates to judges’ obligations to recuse themselves).

¹⁶ See GENE R. SHREVE, PETER RAVEN-HANSEN & CHARLES GARDNER GEYH, UNDERSTANDING CIVIL PROCEDURE 2 (5th ed., 2013).

¹⁷ At the federal level, recusal is addressed through federal statute and the federal Code of Conduct for United States Judges. See 28 U.S.C.A. § 455 (2016); 28 U.S.C.A. § 144 (2016). At the state level, judges are guided by the state's Code of Judicial Conduct (nearly all states have adopted all or part of the ABA Model Code of Judicial Conduct, updated most recently in 2011), as well as by rules that may be found in state legislation, state constitutions, court rule, and common law.

¹⁸ See ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, RETHINKING JUDICIAL SELECTION IN STATE COURTS (2016), available at <http://www.brennancenter.org/publication/rethinking-judicial-selection-state-courts>; see also CIARA TORRES-SPELLISCY, MONIQUE CHASE, EMMA GREENMAN & SUSAN M. LISS, BRENNAN CTR. FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY (2d ed. 2010), available at <https://www.brennancenter.org/publication/improving-judicial-diversity>.

¹⁹ See BANNON, *supra* note 18; see also TORRES-SPELLISCY, CHASE, GREENMAN & LISS, *supra* note 18.

²⁰ Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886 (2009) (“The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process.”).

²¹ See MODEL CODE OF JUDICIAL CONDUCT Canon 2 r. 2.11(A) (AM. BAR ASS'N 2011).

²² Geyh, *Why Judicial Disqualification Matters. Again.*, *supra* note 7, at 690 (“That standard...has been adopted in at least forty-eight states...”) (citing ABA Judicial Disqualification Project, *Taking Judicial Disqualification Seriously*, 92 JUDICATURE 12 (2008)).

²³ MODEL CODE OF JUDICIAL CONDUCT Canon 2 r. 2.11(A) (AM. BAR ASS'N 2011).

²⁴ This rule was adapted from MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (AM. BAR ASS'N 2011).

²⁵ See, e.g., Chris Guthrie, Jeffrey Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

²⁶ See *id.*

²⁷ See, e.g., Jennifer K. Robbenolt & Matthew Taskin, *Can Judges Determine Their Own Impartiality?*, 41 MONITOR ON PSYCHOL. 24 (2010).

²⁸ See, e.g., Debra Lyn Bassett, *Three Reasons Why The Challenged Judge Should Not Rule On A Judicial Recusal Motion*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 659, 662 (2015).

²⁹ Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 Personality & Soc. Psychol. Bull. 680, 681 (2005).

³⁰ See Geyh, *Why Judicial Disqualification Matters. Again.*, *supra* note 7, at 708-9.

³¹ RICHARD A. POSNER, HOW JUDGES THINK (Harvard Univ. Press 2008).

³² STEVEN LUBET, THE IMPORTANCE OF BEING HONEST 6 (2008).

³³ See Bam, *supra* note 10, at 653 (citing R. Matthew Pearson, Note, *Duck Duck Recuse?: Foreign Common Law Guidance and Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1833-34 (2005)).

³⁴ See Chris Guthrie et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

³⁵ *Id.*

³⁶ Assignment to an independent judge may also be imperfect. Professional courtesy and the small nature of the judicial profession may lead judges to err on the side of preserving their colleagues' reputation in any given case. *See, e.g.*, Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1237 (examining the "resistance of other appellate judges to the idea of evaluating allegations of bias or prejudice against their colleagues.").

³⁷ *See* Debra Lyn Bassett, *Three Reasons Why*, *supra* note 28 (reviewing studies of bias and arguing that independent review of recusal motions can mitigate unconscious bias).

³⁸ A.B.A. Standing Comm. on Judicial Indep., Res. 105C (2014).

³⁹ *See* Charles Geyh, Lynk, Peck & Clark, *supra* note 13, at 520.

⁴⁰ Conf. of Chief Justices, Res. 8: *Urging Adoption of Procedures for Deciding Judicial Disqualification/Recusal Motions: Ensuring a Fair and Impartial Process* (2014).

⁴¹ Thirty nine states elect judges, and 76% of all state courts use elections of some type to select their judges. Elections cost money, and as the Brennan Center has documented, spending in state judicial races has skyrocketed in the twenty-first century. However, despite the holding in *Caperton* that significant campaign support from a litigant may require recusal, few states have adopted rules that give judges clear guidance on when they should step aside from cases involving campaign supporters. This is particularly problematic because the majority of spending in judicial races, both through campaign contributions and independent expenditures, is by lawyers, frequent litigants, and groups with interests in the outcome of judicial decisions. However, this topic is beyond the scope of this report.

⁴² Because intermediate appellate review differs across states, this report does not address them specifically. As a general matter, when a single judge hears a case, recusal motions should be transferred to another judge. When a recusal motion is directed to a member of a full panel of judges, the panel should decide the motion without the challenged judge's participation.

