No. 11-1203

In the Supreme Court of the United States

SHOLOM RUBASHKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF CRIMINAL-JUSTICE AND LEGAL-ETHICS PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors who teach and write in the area of criminal justice and legal ethics.[2] They include professors specializing in criminal law and procedure, evidence, and legal ethics. Their shared objective is to bring to the Court's attention the serious violations of law and ethics that occurred as the result of at least a dozen *ex parte* communications between the trial judge and the prosecutors in the *Rubashkin* case.

STATEMENT OF THE CASE

The indictment of Sholom Rubashkin had its genesis in a massive federal raid of Agriprocessors, a kosher meatpacking plant in Postville, Iowa, where Rubashkin worked as a manager. Cert. Pet. 1, 3.

The United States Attorney's Office for the Northern District of Iowa (USAO) prosecuted 297 workers arrested during the raid. Over a four-day period, all of these individuals pleaded guilty to immigration violations. Julia Preston, *Illegal*

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[1] The parties' letters of consent to the filing of this *amicus curiae* brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part, and that no person or entity has made a monetary contribution toward its preparation or submission. This brief was prepared with the *pro bono* assistance of the law firm Coblentz, Patch, Duffy & Bass LLP, in San Francisco, California.

[2] A complete list of *amici*, including their institutional affiliations, is set forth in Appendix A to this brief.

Immigrants Sent to Prison in Federal Push, N.Y. Times, May 24, 2008.

Less than six months after the raid, Sholom Rubashkin was arrested on multiple charges of harboring illegal immigrants for profit at Agriprocessors. Resp. C.A. Br. 2-3. Ultimately, the USAO indicted him on these and numerous other immigration and financial crimes. *Id*. at 3-5. After a one-month trial at which the Chief Judge for the Northern District of Iowa, the Honorable Linda R. Reade, presided, Rubashkin was convicted on eighty-six counts. *Id*. at 6. On June 22, 2010, Judge Reade handed down a sentence of twenty-seven years in prison. Cert. Pet. App. 5. It was effectively a life sentence for the fifty-one-year-old Rubashkin. *Id*. 34-36.

More than eight months *before* Rubashkin's trial, his attorneys filed a Freedom of Information Act (FOIA) request, seeking documentation of the Agriprocessors raid. Cert. Pet. 6; Cook Aff. ¶ 16. Rubashkin was forced to file suit to compel the Government to produce these documents and therefore he did not receive them until after he was sentenced. Cert. Pet. 6. These documents, consisting of memoranda authored by Immigration and Customs Enforcement Agency (ICE) officials, describe numerous *ex parte* meetings between Judge Reade and the USAO beginning in early October 2007 and continuing throughout the seven months leading up to the Agriprocessors raid on May 12, 2008. Cert. Pet. 21. None was recorded or transcribed. Pet. C.A. Br. 33.

According to the ICE memoranda, Judge Reade, federal prosecutors, and ICE agents met *ex parte* at

least twelve times. Cert. Pet. 2. The ICE memoranda refer to Judge Reade as a "stakeholder" who was "willing to support the immigration operation in any way possible." *United States v. Rubashkin*, 655 F.3d 849, 856 (8th Cir. 2011). The memoranda make clear that the raid was aimed at company managers such as Rubashkin, as well as low-level employees. Cert. Pet. 7-8.

During an October 16, 2007 meeting, "Judge Reade indicated full support for the initiative," after the USAO "briefed" her "regarding the ongoing investigation." Lewin Decl. ¶ 7. At another meeting on March 17, 2008, "[t]he parties discussed an overview of charging strategies, numbers of arrests and prosecutions, logistics . . . and other issues related to the . . . investigation and operation." *Id*. ¶19. Three days later, Judge Reade asked the USAO and ICE for a "final gameplan" for the raid. *Id*. ¶ 26. A March 31, 2008 email refers to a meeting between Judge Reade and AUSA Richard Murphy on April 4, at which Murphy planned to give a "presentation" and asked ICE for "an operation plan" to incorporate into it. *Id*. ¶ 24.

Following the disclosure of the ICE memoranda, Rubashkin filed a motion pursuant to Federal Rule of Criminal Procedure 33, arguing that Judge Reade should have recused herself from presiding over his trial. Judge Reade denied the motion and denied Rubashkin's alternative request for additional discovery and an evidentiary hearing. Cert. Pet. App. 10. The Eighth Circuit Court of Appeals affirmed. *Rubashkin*, 655 F.3d at 857-59. Rubashkin filed a petition for certiorari with this Court on April 2, 2012.

