No. 24-10287

In the United States Court of Appeals for the Fifth Circuit

JAMES DONDERO; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; THE DUGABOY INVESTMENT TRUST; NEXPOINT REAL ESTATE PARTNERS, L.L.C.; AND GET GOOD TRUST,

Plaintiffs-Appellants,

v.

STACEY G. JERNIGAN; HIGHLAND CAPITAL MANAGEMENT, L.P.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division
No. 3:23-CV-0726-S

APPELLANTS' PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION AND RULE 40(b)(2) STATEMENT

The panel's decision raises a question of extraordinary importance: What standard of review should an appellate court apply when reviewing a decision denying recusal? The panel applied a deferential, abuse-of-discretion standard in upholding the district court's order affirming the bankruptcy judge's refusal to recuse. And although the district court did not even mention the standard of review when it affirmed the bankruptcy judge's refusal to recuse, it is apparent that the district court adopted a similarly deferential posture toward the bankruptcy court. Both the panel and the district court erred in doing so. The recusal statute makes recusal mandatory, not discretionary, under specified circumstances. *See* 28 U.S.C. § 455. And an abuse-of-discretion standard confers unwarranted deference on the decision of the very judge whose impartiality has been called into question. Other courts have recognized that an abuse-of-discretion standard conflicts with rulings from other federal appellate courts. *See, e.g.*, *United States v. Balistrieri*, 779 F.2d 1191, 1216 (7th Cir. 1995) ("Our standard of review under [28 U.S.C. § 455] is *de novo*.").

And this is far from the ordinary case of a party seeking recusal when dissatisfied with decisions of a lower court: The bankruptcy court *is writing books clearly related to the subject matter of this litigation*. The continuation of the bankruptcy—remarkably now improperly liquidating a solvent company—dovetails with the bankruptcy judge's interest in further material for her books. That is a source of bias entirely external to this case and contrary to Congress's mandate to avoid the appearance of impartiality, a requirement that is crucial to preserving judicial integrity.

The Court should determine that a highly deferential standard of review cannot be squared with the recusal statute. And this Court should avoid the conflict with other courts of appeals that this panel decision would otherwise create.

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Whether a judge's ruling on a motion to recuse pursuant to 28 U.S.C. § 455 should be reviewed de novo or for abuse of discretion.

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The Honorable Stacey G. Jernigan serves as the Chief Judge of the U.S. Bankruptcy Court for the Northern District of Texas, and she is presiding over the Chapter 11 bankruptcy of Highland Capital Management, L.P. When Highland petitioned for relief in 2019, its co-founder, appellant James Dondero, was serving as the company's CEO and remained significantly involved in its management. *See* Panel Op. at 2-3. But shortly after the bankruptcy proceedings began, Mr. Dondero surrendered his positions at Highland and was replaced by an Independent Board. *See id.* Other creditors and parties-in-interest appeared and participated alongside Mr. Dondero in the bankruptcy proceedings. For simplicity and ease of exposition, we will refer to these entities collectively as "the Dondero parties."

As the bankruptcy proceedings progressed, Chief Judge Jernigan repeatedly behaved in a manner that displayed bias against Mr. Dondero and led the Dondero Parties to reasonably question her impartiality. *See* Brief of Appellants at 8-10 & n.4 (documenting these episodes). Chief Judge Jernigan had also expressed unfavorable opinions of Mr. Dondero and Highland's management in a separate and previous bankruptcy case involving Acis Capital Management. *See id.* at 5-6. The Dondero Parties therefore moved to recuse Chief

Judge Jernigan in March 2021, arguing that her "impartiality might reasonably be questioned" due to her repeated disparaging statements from the bench about Mr. Dondero personally and his role in the reorganization proceedings. ROA.80-117. One week later, Chief Judge Jernigan denied the motion. ROA.3656-3666. Chief Judge Jernigan first suggested that the motion to recuse was "not timely," although she did not deny the motion on that basis and acknowledged that the recusal statute imposes no timeliness requirement. ROA.3660 ("[T]he applicable statute and rule do not expressly address timeliness."); ROA.3662 ("[S]ince the Motion to Recuse raises serious issues, the court will nevertheless analyze it as though it is timely."). And despite recognizing her obligation to apply an objective standard to the recusal determination, the judge relied in part on her subjective belief in her impartiality to conclude recusal was not warranted. ROA.3665 ("The Presiding Judge does not believe she harbors, or has shown, any personal bias or prejudice against the Movants."); *but see Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009) ("The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.' "); *Balistrieri*, 779 F.2d at 1204 ("Section 455(a) . . . is directed against the *appearance* of partiality, whether or not the judge is actually biased." (internal citation omitted). The order denying recusal does not address the evidence of partiality in any detail. *See generally* ROA.3656-3666. The Dondero Parties appealed, but the district court dismissed on jurisdictional grounds, as the recusal decision was interlocutory and

fell outside the appellate jurisdiction of the district court. ROA.5840-5853; 28 U.S.C. § 158(a).