⁴³ Independent review of recusal motions at the trial level is available in Alaska (ALASKA STAT. § 22.20.020(c)(2015)); Arizona (ARIZ. R. CIV. P. 42(f)(2)(D); ARIZ. R. CRIM. P. 10.1); California (CAL C. CIV. P. 170.3(c)(1)-(5)); Florida (FLA. R. JUD. ADMIN 2.330(f)); Georgia (GA. R. UNIF. SUPER. CT. 25); Illinois (737 ILL. COMP. STAT. ANN. 5/2-1001(a)(3)(iii) (West 2016)); Kansas (KAN. STAT. ANN. § 20-311d (2016)); Kentucky (KY. REV. STAT. ANN. § 26A.015 (West 2016); KY. REV. STAT. ANN. § 26A.020 (West 2016)); Louisiana (LA. C. CIV. P. 155 (A)); Maryland (*See, e.g.*, *Surratt v. Prince George's County*, 578 A.2d 745, 758 (Md. 1990) ("[W]hen the asserted basis for recusal is personal conduct of the trial judge that generates serious issues about his or her personal misconduct, then the trial judge must permit another judge to decide the motion for recusal.") (noting, however, that "the question of recusal, at least in Maryland, ordinarily is decided, in the first instance, by the judge whose recusal is sought."); Michigan (Mich. C. R. 2.003(D)(3)(a)); Montana (MONT. CODE ANN. § 3-1-805 (2015)); Nevada (NEV. REV. STAT. ANN. § 1.235(5) (Lexis-Nexis 2015)); North Carolina (*See, e.g.*, *State v. Poole*, 289 S.E.2d 335, 343 (N.C. 1982) ("[I]t is well-established in this jurisdiction that a trial judge should either recuse himself or refer a recusal motion to another judge if there is 'sufficient force in the allegations contained in the defendant's motion to proceed to find facts,'" or if a "reasonable man" would doubt the concerned judge's ability to rule on the motion "in an impartial manner." *See also* *Lange v. Lange* 588 S.E.2d 877, 879 (N.C. 2003) (summarizing the review of a recusal motion that was heard before another judge who ultimately recused the challenged judge)); Ohio (OHIO REV. CODE ANN. § 2701.03 (LexisNexis 2015); OHIO REV. CODE ANN. § 2501.13 (LexisNexis 2015); OHIO CONST. art. IV, § 5(C) (empowering the chief justice or designee to "pass upon the disqualification" of judges of the courts of appeals and common pleas)); Oklahoma (OKLA. DIST. CT. R. 15(a) - (c)); South Dakota (S.D. CODIFIED LAW § 15-12-22 (2016); S.D. CODIFIED LAW § 15-12-32 (2016)); Texas (TEX. R. CIV. P. 18a(f)-(g)); Utah (UTAH R. CIV. P. 63(b); UTAH R. CRIM. P. 29(c)); Vermont (VT. R. CIV. P. 40(e); VT. R. CRIM. P. 50(d)); and West Virginia (W. VA. TRIAL CT. R. 17.01(b)).

There is no independent review of recusal motions at the trial level in Alabama (*See, e.g.*, *Wambles v. Coppage*, 333 So. 2d 829, 836-37 (Ala. Civ. App. 1976) (stating motions challenging a judge's qualifications must be presented at trial so the trial judge can rule thereon); *see also* *Crumpton v. State*, 677 So. 2d 814, 816 (Ala. Crim. App. 1995) (reversing trial judge's denial of motion for recusal); *see, e.g.*, *Ex parte Balogun*, 516 So. 2d 606, 609 (Ala. 1987)); Arkansas (*See, e.g.*,

