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' MOTION FOR LEAVE TO FILE A REPLY BRIEF IN SUPPORT OF 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.

Appellants	Appellants' Counsel
• James D. Dondero • Highland Capital Management Fund Advisors, L.P. • The Dugaboy Investment Trust • NexPoint Real Estate Partners, LLC • Get Good Trust	Jonathan F. Mitchell Mitchell Law PLLC John Ashcroft Ashcroft Sutton Reyes Michael Lang Crawford Wishnew & Lang PLLC

Appellee	Appellee's Counsel
• The Honorable Stacey G. Jernigan, United States Bankruptcy Court for the Northern District of Texas	

Debtor	Proposed Intervenor's Counsel
• Highland Capital Management, L.P.	Jeffrey N. Pomerantz John A. Morris Pachulski Stang Ziehl & Jones LLP Melissa S. Hayward Zachary Z. Annabel Hayward PLLC

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Appellants

Appellants James Dondero et al. respectfully move for leave to file a reply brief in support of their petition for rehearing en banc. The plaintiffs-appellees' response raised numerous arguments against rehearing en banc that warrant a reply. We have attached a copy of the proposed reply brief to this motion.

We have conferred with counsel for Highland Capital Management L.P. and they are opposed to this request.

CONCLUSION

The Court should grant the appellants' motion for leave to file a reply brief in support of their petition for rehearing en banc.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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CERTIFICATE OF CONFERENCE

I certify that I have conferred with John A. Morris, counsel for the plaintiffs-appellees, and he informed that the plaintiffs-appellees are opposed to this motion.

/s/ Jonathan F. Mitchell
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CERTIFICATE OF COMPLIANCE

with type-volume limitation, typeface requirements,
and type-style requirements

1. This motion complies with the type-volume limitation of Fed. R. App. P. 40(d)(3)(A) because it contains 91 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: December 31, 2024

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on December 31, 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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REPLY BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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Highland Capital Management L.P. (Highland) offers several arguments against rehearing en banc, but none of them warrant denial of Mr. Dondero's petition.

I. Highland's Claim That The Appellants Are "Contradicting Themselves" Is False

Highland correctly observes that a district court's decision to deny mandamus relief is reviewed for an abuse of discretion on appeal. *See* Panel Op. at 6 ("We review the denial of mandamus for abuse of discretion."); *id.* (citing authorities). The appellants have never denied or questioned this at any stage of these proceedings.

But an error of law is an abuse of discretion *per se*. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . ."); *Arete Partners, L.P. v. Gunnerman*, 643 F.3d 410, 412 (5th Cir. 2011) ("A district court abuses its discretion when its ruling is based on an erroneous view of the law . . ."). And alleged errors of law are reviewed de novo, even when an abuse-of-discretion standard applies to the district court's ruling. *See, e.g.*, *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 737 (5th Cir. 2003) ("Because . . . a court abuses its discretion when it makes an error of law, we apply a *de novo* standard of review to such errors. *Id.*"). Whether to apply de novo or deferential review to a judge's recusal decision is a question of law, which means that a district court commits legal error (and abuses its discretion) if it applies the wrong standard of review when evaluating a bankruptcy judge's

recusal decision. *See Cruz v. Barr*, 929 F.3d 304, 308 (5th Cir. 2019) ("[A]ppl[ying] the wrong standard of review" is "a legal error").

So there is no "contradiction"[1] between the appellants' panel-stage briefs and the petition for rehearing en banc. The district court's decision denying mandamus relief is reviewed for abuse of discretion. But an error of law *is* an abuse of discretion, and alleged errors of law are reviewed de novo even when the abuse-of-discretion standard applies. *See O'Sullivan*, 319 F.3d at 737.

More importantly, the standard of review that the *district court* should have applied to the *bankruptcy judge's* refusal to recuse is a different matter from the standard of review that *this Court* should apply to *the district court's* refusal to grant mandamus relief. Highland's response conflates the two. *See* Response at 4 n.10. The appellants are arguing that the district court committed legal error by refusing to apply a de novo standard of review when evaluating the bankruptcy judge's refusal to recuse—and that the panel erred by failing to correct this legal error on appeal. That does not mean (or even imply) that the court of appeals should have applied de novo review to the district court's ruling, due to the current mandamus setting of this case.