While this appeal was pending, Chief Judge Jernigan continued to threaten the Dondero Parties, make negative comments about them from the bench, impose hefty sanctions on them and their counsel without proper cause or evidentiary support, and single them out for disparate treatment. *See* Brief of Appellants at 12-20 (describing examples). In response, the Dondero Parties moved to supplement their earlier recusal motion and requested a final, appealable order so that a judge other than the presiding judge could review the arguments for recusal. *See* ROA.6221-6231. Chief Judge Jernigan denied the motion on procedural grounds but invited the Dondero Parties to submit a new motion to recuse (ROA.14719-14721), which they filed in October 2022. ROA.2842-2870.

After filing their renewed recusal motion, the Dondero Parties learned for the first time that Chief Judge Jernigan had written two novels that express negative views of the industry in which Mr. Dondero and his companies operate—and that she had published these novels while presiding over the bankruptcies of the Acis and Highland hedge funds. The two novels, entitled *He Watches All My Paths* and *Hedging Death*, contain derisive commentary about hedge fund leaders and the specific financial instruments at issue in Highland's bankruptcy. ROA.3207-3211. In the books, Chief Judge Jernigan derides "[h]igh flying hedge fund managers" that "suck up money like an i-robot vacuum" and display "outrageous amounts of hubris" as part of their "bro

culture." ROA.3208. And *Hedging Death*, which was written and published while Chief Judge Jernigan was presiding over the Highland hedge fund bankruptcy, has striking parallels to Highland while it was under Mr. Dondero's management:

- The book involves a company called Ranger Capital. Highland's former name was Ranger Asset Management. ROA.3209; *Kischner v. Dondero*, Case No. 3:21-03076-sgj (Bankr. N.D. Tex.), Dkt. 310 at 16-17.

- The book describes Ranger as a "multi-billion-dollar conglomerate, which manage[s] not just hedge funds, but private equity funds, CDOs, CLOs, REITS, life settlements, and all manner of complicated financial products." Highland was once a "multibillion-dollar" enterprise that managed the exact same unusual mix of investments. ROA.3209; *Kirschner*, Case No. 3:21-03076-sgj (Bankr. N.D. Tex.), Dkt. 310 at 16-17.

- The book describes "byzantine" international tax structures and off-shore transactions as pretexts for hiding illegal activity and money laundering. *Kirschner*, No. 3:21-03076-sgj (Bankr. N.D. Tex.), Dkt. 310 at 18. Highland and Mr. Dondero use international tax structures and off-shore transactions, and the bankruptcy judge repeatedly expressed her suspicion of them and called them "byzantine." *See, e.g.*, ROA.2924-2925 at 86:16-87:15.

Each of the books also pits a protagonist bankruptcy judge that resembles Chief Judge Jernigan (the fictional judge is even married to a police officer, as Chief Judge Jernigan is) against an antagonist hedge-fund manager in the financial-services industry that resembles Mr. Dondero. ROA.3208-3209.

Immediately after learning of the novels, the Dondero Parties supplemented their renewed recusal motion to explain why the novels also merited recusal. ROA.3207-3211. Three days later, Chief Judge Jernigan denied the renewed recusal motion. ROA.44-79.

The Dondero Parties sought mandamus relief from the federal district court.

On March 8, 2024, the district court denied the mandamus petition, but it did not discuss the standard of review that should apply to Chief Judge Jernigan's refusal to recuse. ROA.18885-18889.

The Dondero parties appealed, and a panel of this Court affirmed. The panel noted that the Dondero Parties "easily" meet the first requirement for mandamus relief—*i.e.*, that they have had no "'other adequate means to attain the [requested] relief.'" Panel Op. at 6.