Turner v. Nw. Arkansas Neurosurgery Clinic, P.A., 210 S.W.3d 126, 134 (Ark. 2005) (“A judge’s decision whether to recuse is within his discretion and will not be reversed absent abuse of that discretion... Further, unless there is an objective showing of bias, there must be a communication of bias in order to require recusal for implied bias.”)); Colorado (COLO. R. CIV. P. 97; COLO. REV. STAT. § 16-6-201 (2016) (stating that a judge that is subject to a recusal motion decides whether she should be recused, but that if a party files a recusal motion supported by two affidavits stating facts establishing grounds for recusal, the judge is required to recuse herself, and that the statute applies only to criminal cases, the same rule has been applied in civil cases). Goebel v. Benton, 830 P.2d 995, 999 (Colo. 1992)); Connecticut (CONN. R. SUPER. CT. § 1-23); Delaware (*See, e.g.*, Los v. Los, 595 A.2d 381, 385 (Del. 1991) (finding a trial judge must be satisfied he can proceed free from actual bias or the appearance of bias, and the reviewing court’s standard of review is an abuse of discretion)); Hawaii (*See, e.g.*, Arquette v State 290 P.3d 493, 497 (Haw. 2012) (affirming intermediate court of appeals decision to deny petitioner’s motion to recuse by the abuse of discretion standard)); Idaho (IDAHO R. CIV. P. 40(b)(2); IDAHO CRIM. R. 25); Indiana (*See* Voss v. State, 856 N.E.2d 1211, 1216 (Ind. 2006) (holding that it was improper for a trial judge to appoint another judge to decide upon a recusal petition and the determination must be made by the sitting judge)); Iowa (IOWA CODE § 602.1606 (2016)); Maine (*See, e.g.*, Estate of Tingley, 610 A.2d 266, 267 (Me. 1992) (Supreme Judicial Court of Maine finding that recusal is a matter within the broad discretion of the trial court)); Massachusetts (*See, e.g.*, Haddad v. Gonzalez, 576 N.E.2d 658, 663 (Mass. 1991) (“When faced with a recusal motion, a judge must first consult his own emotions and conscience.”)); Commonwealth v. Kope, 570 N.E.2d 1030, 1032 (Mass. App. Ct. 1991) (“Recusal it is well understood rests with the sound discretion of the judge.”)); Minnesota (MINN. R. CIV. P. 63.03; MINN. R. CRIM. P. 26.03); Mississippi (MISS. UNIF. R. CIR. & CNTY. CT. 1.15 (stating the challenged judge rules on motion); MISS. R. APP. P. 48B (stating that the denial of a motion to recuse is subject to review by the Supreme Court on motion of the appealing party and review is for abuse of discretion)); Missouri (*See* Anderson v. State, 402 S.W.3d 86, 92 (Mo. 2013) (reversing the trial judge’s overruling of a motion for recusal)); Nebraska (*See* State v. Richter, 485 N.W.2d 201, 205 (Neb. 1992) (“A motion requesting a judge to recuse himself on the grounds of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.”)); State v. Hubbard, 673 N.W.2d 567, 576 (Neb. 2004) (“We determine that the judge did not err by refusing to recuse herself.”)); New Hampshire (*See, e.g.*, State v. Linsky, 379 A.2d 813, 823-24 (N.H. 1977) (Supreme Court of New Hampshire upholding a trial judge’s decision not to recuse himself); State v. Bader, 808 A.2d 12, 21 (N.H. 2002) (upholding a trial judge’s decision not to recuse himself)); New Jersey (*See, e.g.*, N.J. R. CT. 1:12; N.J. STAT. ANN. § 2A:15-50 (2016); *see also* Magill v. Casel, 568 A.2d 1221, 1224 (N.J. Super. Ct. App. Div. 1990) (“A motion for recusal must be made to the judge sought to be disqualified... Submission of a recusal motion to the challenged judge is not only required by statute and rule; it is also sound practice.”)); New Mexico (Dawley v. La Puerta Architectural Antiques, Inc., 62 P.3d 1271, 1280 (N.M. Ct. App. 2003) (affirming a trial judge’s decision not to recuse himself under an abuse of discretion standard of review) (concerned judge makes a determination on disqualification)); New York (*See, e.g.*, People v. Moreno, 516 N.E.2d 200, 201 (N.Y. 1987) (“[A] trial judge is the sole arbiter of recusal. This discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of ‘nonjudicial data.’”); *see also* D’Andraia v. Pesce, 960 N.Y.S.2d 154, 156 (N.Y. App. Div. 2013) (“A court’s decision in this respect may not be overturned unless it was an improvident exercise of discretion.”)); North Dakota (*See, e.g.*, Farm Credit Bank of St. Paul v. Brakke, 512 N.W.2d 718, 721 (N.D. 1994) (“When making recusal decisions, the judge must determine whether a reasonable person could, on the basis of all of the facts, reasonably question the judge’s impartiality.”); State v. Murchison, 687 N.W.2d 725, 729 (N.D. 2004) (same); Datz v. Dosch, 846 N.W.2d 724, 730 (N.D. 2014) (citing *Farm Credit Bank of St. Paul* 512 N.W.2d at 721)); Oregon (*See* Pinnell v. Palmateer, 114 P.3d 515, 521 (Or. Ct. App. 2005)); Pennsylvania (*See, e.g.*, *In re* Appointment of a Sch. Dir., 682 A.2d 871, 871 (Pa. Commw. Ct. 1996) (applying to lower courts); Reilly v. Se. Pennsylvania Transp. Auth., 489 A.2D 1291, 1295 (Pa. 1985) (Supreme Court of Pennsylvania noting that controlling law is that the “proper practice on a plea of prejudice is to address an application by petition to the judge before whom the proceedings are being tried. He may then determine the question in the first instance, and ordinarily his disposition of it will not be disturbed unless there is an abuse of discretion.”)); Rhode Island (*See, e.g.*, State v. Cruz, 517 A.2d 237, 240 (R. I. 1986) (affirming trial judge’s denial of motion to recuse); State v. Clark, 423 A.2d 1151, 1158 (R.I. 1980) (affirming trial judge’s denial of motion to recuse); Kelly v. Rhode Island Pub. Transit Auth., 740 A.2d 1243, 1246 (R.I. 1999) (affirming trial judge’s denial of motion to recuse)); South Carolina (Townsend v. Townsend, 474 S.E.2d 424, 427 (S.C. 1996) (stating that denial of motion for disqualification is interlocutory order not affecting merits and, thus, is reviewable only on appeal from that order)); Tennessee (TENN. R. SUP. CT. 10B.1.01-1.04); Virginia (*See, e.g.*, Welsh v. Commonwealth, 416 S.E.2d 451, 459 (Va. Ct. App. 1992) (affirming trial judge’s denial of motion to recuse); Buchanan v. Buchanan, 415 S.E.2d 237, 238 (Va. Ct. App. 1992) (affirming trial judge’s denial of a motion to recuse)); Washington (*See, e.g.*, *In re* Parentage of J.H., 49 P.3d 154, 159 (Wash. Ct. App. 2002) (affirming a trial judge’s denial of a recusal motion); Wolfkill Feed & Fertilizer Corp. v. Martin, 14 P.3d 877, 878 (Wash. Ct. App. 2000) (“Recusal is within