From its inception through the present, the *Rubashkin* case has received national attention, much of it sharply critical of Judge Reade's conduct. Most relevant for purposes of this brief are the letters and other documents signed by some of the country's most prominent legislators and members of the bar expressing deep concern over Judge Reade's failure to recuse herself. More than forty-five members of Congress—roughly equal numbers of Democrats and Republicans—have written to the DOJ to express their doubts about the fairness of the proceedings, pointing to Judge Reade's *ex parte* meetings with the USAO and ICE agents as the crux of their concern. Likewise, more than fifty law professors, former Deputy Attorneys General, and former United States Attorneys have jointly called upon the Department of Justice to launch an investigation into the allegations that Judge Reade committed misconduct.

It is against this backdrop of significant evidence establishing that Judge Reade has violated statutory and ethical precepts of judicial neutrality and shaken the public's faith in the integrity of the *Rubashkin* proceedings that we file this *amicus* brief.

SUMMARY OF ARGUMENT

Petitioner Rubashkin asks this Court to grant a writ of certiorari to resolve the Circuit split concerning whether he may introduce new evidence under Federal Rule of Criminal Procedure 33 challenging the fundamental fairness of his conviction and sentence. That question cannot be answered without considering the extraordinary circumstances that have given rise to the Rule 33 issue in the first place, namely, the numerous pretrial *ex parte* communications between Judge Reade and the Government. Part I of this brief explains why those communications denied Rubashkin a fair trial.

The Rule 33 question presented by the petition also cannot be resolved without considering the failure of the courts below to properly address how a reasonable observer would construe those *ex parte* meetings. Separate and apart from whether Judge Reade manifested any actual bias, her close participation in the planning for the immigration raid—the most significant target of which turned out to be Rubashkin—tainted the proceedings with an impermissible appearance of bias that required her recusal. Part II will address this issue.

ARGUMENT

I. This Court Should Grant Review Because The Number And Nature Of *Ex Parte* Communications Between The Trial Judge And The Prosecutors Deprived Rubashkin Of A Fair Trial.

The words "*ex parte* communication" provoke a feeling of foreboding among lawyers and judges. The overriding concern is that the party to the communication will obtain an unfair advantage. While *ex parte* communications are widely condemned, however, there are certain limited circumstances in which they are tolerated, such as when the Government applies for a search warrant, or when a party and the court must attend to a purely administrative matter.

Judge Reade and the Government have insisted that their meetings were confined to "logistical" issues of an administrative nature. That is not what the record reveals. What happened here was a series of meetings over seven months that were sufficiently substantive that ICE officials saw Judge Reade as a "stakeholder" in the Government's impending Agriprocessors' prosecutions. To treat such communications as permissible will implicitly authorize prosecutors and courts to engage in a variety of substantive and procedural discussions under the guise of an expanded "administrative" exception to the prohibition on *ex parte* communications.

A. The Right To A Neutral Arbiter Is A Fundamental Component Of A Defendant's Right To Due Process.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Central to the satisfaction of that fair trial right in criminal cases is the adversarial representation provided by the prosecutor and defense counsel and the presence of an impartial judge, who ensures that the law is followed, that the rules of the court are observed, and that neither side obtains an undue advantage. *See, e.g.*, Roberta K. Flowers, *An Unholy Alliance: The Ex parte Relationship Between the Judge and the Prosecutor*, 79 Neb. L. Rev. 251, 256-263 (2000).

When specific facts give rise to a genuine question concerning whether the judge is acting impartially, a fundamental breakdown in the adjudicatory process occurs. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.") Lacking the power of the purse or the sword, the judiciary depends largely on the faith and esteem of the citizenry for the enforcement of its decisions. James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 Law & Soc'y Rev. 469, 471 (1989).