It is also does not mean that applying the proper standard of review is somehow esoteric or irrelevant or unworthy of this Court's attention because there are two layers of review. The crucial need is that some judge or panel of

1. *See* Response at 2 ("Appellants Should Be Estopped From Contradicting Themselves"); *id.* at 3 ("Appellants should be judicially estopped from flipping their position.").

judges—about whom there has no suggestion of improper partiality or inappropriate extrajudicial conduct—reviews fresh and without deference the recusal decision of the judge whose impartiality is challenged.

Any other structure threatens the integrity of the judicial system. *See In re International Business Machines*, 618 F.2d 923, 926–27 (2d Cir. 1980) ("A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits.). It leaves the fox guarding the hen house. After all, "the question" cannot be "whether a trial judge abused his discretion but whether he could exercise any discretion because of a personal, extrajudicial bias which precludes dispassionate judgment." *Id.* at 926.

In this case, every judge—the district judge and a panel of this Court—took a light, deferential touch to the bankruptcy judge's decision not to recuse herself. That led to the bankruptcy judge come novelist to decide whether her books—portraying a heroic bankruptcy judge battling an evil hedge fund leader with characteristics indistinguishable from Mr. Dondero—compromised the appearance of her own impartiality. Judge Jernigan can write novels about the litigants before her or continue to preside over case concerning them, but cannot do both.

II. Highland Is Wrong To Declare The Standard Of Review "Irrelevant" In A Mandamus Proceeding

Highland argues that there is no "standard of review" that should apply to Judge Jernigan's refusal to recuse because the district court reviewed her decision in response to a petition for mandamus rather than on direct appeal. *See* Response at 4–6. That is a non sequitur. A district court still conducts "review" of a bankruptcy court's recusal decisions on mandamus, and it must determine whether it should apply de novo or deferential review when evaluating a bankruptcy judge's refusal to recuse. *Some* standard of review must be applied whenever a court is asked to countermand another court's decision—regardless of requested review takes place on appeal, mandamus, or certiorari. The appellants are simply asking the en banc court to decide what the standard of review should be.[2]

This Court has also made clear that mandamus petitions are the appropriate mechanism for seeking review of a refusal to recuse. *See In re Chevron USA, Inc.*, 112 F.3d 163, 165 (5th Cir. 1997). That is because a judge continuing to preside over the case, when her impartiality might be reasonably questioned, does immediate and significant damage to the judicial system. *See*, *e.g.*, *Berger v. United States*, 255 U.S. 22, 36 (1921). This Court should vindicate the simple principle urged here—and embraced by sister circuits—that at least one judge

2. This is not an "appellate standard" of review, as Highland claims in its brief, but it is a "standard of review" nonetheless. *See* Response at 6 ("Because the District Court ruled on a mandamus petition, not an appeal, the 'appellate standard' is irrelevant.").

whose impartiality is not questioned should take a fresh and non-deferential look at a refusal to recuse.

III. En Banc Review Is Warranted Because The Panel's Decision Conflicts With Seventh Circuit Cases Requiring De Novo Review Of A Judge's Refusal To Recuse Under 28 U.S.C. § 455

The panel decision conflicts with a string of Seventh Circuit rulings that require de novo rather than deferential review of a judge's recusal decision under 28 U.S.C. § 455. *See* Petition at 9–10 (citing *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1995); *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); *Hook v. McDade*, 89 F.3d 350, 353 (7th Cir. 1996); *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989)). Highland does not deny that the panel opinion conflicts with these Seventh Circuit decisions. *See* Response at 7–9. Instead, Highland notes that one Seventh Circuit decision applied the abuse-of-discretion standard when reviewing a district court's refusal to recuse,[3] and it claims that the Seventh Circuit's rulings on this matter cannot qualify as "authoritative decisions" within the meaning of Fed. R. App. P. 40(b)(2)(C) because the rulings from that Court have not been consistent. *See* Response at 7 ("[T]he Seventh Circuit's rulings on the issue have been inconsistent; that Court has never issued an 'authoritative decision'

3. *See* Response at 8 (citing *Tezak v. United States*, 256 F.3d 702 (7th Cir. 2001)); *see also Tezak*, 256 F.3d at 716 ("A district court judge's decision not to recuse himself is reviewed under an abuse of discretion standard.").

concerning the applicable standard of review."). That is wrong for multiple reasons.