the sound discretion of the trial court . . .”); Wisconsin (*See, e.g.*, *State v. Santana*, 584 N.W.2d 151, 157 (Wis. Ct. App. 1998) (affirming a trial judge’s refusal to recuse himself)); or Wyoming (WYO. R. CIV. P. 40.1 (b) (stating the motion shall be heard by the presiding judge); WYO. R. CRIM. P. 21.1 (“The motion shall be referred to another judge, or a court commissioner, who shall rule on the motion, and if granted shall immediately assign the case to a judge other than the disqualified judge.”)).

⁴⁴ *See* ADAM SKAGGS & ANDREW SILVER, BRENNAN CTR. FOR JUSTICE, PROMOTING FAIR AND IMPARTIAL COURTS THROUGH RECUSAL REFORM (2011), available at <https://www.brennancenter.org/publication/promoting-fair-and-impartial-courts-through-recusal-reform>.

⁴⁵ *See, e.g.*, Dmitri Bam, *Our Unconstitutional Recusal Procedure*, 84 Miss. L.J. 1135, 1189 (2015).

⁴⁶ CAL. C. CIV. P. 170.3(c)(1)-(5)

⁴⁷ Independent review of recusal motions is available at courts of last resort in Alaska (ALASKA STAT. § 22.20.020(c) (2015)); California (Telephone Interview with Jorge Navarette, Legal Clerk, Cal. Supreme Court (Oct. 17, 2016)); Connecticut (Telephone Interview with Rene Robertson, Assistant Clerk, Appellate (Oct. 7, 2016)); Georgia (GA. SUP. CT. R. 26); Louisiana (LA. C. CIV. P. ANN. ART. 159 (2010)); Michigan (MICH. CT. R. 2.003(D)(3)(b)); Mississippi (MISS. R. APP. P. 48C(a)(iii); MISS. CONST. ART. 6, § 165 (while initially decided by challenged judge, review by full court on reconsideration provided); Montana (Email Interview with Chris Wethern, Staff Att’y, Mont. Supreme Court (July 10, 2014) (on file with author); *see also* *Reichert v. State*, 278 P.3d 455, 471 (Mont. 2012) (whole court concluding that challenged justices did not need to recuse themselves)); Nevada (NEV. REV. STAT. ANN. § 1.225(4) (2015)); New Jersey (Telephone Interview with Supreme Court Clerk’s Office (Oct. 11, 2016)); Oregon (OR. R. APP. P. 8.30); Tennessee (TENN. SUP. CT. R. 10B. 3.03); Texas (TEX. R. APP. P. R. 16.3); Utah (Email Interview with Andrea R. Martinez, Clerk of Court, Utah Supreme Court (July 10, 2014) (on file with author) (describing that rather than addressing recusal through motion practice, recusal is addressed before oral argument through a review vetting process by the Clerk of Court); Vermont: (VT. R. APP. P. R. 27.1(b)).