B. Contrary To The Eighth Circuit's Decision, The Extensive *Ex Parte* Contacts That Occurred Here Are Not Permissible.

Perhaps nothing is more fatal to the perception of a judge's impartiality as the knowledge that she has engaged in *ex parte* communications with the prosecution in a criminal case. Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 Hous. L. Rev. 1343, 1356 (2000); *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969) (finding "a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court"); *United States v. Barnwell*, 477 F.3d 844, 853-54 (6th Cir. 2007) (communicating *ex parte* with a prosecutor "stifles the people's belief in our independent and impartial judiciary" and "reeks of the type of impropriety we need to avoid"). Except in very limited circumstances, "*ex parte* communications . . . are an extraordinarily bad idea," *United States v. Carmichael*, 232 F.3d 510, 517 (6th Cir. 2000), and "should be avoided whenever possible." *United States v. Napue*, 834 F.2d 1311, 1318 (7th Cir. 1988).

Ex parte communications between a trial judge and prosecutor undermine the legal and ethical foundations of the adjudicatory process by creating an appearance of collusion and bias. This evil is on full display in this case, where the contacts between Rubashkin's prosecutors and the trial judge were extensive, expansive, unrecorded, and undisclosed until after that same trial judge imposed an effective life sentence.

1. *Ex Parte* Communications Between Judges And Prosecutors Constitute A Serious Breach Of Judicial Ethics.

Barring narrowly drawn exceptions, *ex parte* contacts between judges and prosecutors constitute a serious breach of judicial ethics. The Code of Conduct for United States Judges provides that "a judge should not initiate, permit, or consider *ex parte* communications . . . concerning a pending or impending matter that are made outside the presence of the parties or their lawyers." Canon 3(A)(4). The Code allows judges to engage in *ex parte* communications "when circumstances require it . . . for scheduling, administrative, or emergency purposes," but two important caveats apply: (1) the *ex parte* communication must not "address substantive matters," and (2) the judge must "reasonably believe[] that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication." Canon 3(A)(4)(b).

The circumstances did not require the kind of repeated and detailed communications that occurred here. First, many of the logistical issues could have been delegated to court staff. Hazard Aff. ¶ 6(f).[3] Second, the ICE memoranda make clear that the topics covered at these *ex parte* meetings expanded well outside the logistical realm to encompass "the entire program that the Government proposed to follow." *Id.* at ¶ 6(a).

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[3] The Affidavit of Professor Geoffrey C. Hazard, Jr. is attached as Appendix B to this brief.

While Judge Reade may have maintained a belief that her *ex parte* meetings would not result in "a procedural, substantive, or tactical advantage" for the Government, it is hard to fathom how such a belief could have been "reasonable," as Canon 3(A) requires. The USAO had ongoing access to Judge Reade for a prolonged period of time to broadly discuss with her issues "regarding the ongoing investigation." Cert. Pet. ¶ 7.

Each meeting that the Government held with Judge Reade during the seven months that preceded the raid was an opportunity to emphasize the importance of the high-profile, high-stakes nature of the criminal proceedings for all involved. Having worked closely with the Government for so long, there was a clear risk that Judge Reade would become invested in the Government's success, particularly in the culminating event of its investigation—the Rubashkin trial. At the very least, these circumstances qualified as a "tactical advantage" for the Government, and may also have amounted to "substantive" and "procedural advantages." Canon 3(A)(4)(b).

2. *Ex Parte* Communications Between Judges And Prosecutors Are Particularly Vulnerable To The Appearance Of Collusion And Bias.

Ex parte communications between judges and prosecutors during a pending or impending matter are problematic for a number of reasons. Indeed, the relationship between prosecutors and judges is particularly vulnerable to the perception of collusion. Many judges are former prosecutors who, by virtue of

their background, may be inclined to view matters from a prosecutorial perspective. *See, e.g.*, Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" on the Bench*, 39 U. Rich. L. Rev. 849, 863-64 (2004); Flowers, *An Unholy Alliance*, 79 Neb. L. Rev. at 268-69.

Prosecutors and judges are repeat players in the system with a shared objective of seeing that justice is administered fairly and expeditiously, leading to "a more interdependent and cooperative relationship than would be enjoyed by the defense attorney." Flowers, *An Unholy Alliance*, 79 Neb. L. Rev. at 270; *Haller*, 409 F.2d at 859-60 ("The firmness of the court's belief may well have been due not only to the fact that the prosecutor got in his pitch first, but, even more insidiously, to the very relationship, innocent as it may have been thought to be, that permitted such disclosures."). Even *ex parte* meetings undertaken with the intent of discussing a simple matter of scheduling or logistics can appear to—and in fact do—spill over into areas that affect the excluded defendant's substantial rights.