But the panel held that the Dondero parties could not meet the second or third requirements for mandamus relief. *See* Panel Op. at 7-15. With respect to the second requirement—whether it was "clear and indisputable" that the presiding judge's impartiality might reasonably be questioned—the panel relied on Fifth Circuit precedent establishing that "[r]ecusal decisions are reviewed for abuse of discretion, and in general, 'if a matter is within the district court's discretion, the litigant's right to a particular result cannot be 'clear and indisputable.'" Panel Op at 7 (quoting *Kmart Corp. v. Arends*, 123 F.3d 297, 300-01 (5th Cir. 1997)). The panel then considered the examples of bias cited by the Dondero Parties and concluded that none "'reveal[ed] such a high

degree of favoritism or antagonism as to make fair judgment impossible.'" Panel Op. at 15 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). The panel did not, however, explicitly analyze whether any of the examples "might reasonably" cause an objective observer to question the presiding judge's impartiality.

This deferential approach particularly affected the extraordinary aspect of this case: The bankruptcy judge's work as an author of what were presented as fiction books. This author was drawing her stories from her job—writing about judges presiding over hedge-fund bankruptcies. The panel acknowledged that "some similarities between the books [written by Chief Judge Jernigan] and the cases before Chief Judge Jernigan *may* raise cause for concern." *Id.* The panel held it was nonetheless insufficient to warrant recusal under the exceedingly deferential standard of review produced by combining the abuse-of-discretion standard with the requirement to show a "clear and indisputable" entitlement to mandamus. Instead, the panel incorrectly deferred to the judgment of a trial judge who was engaging in precisely the type of perilous extrajudicial conduct that merits serious review from the appellate courts.

Because the panel found that the Dondero parties lacked a clear and indisputable right to mandamus relief, the panel also found that mandamus was not "'appropriate under the circumstances.'" *Id.* (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004)).

STATEMENT OF FACTS

The facts necessary to the argument of the issues are set forth in the Rule 35(b) statement, *see supra* at ii-iii, and the statement of the course of proceedings and disposition of the case, *see supra* at 1-6.

ARGUMENT

Central to the American justice system and its guarantee of due process is access to fair proceedings before a fair tribunal. For that reason, the federal recusal statute provides that a judge *must* recuse whenever her "impartiality might reasonably be questioned." 28 U.S.C. § 455. Contrary to the panel's conclusion that "[t]he bar for recusal under § 455 is a high one," the Supreme Court of the United States has for decades counseled that "'justice must satisfy the *appearance of justice*.'" *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (emphasis added) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). The statute is intended not only to protect litigants from actual bias in their judge, but also to promote public confidence in the impartiality of the judicial process. Thus, the statute is designed to protect against the *appearance* of partiality. As this Court has explained: "The purpose of section 455(a) . . . is apparent; it seeks to protect against even the appearance of impropriety in judicial proceedings and we are charged with determining 'whether a reasonable and objective person, knowing all of the facts, would harbor doubts concerning the judge's impartiality.'" *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) (emphasis added). For this reason, this Court has held that "if the question of whether § 455(a) requires disqualification is a close one, the

balance tips in favor of recusal." *Id.*; *accord Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir. 1982).

To protect the appearance of justice, the Court should rehear the case en banc. The panel, in denying mandamus relief, employed the highly deferential abuse-of-discretion standard of review. That approach cannot be squared with the federal recusal statute, which is written in mandatory terms. The congressional command for judges to recuse in certain circumstances is simply inconsistent with marking the decision as discretionary.

An abuse-of-discretion standard of review also thwarts the apparent purpose of the federal recusal statute to preserve the integrity of the judicial system and the appearance thereof. Such a standard requires deference to the recusal ruling of the very judge accused of partiality. Against charges that a judge is not impartial, deferring to that allegedly compromised judge does little to assure the public that cases are being adjudicated impartially. After all, that same lack of impartiality may also infect the judge's decision on whether to recuse. The whole system of preserving judicial integrity requires at least one set of judges—not alleged to lack impartiality—to take a clean, *de novo* look at the recusal question.

Other circuit courts recognize the above and require a *de novo* review of lower court recusal decisions. Accordingly, the panel's abuse-of-discretion standard brings the Fifth Circuit into conflict with the Seventh Circuit. *See United States v. Balistrieri*, 779 F.2d at 1216 (7th Cir. 1995) ("Our standard of review under [28 U.S.C. § 455(b)(1)] is *de novo*."). The en banc court should

address the exceptionally important question of whether the Fifth Circuit should adopt a less deferential standard of review when considering a judge's decision not to recuse.