Independent review of recusal motions is not available at courts of last resort in Alabama (*See, e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1089 (Ala. 1984) (per curiam) (explaining that each justice “should vote individually on the matter of whether or not he or she is disqualified and should recuse.”), *vacated on other grounds*, 475 U.S. 813 (1986)); Arizona (Email Interview with Ellen M. Crowley, Chief Staff Attorney, Ariz. Supreme Court (July 11, 2014) (on file with author)); Arkansas (*See, e.g.*, *U.S. Term Limits v. Hill*, 870 S.W.2d 383, 385 (1994) (challenged justice denying a motion to recuse, noting “[d]isqualification is a matter left largely to the discretion of the individual judge.”)); Colorado (*See, e.g.*, *People v. Owens*, 219 P.3d 379, 390 (Colo. App. 2009) (denying motion for reconsideration of denied recusal motion)); Delaware (no rule or reported practice); Florida (*See, e.g.*, *Adams v. Smith*, 884 So. 2d 287, 288 (Fla. Dist. Ct. App. 2004) (challenged justice denying motion to recuse), *In re Estate of Carlton*, 378 So. 2d 1212, 1216-17 (Fla. 1979) (holding that an appellate judge must determine for himself or herself both the legal sufficiency of a motion to disqualify the judge and the propriety of withdrawing in any particular circumstance)); Hawaii (Email Interview with Matthew Champan, Staff Attorney, Haw. Supreme Court (Oct. 11, 2016) (on file with author)); Idaho (IDAHO R. CIV.P. 40(b)(2)); Illinois (*See Philip Morris USA Inc. v. Appellate Court, Fifth Dist., No. 117689* (Ill. Sept. 24, 2004), available at http://www.illinoiscourts.gov/SupremeCourt/SpecialMatters/2014/102114_117689_Order.pdf (order by Justice Karmeier denying recusal motion and noting that “there is no fixed procedure in Illinois governing motions to recuse or disqualify members of courts of review . . .”)); Indiana (*See Indiana Gas Co. v. Indiana Fin. Auth.*, 992 N.E.2d 678, 682 (Ind. 2013) (challenged justice denying motion to recuse)); Iowa (IOWA CODE § 602.1606 (2016)); Kansas (Telephone Interview with Jennifer Bates, Clerk, Ks. Supreme Court (October 27, 2016)); Kentucky (Email Interview with Susan Clary, Clerk, Ky. Supreme Court (July 25, 2014) (on file with author)); Maine (Telephone Interview with Kim Patterson, Assoc. Clerk, Me. Supreme Court (Oct. 11, 2016)); Maryland (Email Interview with Angelita Williams, Dir., Office of Comm’n and Pub. Affairs, Admin. Office of the Courts (July 28, 2014) (on file with author)); Massachusetts (Telephone Interview with clerk, Mass. Supreme Court (Oct. 11, 2016)); Minnesota (*See, e.g.*, *In re Modification of Canon 3A(7) of the Minn. Code of Judicial Conduct*, 438 N.W.2d 95 (Minn. 1989); *State ex rel. Wild v. Otis*, 257 N.W.2d 361 (Minn. 1977)); Missouri (Email Interview with Beth Riggert, Communications Counsel, Mo. Courts (Oct. 25, 2016) (on file with author); Mo. Sup. Ct. R. 2-2.11); Nebraska (Telephone Interview with Shelly, Neb. Supreme Court Clerk’s Office (Oct. 11, 2016)); New Hampshire (*See Holmes v. Holmes*, No. 00-M-815, 2001 N.H. Super. Ct. WL 34012428 (N.H. Super. Ct. Oct. 15, 2001) (challenged supreme court justice denying recusal motion)); New Mexico (Telephone

Interview with N.M. Supreme Court Clerk's Office (Oct. 17, 2016)); New York (*See* Ratajczak v. Yoonessi, 945 N.E.2d 1030 (mem.) (holding a motion to disqualify a Court of Appeals judge on non-statutory grounds is referred to the challenged judge for individual consideration and determination)); North Carolina *Email Interview with Chief Justice Mark D. Martin, North Carolina Supreme Court (October 27, 2016) (on file with author)); North Dakota (N.D. C. JUD. CONDUCT R. 2.11 cmt. [1] (stating that a motion for disqualification is referred to the justice against whom the motion is brought, and that the justice consults with other members of the court)); Ohio (S. CT. PRAC. R. 4.04 (stating that a party to a case pending before the Supreme Court can file a request for recusal of a justice with the court's clerk, that the justice files a written response with the clerk, and that the concerned justice's decision is final); *see also* 22 OHIO JUR. 3d Courts and Judges § 117 (2014); *see also* Hon. Joseph D. Russo et al., *A Legal, Political, and Ethical Analysis of Judicial Selection in Ohio: A Proposal for Reform*, 38 CAP. U. L. REV. 825, 829 (2010) (“[T]here is no procedure to determine whether members of the Ohio Supreme Court should be disqualified; these justices are expected to disqualify themselves, if necessary.”)); Oklahoma (OKLA. SUP. CT. R. 1.175); Pennsylvania (*See, e.g.*, Commonwealth v. Beasley, 937 A.2d 379, 380 (Pa. 2007) (opinion denying recusal motion)); Rhode Island (Email Interview with Deb Saunders, Clerk of the R.I. Supreme Court (October 24, 2016) (on file with author)); South Carolina (Telephone Interview with Clerk, Supreme Court (Oct. 11, 2016)); South Dakota (Telephone Interview with Supreme Court Clerk's Office (Oct. 11, 2016)); Virginia (Telephone Interview with Trish Harrington, Clerk, Supreme Court Va. (October 11, 2016)); West Virginia (W. VA. R. APP. P. 33(g)); Wisconsin (*See, e.g.*, State v. Henley, 802 N.W.2d 175, 181 (Wis. 2011) (per curiam) (stating that the individual Supreme Court justice whose disqualification was sought in criminal appeal had sole power to determine whether to disqualify self)); Washington (Email Interview with Susan Carlson, Clerk, Supreme Court (Oct. 10, 2016) (on file with author)); or Wyoming (Telephone Interview with Wyo. Supreme Court Clerk's Office (Oct. 7, 2016)).