The *ex parte* communications between the USAO and Judge Reade, who was herself a longtime federal prosecutor, were numerous and took place over a period of seven months. In the order denying Rubashkin's motion for a new trial, Judge Reade describes these meetings as "limited to ensuring that a sufficient number of judges, court-appointed attorneys, and interpreters would be available and that the Court would be able to function efficiently at an off-site location." *United States v. Rubashkin*, No. 08-CR-1324, 2010 U.S. Dist. LEXIS 114962, *9 (N.D. Iowa Oct. 27, 2010). The ICE memoranda cast doubt

on the accuracy and completeness of this characterization.

While logistics and scheduling were clearly topics of discussion during these *ex parte* meetings, they were not the only topics of discussion. The prosecutors "briefed" Judge Reade "regarding the ongoing investigation," gave her "an overview of charging strategies" and advised about "other issues related to the . . . investigation and operation." Judge Reade responded with a pledge "to support the immigration operation in any way possible." *Rubashkin*, 655 F.3d at 856. While the parties may have intended these *ex parte* meetings to address only matters of logistics, the ICE memoranda reflect a seepage that is alarming, albeit unsurprising. *Ex parte* contacts that continue with regularity over time can give rise to a degree of familiarity and ease that leads to a steady erosion of boundaries. Abramson, *The Judicial Ethics of Ex parte Contacts*, 37 Hous. L. Rev. at 1363-64 (noting that "it may be difficult for the judge and counsel to maintain separation between substance and procedure as the duration of a communication grows").

The erosion of boundaries in this case is clear from the ICE memoranda's characterization of Judge Reade as a "stakeholder," a description signaling that the Government viewed her as an interested party and ally rather than a detached and neutral arbiter. It is unlikely that an outsider, looking at this case objectively but with full knowledge of the facts, would hold a different view.

3. *Ex parte* Communications Between Judges And Prosecutors Threaten Defendants' Rights To Due Process And The Effective Assistance Of Counsel.

Meetings that exclude defense counsel threaten the defendant's right to due process because they "deprive the defendant of notice of the precise content of the communications and an opportunity to respond." *Napue*, 834 F.2d at 1319. As this Court has made clear, "[t]he value of a judicial proceeding . . . is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) (invalidating a ten-day restraining order issued outside petitioners' presence and without notice). In a criminal case, a defendant's right to the effective assistance of counsel is also implicated. If a prosecutor is permitted to advocate his version of events to the court unchecked by an opposing point of view, he stands to gain "an unfair advantage." *Haller*, 409 F.2d at 859; *United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984).

The failure of Judge Reade and the Government to disclose the existence and content of their secret pretrial meetings not only reinforces the appearance of collusion, it establishes a violation of Rubashkin's constitutional rights. The threats to a defendant's right to counsel and due process are compounded when the defendant's lawyers are treated like "mushrooms . . . kept in the dark." *Barnwell*, 477 F.3d at 851; *compare id.* ("What makes this case more persuasive than [a precedent case] is that in addition to the

defense counsel not knowing the substance of these *ex parte* communications, they had no knowledge that these communications were taking place.") *and Haller*, 409 F.2d at 860 ("At a minimum, to permit only tardy rebuttal of a prosecutor's statement, not accurately transcribed, is a substantial impairment of the right to the effective assistance of counsel to challenge the state's presentation.") *with Wesbrook v. Thaler*, 585 F.3d 245, 256-59 (5th Cir. 2009) (finding no violation of due process where *ex parte* communications between trial judge and prosecutor were transcribed and substance of those communications disclosed to defense counsel during trial).

The prejudice to Rubashkin's due process and Sixth Amendment rights is clear. The *ex parte* meetings summarized in the ICE memoranda provide more than a sufficient basis for a recusal motion, but such a motion was not made pretrial due to the court's failure to disclose. In sworn statements, Rubashkin's trial attorneys, F. Montgomery Brown and Guy Cook, explained that they knew only that Judge Reade had denied a recusal motion in a related case, declaring that her involvement in the planning of the Agriprocessors raid was purely "logistical." Cook Decl. ¶¶ 7-9. Lacking "any additional material information," they decided that filing the identical recusal motion on Rubashkin's behalf would be futile. Brown Decl. at ¶¶ 8-10. Had they known of the information in the ICE memoranda, "there is no question [Brown and Cook] would have moved to recuse." Cook Decl. ¶ 14; Brown Decl. ¶ 15. In any event, Judge Reade's twenty-five page order denying Rubashkin's Rule 33 motion, described below, makes clear that a pretrial recusal motion would indeed have been futile.