This is a case in which applying an incorrect standard of review made a material difference. This is not the ordinary case of appellants complaining about harsh decisions below. Here, the bankruptcy judge took the extraordinary act of *writing books of ostensible fiction regarding her role as a judge and her battle against a hedge fund in her court.* The bankruptcy judge, who should have been focusing on her work and speaking solely through judicial opinions about it, was playing with matches on nights and weekends. *Amid such exceptional*, *extrajudicial activity,* a judge should not be deferred to when asked to recuse. The integrity of the judicial system requires, at least, that reviewing courts take a serious look at this extrajudicial behavior and whether it compromises the appearance of impartiality essential to confidence in the courts.

I. The Seventh Circuit Has Consistently And Correctly Held That De Novo Review Is Appropriate When Analyzing A Judge's Recusal Decision On Petition For Writ Of Mandamus

In stark contrast to the Fifth Circuit, the Seventh Circuit has, for nearly forty years, consistently conducted *de novo* review of recusal decisions under 28 U.S.C. § 455—even when reviewing recusal decisions on petition for writ of mandamus. The de novo standard was first established in *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1995), which reviewed on appeal a district judge's refusal to recuse under 28 U.S.C. § 455(b)(1). That provision requires

recusal when a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.*; *see also Balistrieri*, 779 F.2d at 1202-03. Since *Balistrieri*, the Seventh Circuit has applied de novo review to *all* recusal rulings made under § 455, including decisions made under § 455(a) that the Seventh Circuit reviews on petition for writ of mandamus. *See Dunkley v. Ill. Dep't of Human Svcs.*, No. 23-2215, 2024 WL 1155448, at *3 (7th Cir. Mar. 18, 2024); *In re Sherwin-Williams Co.*, 607 F.3d 474, 477 (7th Cir. 2010) (conducting de novo review of recusal decision under § 455(a) on petition for writ of mandamus); *Hook v. McDade*, 89 F.3d 350, 353 (7th Cir. 1996) (same); *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989). *Sherwin-Williams* and *Taylor* are in direct conflict with the panel opinion, as they each applied *de novo* rather than deferential review when a litigant sought mandamus relief in response to a judge's refusal to recuse under 28 U.S.C. § 455(a).

Other federal circuit courts have also applied a *de novo* standard of review to questions of judicial impartiality, though not consistently. *See, e.g.*, *People Helpers Found., Inc. v. City of Richmond*, 12 F.3d 1321, 1325 (4th Cir. 1993) ("This court reviews questions of judicial bias de novo."); *Sac & Fox Nation of Okla. v. Cuomo*, 193 F.3d 1162, 1168 (10th Cir. 1999) (noting disqualification for an appearance of bias is "generally" reviewed for an abuse of discretion, but that when the trial judge does not "create a record or document her decision not to recuse," the court will apply a de novo standard).

Wright and Miller have also endorsed the Seventh Circuit's de novo approach to judicial recusal decisions: "Because the disqualification statutes are mandatory and reflect a societal interest in an impartial judiciary, there is a strong argument that appellate courts should apply a *de novo* standard in reviewing recusal decisions." 13D Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3553 (3d ed. 2008).

Other commentators similarly have counseled that de novo review of recusal decisions is appropriate. *See, e.g.*, Cassandra Burke Robinson & Gregory Hilbert, *Judicial Disqualification on Appeal*, 53 Akron L. Rev. 573, 594-95 (2019) ("[T]he legal standard is clearly established under § 455, and the underlying facts are rarely disputed. The only question is whether those facts give rise to a reasonable question about the judge's impartiality. If they do, the judge must step aside—there is no room for the exercise of discretion within that process."); Debra Lyn Basset, *Judicial Disqualification in the Federal Appellate Courts*, 187 Iowa L. Rev. 1203, 1255 (2002) ("In light of the existing anomaly requiring district judges to rule on motions involving their own partiality, and the undeniable importance of judicial impartiality to due process, the abuse of discretion standard accords too much deference to the trial judge's determination.").

This Court's continued use of an abuse-of-discretion review is incompatible with the text, structure, and purpose of the federal recusal statute. The standard simply gives too much deference to the opinion of the judge being accused of partiality. And the standard gives the public no assurance that at

least one set of judges—not alleged to lack impartiality—has taken a clean look at whether a judge handling a case is impartial.