⁴⁸ *See* COLORADO COMM'N ON JUDICIAL PERFORMANCE, <http://www.coloradojudicialperformance.gov/> (last visited Oct. 17, 2016). *See also* ARIZONA COMM'N ON JUDICIAL PERFORMANCE REVIEW, <http://www.azcourts.gov/jpr> (last visited Oct. 17, 2016); NEBRASKA JUDICIAL RETENTION SYS., <http://supremecourt.nebraska.gov/7286/voters%E2%80%99-guide-nebraska%E2%80%99s-judicial-retention-elections> (last visited Oct. 17, 2016); NEW YORK INDEP. JUDICIAL ELECTIONS QUALIFICATION COMM'N, <http://www.ny-ijecq.org/> (last visited Oct. 17, 2016); UTAH JUDICIAL PERFORMANCE EVALUATION COMMISSION *available at* <http://judges.utah.gov/>; NEW MEXICO JUDICIAL PERFORMANCE EVALUATION COMM'N, <http://www.nmjpec.org/en/> (last visited Oct. 17, 2016).

⁴⁹ *See, e.g., Committee History*, OP. OF THE JUDICIAL ETHICS ADVISORY COMM., <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/History.html> (last visited Oct. 20, 2016).

⁵⁰ Randy J. Holland & Cynthia Gray, *Judicial Discipline: Independence with Accountability*, 5 Widener L. Symp. J. 117, 127 (2000).

⁵¹ Hughes III v. Johnson et al., No. 2:15-cv-07165-MVL-DEK (E.D. La. filed Dec. 30, 2015).

⁵² *See* Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUSTICE SYS. J. 3 (2007).

⁵³ JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, BRENNAN CTR. FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS (2008).

⁵⁴ ABA Resol. 105C (2014), *supra* note 37

⁵⁵ JUDICIAL DIV., ABA, REPORT ON RESOLUTION 105C, at 3 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_105c.authcheckdam.pdf..

⁵⁶ *See* SAMPLE, POZEN & YOUNG, *supra* note 53, at 32; *see also* Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 561-62 (2005) (arguing that reasoned decisionmaking is crucial to judicial legitimacy).

⁵⁷ *See* Frost, *supra* note 56, at 569.

⁵⁸ See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 662-63 (1987).

⁵⁹ See, e.g., BARBARA ALLEN BABCOCK ET AL., CIVIL PROCEDURE: CASES AND PROBLEMS 871 (Vicki Been et al., 4th ed. 2009).

⁶⁰ See, e.g., Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 301 (1992).

⁶¹ State v. O'Neill, 663 N.W.2d 292, 297 (Wis. Ct. App. 2003); see also People v. Julien, 47 P.3d 1194, 1197 (Colo. 2002) (“We review de novo a trial court ruling on a motion for recusal.”); State v. Dorsey, 701 N.W.2d 238 (Minn. 2005) (“Whether a judge has violated the Code of Judicial Conduct is a question of law, which we review de novo.”).

⁶² See FLAMM, *supra* note 7, § 33.2, at 988.

⁶³ See FLAMM, *supra* note 7, § 33.3, at 993.

⁶⁴ See, e.g., Paul G. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. Kan. L. Rev. 381, 407 (1990) (critiquing the abuse of discretion standard for not providing meaningful protection against judicial misconduct); see also Stempel, *supra* note 58, at 661-62; see also Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification – and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoilation, and Perceptual Realities*, 30 REV. LITIG. 773, 804-805 (urging do novo review of recusal motions).

⁶⁵ See FLAMM, *supra* note 11, § 33.1 at 988 (citing *People v. Mercado*, 614 N.E.2d 284 (Ill. App. Ct. 1993)).

⁶⁶ See Deborah Goldberg, James Sample, & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L. J. 503, 531 (2007).

⁶⁷ The governor replaces recused justices in Arkansas (ARK. CONST. amend. 80, § 13(A), ARK. CONST. amend. 80, § 13(D)); Kentucky (KY. CONST. § 110(3)); Mississippi (MISS. CONST. § 165); Nevada (NEV. REV. STAT. ANN. § 1.225(5) (West 2015) (providing that a disqualified justice shall be replaced pursuant to the Nevada Constitution); NEV. CONST. art. VI, § 4 (specifying that the governor is empowered to appoint a replacement justice)); and Texas (Email Interview with Nina Hsu, Gen. Counsel, Tex. Supreme Court (July 29, 2014) (on file with author); TEX. GOV'T CODE ANN. § 22.005(a) (West 2015) (stating that the chief justice “may certify to the governor when one or more justices of the supreme court have recused themselves.”)).