Because no recusal motion was filed and because Judge Reade improperly failed to recuse herself *sua sponte*, Rubashkin's Fifth and Sixth Amendment rights were violated. He was tried and sentenced to an effective life term by a judge who, under federal law, should never have sat in his case, and represented by attorneys who, because they were kept in the dark, were unable to prevent that from happening. *See* 28 U.S.C. § 455(a).

II. This Court Should Grant Review To Reinforce The Statutory And Ethical Commands Against The Appearance Of Impropriety.

Allowing the Eighth Circuit's decision to stand will send the wrong message to the lower federal courts and litigants. The Eighth Circuit's decision was predicated primarily on the conclusion that criminal defendants may not avail themselves of Rule 33 to challenge the fundamental fairness of the proceedings against them. That being said, the Court still reached the merits of Rubashkin's recusal argument insofar as it held that there was adequate disclosure of Judge Reade's *ex parte* meetings with the Government and that her "rulings and statements to the jury reveal no evidence of bias or prejudice toward Rubashkin." Cert Pet. 15.

The court below erred in two fundamental respects. First, the court improperly demanded a showing of "actual bias," even though Title 28 of the United States Code § 455(a) is concerned only with the equally pernicious "appearance of bias." In doing so, the court substituted § 455(a)'s objective, reasonable layperson standard with a subjective, judge-based standard. Relatedly, Judge Reade (and the Eighth Circuit in

affirming her) treated the recusal inquiry as turning on facts the judge herself supplied, and that therefore could not be independently verified by the defense. In other words, Judge Reade did not consider the facts as known to a reasonable layperson in the public at-large, but rather the facts as she subjectively knew and believed them to be.

Second, the Eighth Circuit concluded that the facts pertaining to Judge Reade's *ex parte* meetings were sufficiently disclosed so as not to raise the specter of impropriety. But as the ICE memoranda show, those facts are disquieting, both for what they reveal and for what they allude to but fail to describe. Judge Reade herself never timely aired the substance of the *ex parte* meetings, and thus never obtained Rubashkin's informed consent to preside over his criminal trial and sentencing. Disclosure and consent were the minimum necessary ingredients to ensuring that the appearance of impartiality was maintained.

Allowing the Eighth Circuit's decision to remain in force (and by implication, the district court's) will give the weight of precedent to the legally untenable principle that judges who engage in extensive *ex parte* communications need not recuse themselves so long as they can rely on their own subjective assessments of their neutrality and the party seeking recusal cannot point to evidence of actual bias. This is not what Congress contemplated when it substantially amended § 455(a) in 1974, and it will not serve the interests of justice.

A. The Standard For Determining Whether A Judge's Conduct Gives Rise To An Appearance Of Bias Is That Of A Reasonable Person Who Is Not The Judge.

Federal statutory and ethical requirements governing judicial disqualification are as much concerned with the appearance of impropriety and bias as they are with actual impropriety or bias. This Court has repeatedly acknowledged that simple precept. *See, e.g., Liteky v. United States*, 510 U.S. 540, 552 (1994) (stating that recusal under § 455(a) requires only that in the mind of the public, "there exists a genuine question concerning a judge's impartiality"); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864-65 (1988) ("The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.").

The principal federal recusal statute, 28 U.S.C. § 455(a), requires a federal judge to "disqualify [her]self in any proceeding in which [her] impartiality might reasonably be questioned."[4] Before 1974, § 455 enabled judges to make their own determinations about whether in their "opinion" they should recuse themselves. *Liteky*, 510 U.S. at 546. That year Congress undertook "massive" revisions to the statute, *id.*, that were meant to promote the public's confidence in the judiciary and "liberalize" the scope of

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[4] Section 455(a) and the Code of Conduct for United States Judges run parallel to one another. Indeed, § 455(a) was modeled on Canon 3C of the Code. *In re School Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir. 1992).

disqualification. Sande L. Buhai, *Federal Judicial Disqualification: A Behavioral and Quantitative Analysis*, 90 Or. L. Rev. 69, 78-79 (2011); Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 Drake L. Rev. 751, 760 (2010). Among other things, Congress made it clear that federal judges are to recuse themselves if their appearance of impartiality is subject to doubt. To give teeth to this new "appearance" standard, Congress eliminated the "in his opinion" language of § 455 that hinged judges' recusal decisions on their own subjective assessments. A new objective test took its place. *Liteky*, 510 U.S. at 548.