II. An Abuse-Of-Discretion Standard Of Review Is Incompatible With The Text Of 28 U.S.C. § 455, Which Is Phrased In Mandatory Terms And Confers No Discretion On Judges Who Are Presented With Recusal Motions

The abuse-of-discretion standard can be applied only when the law confers discretion upon the decisionmaker being reviewed. It is incongruous to apply this standard of review to a statute such as 28 U.S.C. § 455, which *mandates* recusal whenever a judge's impartiality "might reasonably be questioned" and withholds any form of "discretion" from judges who are tasked with applying the statute.

The Fifth Circuit has long held that recusal, or judicial disqualification, is a pure question of law. *See In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984) ("The issue of judicial disqualification is solely one of law.").[1]

The text of the federal recusal statute admits of no discretion, providing that a judge "shall" recuse when certain circumstances are presented. And it imposes a low substantive threshold for recusal to be mandatory: "Any justice, judge, or magistrate judge of the United States ***shall*** disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28

1. Recusal is synonymous with judicial disqualification. *See Estes v. Ramirez*, No. 7:14-CV-69, 2014 WL 11698007, at *2 (S.D. Tex. June 13, 2014), amended in part, No. 7:14-CV-69, 2014 WL 11698095 (S.D. Tex. Aug. 7, 2014).

U.S.C. § 455(a) (emphasis added). The Federal Rules of Bankruptcy Procedure expressly provide that disqualification of a bankruptcy judge "[*shall* be] governed by 28 U.S.C. § 455." Fed. R. Bankr. P. 5004(a) (emphasis added); *see also Matter of Burch*, 818 Fed. App'x 367, 368 (5th Cir. 2020) (noting that bankruptcy judges are governed by the federal recusal statute); *In re Wilborn*, 401 B.R. 848, 859-60 (Bankr. S.D. Tex. 2009) (same).

This Court has explicitly recognized the mandatory nature of the recusal statute: "The terms of section 455(a) are mandatory and self-executing; the judge must recuse himself where there is an appearance of partiality regardless of whether a motion to recuse had been made." *Health Servs. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986), *aff'd*, 486 U.S. 847 (1988). This Court—without explanation—has recognized the tension between the mandatory nature of the statute and this Court's abuse-of-discretion standard for reviewing recusal decisions: In this Court, "[a]lthough section 455 speaks in mandatory language, in actual application we have recognized that the decision to recuse is committed to the sound discretion of the district court and typically is reviewed for an abuse thereof." *In re Chevron, U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997).

This Court should resolve this tension rather than continue it. This Court should adopt (and require all courts reviewing petitions for writ of mandamus to apply) the more appropriate *de novo* standard of review. And the Court should give proper weight to the broad scope of the substantive statutory

standard prescribed by Congress that requires recusal whenever a judge's impartiality "might reasonably be questioned."

In fact, this Court already employs a de novo standard to the similar issue of attorney disqualification. *See In re Am. Airlines, Inc.*, 972 F.2d 605, 609 (5th Cir. 1992). As the Court explained in *American Airlines*, "a district court's ruling upon a disqualification motion is not a matter of discretion." *Id.* As a result, when conducting an appellate review of a ruling on an attorney disqualification motion, the reviewing court "carefully examin[es] the district court's application of relevant ethical standards." *Id.*

A similar approach should apply to judicial disqualifications, where there is an even stronger justification for non-deferential review, particularly when an Article I bankruptcy judge's impartiality is being questioned. Again, the federal recusal statute mandates recusal whenever the presiding judge's impartiality "might reasonably be questioned." 28 U.S.C. § 455(a). In other words, the statute asks how an objective observer would view the judge's actions and whether that observer might reasonably "question" those actions, as opposed to how the observer might answer such questions. Yet the statute requires the presiding judge—the very person accused of partiality—to decide whether to recuse in the first instance. It stands to reason that the presiding judge will have *subjective* and highly personal views of her own partiality, making a truly objective review of the record virtually impossible. It makes little sense to give deference to a presiding judge's opinion under the circumstances, and such deference certainly does not promote federal law's textual

mandate and policy of tipping the balance in favor of the party seeking recusal. *See Chevron*, 121 F.3d at 165; *Lewis*, 671 F.2d at 789. An abuse-of-discretion standard is inadequate to ensure appropriate adherence to the mandate of recusal whenever the judge's impartiality might reasonably be questioned.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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Dated: December 3, 2024

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on December 3, 2024, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of VirusTotal and is free of viruses.

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CERTIFICATE OF SERVICE

I certify that on December 3, 2024, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Fifth Circuit and served through CM/ECF upon all counsel of record in this case.

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