The Chief Justice replaces recused justices in Alabama (See *City of Bessemer v. McClain*, 957 So. 2d 1061, 1091-94 (Ala. 2006) (holding that Chief Justice holds constitutional authority to appoint temporary Special Justices despite conflicting constitutional provisions)); Alaska (Telephone Interview with Meredith Montgomery, Chief Deputy Clerk, Alaska Appellate Courts (October 7, 2016)); Arizona (Email Interview with Ellen Crowley, Chief Staff Attorney, Ariz. Supreme Court (July 11, 2014) (on file with author)); California (CAL. CONST. art. 6 § 6(e)); Connecticut (Telephone Interview with Rene Robertson, Assistant Clerk (October 7, 2016)); Delaware (DEL. CONST. art. 4 § 12); Florida (Sup. Ct. Fla. Manual of Internal Operating P. 5(A)); Georgia (Ga. Sup. Ct. R. 57); Hawaii (HAW. CONST. art. 6, § 2); Kansas (Email Interview with Lisa Taylor, Pub. Info. Dir., Kan. Supreme Court (July 11, 2014) (on file with author); KAN. STAT. ANN. 20-3002(c) (West 2016)); Louisiana (LA. C. CIV. P. 159); Maryland (*Court of Appeals*, MARYLAND COURTS, <http://www.courts.state.md.us/coappeals/> (last visited Sept. 23, 2014) (“[A] judge from another court, or a retired appellate judge, may be specially assigned to sit in the place of the recused judge.”); see also MD. CONST. art. IV, § 18(b)(2) (authorizing the Chief Judge of the Court of Appeals to make these special assignments)); Minnesota (Email Interview with Kyle Christopherson, Comm’n Specialist, State Court Admin’r Office, Minn. Judicial Branch (July 9, 2014) (on file with author)); Missouri (MO. CONST. art. V, § 6); Montana (Email Interview with Chris Wethern, Staff Attorney, Mont. Supreme Court (July 10, 2014); see also MONT. CONST. art. VII, § 3(2) (allowing a district judge to substitute for a disqualified supreme court justice but not specifying the appointing authority)); Nebraska (Telephone Interview with Pam, Neb. Supreme Court (July 10, 2014) (on file with author); see also NEB. CONST. art. V, § 2 (authorizing the Supreme Court to “appoint judges of the district court or the appellate court to sit temporarily as judges of the Supreme Court . . .”); NEB. REV. STAT. § 24-729 (2016) (extending this authority to allow appointment of retired judges)); New Hampshire (Telephone Interview with court clerk (October 11, 2016); see also N.H. REV. STAT. § 493-A:1 (2016)); New Jersey (N.J. CONST. art. VI § II); New Mexico (N.M. CONST. art. VI, § 6; N.M. CONST. art. VI, § 28); New

York (N.Y. CONST. art. VI, § 2(a); N.Y. CONST. art. VI, § 2(b)); North Carolina (N.C. GEN. STAT. ANN. § 7A-10(a) (West 2015); N.C. GEN. STAT. ANN. § 7A-39.14(a)(3) (West 2015); (N.C. R. CIV. P. 29.1)); North Dakota (N.D. CONST. art. 6 § 11); Ohio (OHIO CONST. art. IV, § 2(A)); Oklahoma (OKLA. STAT. ANN. tit. 20, R 9(B) (West 2016); *see also* OKLA. CONST. art. VII, § 6; OKLA. STAT. ANN. tit 20, R. 9(C) (West 2016); *see also* OKLA. STAT. ANN. tit. 20, § 1402 (West 2016)); Oregon (Email Interview with Lisa J. Norris-Lampe, Appellate Legal Counsel, Or. Supreme Court (July 10, 2014) (on file with author); *see also* OR. REV. STAT. ANN. § 1.600(1) (West 2016) (authorizing the Supreme Court to appoint a judge of the Court of Appeals, Tax Court, or circuit court to serve as judge pro tempore of the Supreme Court whenever the Supreme Court determines the appointment “is reasonably necessary and will promote the more efficient administration of justice”)); OR. CONST. art. VII, § 2a(1) (empowering the legislature or the people to authorize the Supreme Court to make pro tempore appointments)); Pennsylvania (42 PA. CONS. STAT. ANN. § 326(C) (WEST 2016); *see also* PA. CONST. art. V, § 10(a)); Rhode Island (Email Interview with Deb Saunders, Clerk of the R.I. Supreme Court (October 24, 2016) (on file with author)); South Dakota (S.D. CODIFIED LAWS § 16-1-5 (2016); *see also* S.D. CONST. art. V, § 11 (authorizing the Chief Justice to appoint circuit judges to sit on the Supreme Court in place of disqualified justices)); Utah (UTAH CONST. art. VIII, § 2); Vermont (VT. STAT. ANN. tit. 4, § 22 (2016)); Virginia (Telephone Interview with court clerk (October 11, 2016)); Washington (WASH. SUP. CT. ADMIN. R. 21); West Virginia (Email Interview with Rory Perry, Clerk of the Court, W. Va. Supreme Court (July 10, 2014) (on file with author)); *see also* W. VA. CONST. art. VIII, § 3 (“The chief justice shall be the administrative head of all the courts.”)); and Wyoming (WYO. CONST., art. 5, § 4(a)).