The Circuit courts, including the Eighth Circuit, have held that the objective inquiry under § 455(a) requires courts to consider the question of impropriety from the perspective of a "well-informed, thoughtful observer." *In the Matter of Bradford Mason*, 916 F.2d 384, 386 (7th Cir. 1990); *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (*en banc*) (stating that the issue is "whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case").[5] Notably, a "reasonable person" is not intended to include the sitting judge.

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[5] According to an analysis by the Federal Judicial Center, every federal Circuit Court has "adopted some version of the 'reasonable person' standard" in interpreting § 455(a) and at least five Circuits—the First, Fifth, Sixth, Tenth, and Eleventh—"have said that close questions should be decided in favor of recusal." Federal Judicial Center, *Recusal: Analysis of Case Law Under 28 U.S.C. § 455 & 144*, p. 16, n.57 (2002).

A showing of actual bias is immaterial to satisfying § 455(a)'s appearances test. Courts have emphasized that even when they have no reason to doubt a fellow judge's *actual* impartiality, recusal is nonetheless required due to sufficient misgivings about the *appearance* of partiality. *See*, *e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009) (stating, in the context of a constitutional due process analysis of recusal, that "[w]e do not question [the judge's] subjective findings of impartiality and propriety" or "determine whether there was actual bias").

The objective "man on the street" approach helps promote the statute's intended purpose of fostering public confidence in the judiciary which "does not result from the *judiciary's* perception of impartiality; it results from the *public's* perception of impartiality." Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts*, 87 Iowa L. Rev. 1213, 1245-46 (2002) (emphasis in original). Additionally, judges, like everyone, are subject to various cognitive biases that limit their capacity to detect their own lack of objectivity. Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 Iowa L. Rev. 181, 205-07 (2011); Buhai, 90 Oregon L. Rev. at 82-98; Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification and a Stronger Conception of the Appearance Standard*, 30 Rev. Litig. 733, 740-49 (2011). Neutrality and objectivity are attributes so central to judges' role-identification that they may have difficulty recognizing when those values have become compromised. *Caperton*, 556 U.S. at 883 ("The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules."); *In the Matter of Mason*, 916 F.2d at 386 ("Judges asked to recuse

themselves hesitate to impugn their own standards . . . .").

While courts have no trouble correctly reciting the reasonable layperson test that undergirds § 455(a)'s objective standard, they are prone to applying an incorrect, actual-bias test to the facts before them. There is a temptation for judges, in considering recusal motions, to search their own thoughts and deeds for evidence of actual bias, and finding none, proceed to preside over the case. Bassett & Perschbacher, *The Elusive Goal*, 97 Iowa L. Rev. at 199-202; *Caperton*, 556 U.S. at 882. That is exactly what happened here.

In her opinion denying Rubashkin's Rule 33 motion, Judge Reade substituted an objective evaluation of how a thoughtful layperson would regard the known facts with a vigorous defense of her conduct. *Rubashkin*, 2010 U.S. Dist. LEXIS 114962 at *9. She began by insisting that her meetings with prosecutors and law-enforcement officials were consistent with her past practice in preparing for large-scale prosecutions and that her role was limited to logistical planning. *Id.* at *31.

Judge Reade then set forth no fewer than eight reasons explaining why her *ex parte* meetings with the Government were not improper, including that she was never informed before the raid that Rubashkin "was or could be a target," that she was not told where the raid would occur, that she "did not express personal support for or policy agreement with the" raid, and that she did not "perform any functions that f[e]ll within the executive branch." *Id.* at *32-*33.