First, *Tezak v. United States*, 256 F.3d 702 (7th Cir. 2001), does not conflict with *Balistrieri*, *Dunkley*, *Sherwin-Williams*, *Hook*, or *Taylor* because *Tezak* reviewed a judge's refusal to recuse under 28 U.S.C. § 144 rather than 28 U.S.C. § 455. *See Tezak*, 256 F.3d at 717 n.16 ("Tezak . . . did not seek recusal under § 455(a)."). Recusal under section 144 is required when a party files a "timely and sufficient affidavit" showing that they judge "has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144. Section 455(a), by contrast, requires a judge to recuse "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *see also Tezak*, 256 F.3d at 717 n.16 ("Unlike § 144, which requires recusal of a judge when there is actual personal bias or prejudice, 28 U.S.C. § 455(a) requires a judge to recuse himself when his presiding over a case would create an appearance of bias. Denial of a motion for recusal based on the appearance of impropriety can only be challenged with a writ of mandamus. A party cannot appeal a judge's failure to recuse under § 455(a) after the proceeding in question is completed." (citations omitted)). The Seventh Circuit has made clear that it applies its de novo standard of review only to recusal decisions under 28 U.S.C. § 455, and not to recusal decisions under 28 U.S.C. § 144. *See United States v. Walsh*, 47 F.4th 491, 498 (7th Cir. 2022) (emphasizing that the de novo standard of review is a special one for section 455 recusal issues).

Second, even if there were conflict or inconsistency between *Tezak* and the Seventh Circuit cases that apply de novo review to section 455 recusal decisions (and there is not), appellate-court rulings do not cease to qualify as "authoritative decisions" under Fed. R. App. P. 40(b)(2)(C) whenever they come into conflict with another appellate-court decision within that circuit. *Tezak* did not overrule the de novo review decisions that preceded it (*Balistrieri*, *Hook*, and *Taylor*), nor did it preemptively nullify the de novo review decisions that came afterward (*Dunkley* and *Sherwin-Williams*). All of these rulings remain "authoritative decisions" of the Seventh Circuit, and they would remain "authoritative" even if *Tezak* had applied an abuse-of-discretion standard when reviewing a judge's refusal to recuse under 28 U.S.C. § 455.

Finally, Highland is wrong to suggest that this Court grants rehearing en banc only in "the rare instance when a panel opinion conflicts with Fifth Circuit precedent." Response at 8. The Court has granted rehearing en banc many times in recent years, and few if any of those cases involved situations in which the panel opinion contradicted a previous panel opinion or en banc ruling from this Court. *See, e.g.*, *Little v. Llano County*, 106 F.4th 426 (5th Cir. 2024); *Alliance for Fair Board Recruitment v. SEC*, 2024 WL 670403 (5th Cir.); *United States v. Abbott*, 90 F.4th 870 (5th Cir. 2024); *Petteway v. Galveston County*, 86 F.4th 1146 (5th Cir. 2023). En banc rehearing is warranted when a panel opinion "conflicts with an authoritative decision of another United States court of

appeals"[4] or when the proceeding "involves one or more questions of exceptional importance,"[5] each of which applies here. *See* Fed. R. App. P. 40(b)(2)(C)–(D).

IV. The Panel's Rejection Of The Appellants' Recusal Request Does Not Affect Whether This Court Should Grant Rehearing En Banc To Decide The Standard Of Review

Highland notes that the panel rejected Mr. Dondero's demand for Judge Jernigan's recusal under 28 U.S.C. § 455. *See* Response at 9–11. But the panel evaluated Judge Jernigan's refusal to recuse under the abuse-of-discretion standard that Mr. Dondero is challenging in his en banc petition. And in all events, the panel's ruling on Mr. Dondero's appeal has no bearing on whether the standard-of-review question is worthy of en banc consideration. Mr. Dondero is asking the en banc court to resolve only the standard of review that should apply to judicial recusal decisions under 28 U.S.C. § 455. The ultimate issue of whether Judge Jernigan *should* have recused should be decided on remand to the district court with instructions to apply the proper standard of review.

4. Fed. R. App. P. 40(b)(2)(C).
5. Fed. R. App. P. 40(b)(2)(D).

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted.

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