The entire Supreme Court of Idaho selects a replacement justice. Email Interview with Michael Henderson, Legal Counsel, Idaho Supreme Court (July 25, 2014).

Recused or disqualified justices are not replaced in Colorado (Email Interview with Christopher T. Ryan, Clerk, Colo. Supreme Court (July 8, 2014) (on file with author)); Illinois (*See* *Perlman v. First Nat’l Bank of Chi.*, 331 N.E.2d 65 (Ill. 1975) (*per curiam*); *PHL, Inc. v. Pullman Bank & Trust Co.*, 721 N.E.2d 1119 (Ill. 1999), *see also* ILL. CONST. art. VI, § 3); Indiana (*Peterson v. Borst*, 784 N.E.2d 934, 935 (Ind. 2003) (“[T]here is no procedure to replace a recused Justice, and a recusal is in practical terms a vote for the party who prevailed in the last court.”)); Iowa (Telephone Interview with Donna Humpert, Clerk, Iowa Supreme Court (October 11, 2016)); Maine (Telephone Interview with Kim Patterson, Associate Clerk (October 11, 2016)); Massachusetts (Telephone Interview with court clerk (October 11, 2016)); Michigan (Mich. C. R. 2.003(D)(4)(a)); Wisconsin (*See* WIS. CONST. art. VII, § 4(3) (“The chief justice may assign any judge of a court of record to aid in the proper disposition of judicial business in any court of record except the supreme court.”); *see* *Wisconsin Judicial Comm’n v. Prosser*, 817 N.W.2d 830, 832 (Wis. 2012) (challenged justice declining to recuse because his recusal could leave the Supreme Court without a quorum)).

In Tennessee, both the governor and the chief justice may replace a recused justice. (*Hooker v. Sundquist*, No. 01A01-9709-CH-00533, 1999 WL 74545, at *3 (Tenn. Feb. 16, 1999) (discussing TENN. CODE ANN. § 17-2-102 (2016), which authorizes the governor to appoint “competent lawyers” as temporary replacements for regular justices in cases in which the justices are “incompetent” to sit; and TENN. CODE ANN. § 17-2-110(a), which allows the chief justice to appoint judges of inferior courts as temporary replacements when regular justices are “unable” to sit); TENN. CONST. art. VI, § 11).

In South Carolina, the legislature selects replacement justices. S.C. CONST. art. 5 § 19.

⁶⁸ *See* SAMPLE, POZEN & YOUNG, *supra* note 53, at 33.

⁶⁹ *See, e.g.*, Ronald Sullivan, *Critics Fault Selection of Judge in Jogger Case*, N.Y. Times (Aug. 7, 1989), <http://www.nytimes.com/1989/08/07/nyregion/critics-fault-selection-of-judge-in-jogger-case.html>.

⁷⁰ *Caperton v. Massey*, 556 U.S. at 886.

⁷¹ *Solomon v. Kansas*, 364 P.3d 536 (Kan. 2015) *available at* <https://www.brennancenter.org/sites/default/files/legal-work/ORD%20on%20Recusal%2012-7-15.pdf> (order concluding no justice is compelled to recuse).

⁷² *See* Kan. Stat. Ann. § 20-2616 (2016) (Designation and assignment of retired justices and judges to perform judicial service and duties; revocation; powers; compensation and expense allowances, limitation).

⁷³ WIS. SUP. CT. R. 60.04 cmt. 7, *available at* http://docs.legis.wisconsin.gov/misc/scr/60/04/7/_4 (“[W]hen a justice of the supreme court withdraws from a case, however, the justice is not replaced.”).

⁷⁴ WIS. CONST. art. VII § 4 (3).

⁷⁵ *See* Lincoln Caplan, *The Destruction of the Wisconsin Supreme Court*, NEW YORKER (May 5, 2015), <http://www.newyorker.com/news/news-desk/the-destruction-of-the-wisconsin-supreme-court>.

⁷⁶ *See, e.g.*, NEV. SUP. CT. R. C.J.C. Canon 2 r. 2.11, cmt. 3, *available at* http://www.leg.state.nv.us/courtrules/scr_cjc.html; *see also* TENN. SUP. CT. RULES, R.J.C. 2.11 *available at* <http://www.tsc.state.tn.us/rules/supreme-court/10#CANON%202>) and WIS. SUP. CT. R. 60.04 *available at* http://docs.legis.wisconsin.gov/misc/scr/60/04/4/_4.

⁷⁷ *See* *Clinard v. Brennan*, No. 2011AP2677-OA, slip op. (Wis., Jan. 20, 2012).

⁷⁸ *See* FLAMM, *supra* note 7, at 789-822

⁷⁹ In practice, the other party is also entitled to subsequently use their strike, pursuant to compliance with filing requirements.

⁸⁰ *See* FLAMM, *supra* note 7, § 26.1 at 756.

⁸¹ *See* Bassett, *Judicial Disqualification in the Federal Appellate Courts*, *supra* note 36, at 1254.

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