Judge Reade's analysis consisted of defending her actual conduct (as she perceived it), and dismissing the possibility that anyone could view that conduct differently. She did not perform a § 455(a) "appearance of bias" analysis, but rather an "actual bias" analysis. Had she undertaken the former, she would have considered how a reasonable layperson would view the publicly available information—and lack of information—about her extensive, undocumented *ex parte* meetings. She would have asked whether the public would harbor doubts about her impartiality where: (1) she participated in an undisclosed number of meetings over seven months with federal prosecutors and law-enforcement officials; (2) the federal officials with whom she met regarded her as a "stakeholder" and believed they had her "full support;" (3) the federal officials understood that she wanted a "final gameplan" as the actual date of the enforcement action drew near; and (4) the precise contents of the meetings were never transcribed, and no defense counsel were invited to participate. But instead, Judge Reade negated the inferences that could be drawn from the FOIA materials on the basis of her own subjective understanding of her motives and purposes for becoming (and remaining) involved in the *ex parte* meetings. *In the Matter of Mason*, 916 F.2d at 386 (commenting that "drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under § 455(a) into a demand for proof of actual impropriety"). By affirming Judge Reade's Rule 33 decision, the Eighth Circuit implicitly endorsed this erroneous analysis and compounded it by holding that there was no indication in her rulings and statements to the jury that she was biased against Rubashkin.

Judge Reade's analysis completely undermines § 455(a)'s purpose of fostering confidence in the judiciary by requiring a defendant like Rubashkin and the public at large to simply take Judge Reade at her word. *See* M. Margaret McKeown, *Recusal on Appeal: Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. App. Prac. & Process 45, 58 (2005) (arguing on behalf of the importance of the appearance-of-propriety standard in ethical rules in part because the public should not be forced "simply to trust the judges"). Rubashkin and the public should not have to rely on Judge Reade's subjective opinion that her participation in seven-months-worth of *ex parte* meetings with the Government was free of anything that could have tainted her consideration of the issues in his case. Judge Reade's opinion is not an objectively ascertainable fact that a reasonable layperson is bound to credit.

This is not to say that Judge Reade's statements explaining her involvement in the planning of the immigration raid on the Agriprocessors plant are not entitled to any consideration. She is a respected Article III judge. But her version of events cannot be accepted at face value when those events involve *ex parte* communications where, by definition, the facts are uniquely known to her and to the Government, and are not subject to independent verification.

B. Section 455(a) Requires Full Disclosure Of *Ex Parte* Communications To The Excluded Party.

Judge Reade and the Eighth Circuit also erred in concluding that there was sufficient disclosure to put to rest any concerns about the nature of Judge Reade's

ex parte communications with the Government. To this day, we still do not know: (1) the number of *ex parte* meetings that occurred; (2) who was present at each meeting; (3) what was discussed; (4) what the Government asked of Judge Reade and how she responded; and (5) what directions or instructions Judge Reade may have given those assembled. Merely acknowledging that the meetings occurred and that their focus was in part on planning for the mass prosecutions that were expected to flow from the immigration raid hardly amounts to full disclosure.

Moreover, courts that have considered § 455(a) recusal challenges based on *ex parte* communications have made it clear that such communications require the consent of the excluded party. In *Reed v. Rhodes*, 179 F.3d 453, 468 (6th Cir. 1999), the Sixth Circuit rejected the plaintiffs' § 455(a) arguments concerning ongoing meetings that the district judge had with parties to a school-desegregation decree because the judge "personally explained to Plaintiffs' counsel the ministerial nature of these *ex parte* discussions before they took place" and "personally extended to Plaintiffs' counsel an invitation to attend *all* of these meetings." *But see id.* at 487 (Cole, J. dissenting) (concluding that the regular *ex parte* meetings still created an impermissible appearance of partiality because the trial judge invited the plaintiffs to attend the meetings only after an undisclosed number of such meetings had already occurred).

The Third Circuit in *In re Kensington International Limited*, 368 F.3d 289 (3d Cir. 2004), on the other hand, issued a writ of mandamus requiring the trial judge's disqualification under § 455(a). The primary basis for disqualifying the district judge had to do with

his reliance on a committee of special-master-like asbestos experts, two of whom had conflicts of interest. However, as additional grounds for its decision, the Third Circuit noted that the district judge told the parties of his intent to occasionally meet with them *ex parte* to effectively manage the complex proceedings before him, but he did not allow them to object to that procedure, and deemed any such objections waived. *Id.* at 311. Citing the Code of Conduct of United States Judges, the Third Circuit held that *ex parte* meetings require the affirmative consent of the parties. *Id.*

Judge Reade never obtained Rubashkin's consent to her numerous *ex parte* meetings with the government. Of course, as a practical matter she could not have done so before those meetings occurred because the immigration raid had yet to take place and Rubashkin was still several months away from being arrested. Nonetheless, Judge Reade still had the option—indeed, the duty—to fully disclose her meetings with the Government at the time she was assigned to preside over Rubashkin's trial and to obtain his consent then. Her failure to do so, and her resistance to granting any discovery into those communications, adds to the appearance of impropriety that would shake the confidence of a reasonable layperson in the fairness of the proceedings.

CONCLUSION

Because Judge Reade held months of unrecorded *ex parte* meetings with prosecutors; because the publicly available information strongly suggests that those meetings touched on at least some substantive

issues; and because the contents of those meetings have never been fully disclosed, a reasonable layperson would doubt the fundamental fairness of Rubashkin's trial and sentencing. *Amici* therefore respectfully urge this Court to grant the writ for certiorari.

DATED: May 3, 2012

Respectfully submitted,

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APPENDIX

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APPENDIX A

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(Title and institutional affiliations are provided for identification purposes only.)

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APPENDIX B

AFFIDAVIT

Geoffrey C. Hazard, Jr., states:

1. I am Distinguished Professor of Law, Hastings College of the Law, University of California; Trustee Professor of Law Emeritus, University of Pennsylvania; Sterling Professor of Law, Yale University; and Director (executive director) Emeritus of the American Law Institute. I am a member of the bars of California and Pennsylvania.

2. I was principal draftsman of the Code of Judicial Conduct, which in all material respects is now codified in 28 U.S.C. § 455. I was Reporter and principal draftsman of the American Bar Association Model Rules of Professional Conduct, which in all material respects have been adopted in Iowa and the District of Columbia.

3. For the last 30 years I have been engaged in research, study, teaching, and practice in the field of judicial and lawyer ethics. I have often been recognized as an expert witness in those subjects.

4. I have been asked to present my opinion concerning the conduct of Judge Reade and the lawyers for the Government in this matter. I have had no prior relationship with any of those involved in this matter. I am receiving no compensation.

5. In summary, I entirely agree with the opinions of Mark Harrison concerning the conduct of Judge Reade, as summarized in paragraph 10 of his Affidavit, and I entirely agree with the opinions of Professor Stephen Gillers concerning the conduct of the Government lawyers, as summarized in paragraph 24 of his Affidavit.

6. In essence, Judge Reade and the Government lawyers established and maintained a continuing relationship of substantial *ex parte* communications from the point when the Government planned the raid on Mr. Rubashkin's enterprise through the filing of the charges against him.

(a) The communications went far beyond "logistics," the term used by Judge Reade—after the fact—to describe what was involved. Rather the communications covered the entire program that the Government proposed to follow.

(b) The program included scheduling the arrests and ensuing proceedings so that they would be on Judge Reade's docket, and not that of some other judge.

(c) No record was made of these communications. Their existence was not disclosed to defendants or to defense counsel during the prosecutions.

(d) In testifying before Congress about the arrests, the Government lawyers made no mention of the communications or the plan to have the cases assigned to Judge Reade.

(e) Judge Reade made only a vague and obscurant reference to the communications and the plan. They concerned much more than "logistics": They covered the whole pre-filing operation.

(f) There has been no indication, by Judge Reade or the Government lawyers, why these "logistics" could not have been handled with the Clerk of Court of the Northen District of Iowa.

(g) It is especially shameful that this occurred in Iowa, a State that has long had a reputation for probity in its bench and bar.

1. In my opinion the issue is not whether Defendant has made a showing about the probability of an acquittal, as the Eighth Circuit held. It is whether Defendant has made a showing that the judge's failure to recuse herself, despite circumstances creating at least an appearance of impropriety, was a structural defect that deprived him, from beginning to end, of a fair trial to determine his innocence or guilt.

The showing is certainly sufficient to show that Mr. Rubashkin was tried before a federal judge who came to the proceeding with secret information that, as both the judge and the Government knew, in the language of Commentary to Canon 2(A) of the Model Code:

> would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity [and] impartiality is impaired.

Pursuant to 28 U.S.C § 1746, I declare under penalty of perjury that the above is true and correct.

/s/____________________
Geoffrey C. Hazard, Jr.

Dated: San Francisco, California
April 11, 2012.