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No. 25-355

In the Supreme Court of the United States

JAMES DONDERO, ET AL.,
Petitioners,
v.
STACEY G. JERNIGAN, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR INVESTMENT PROFESSIONALS CONCERNED WITH JUDICIAL IMPARTIALITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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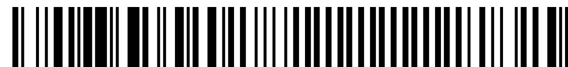
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INTEREST OF *AMICUS CURIAE*

Amicus Investment Professionals Concerned with Judicial Impartiality is composed of investment management industry professionals who worked with Petitioner James Dondero at Highland Capital Management, the debtor in the underlying bankruptcy proceeding. These professionals thus had a front-row seat to what the Fifth Circuit called "a nasty breakup." *In re Highland Cap. Mgmt., L.P.*, 98 F.4th 170, 172 (CA5 2024). They are concerned that the bankruptcy judge's apparent disdain of the investment management industry affected these proceedings—and will have a chilling effect on future proceedings in the Northern District of Texas. Even as the judge was adjudicating this matter, she was writing books in which an investment professional was the antagonist. That apparent predisposition against the industry seemed to be reflected in the case, as the rough treatment of the industry in the judge's books echoed the judge's approach. Yet the fund industry is a responsible and trusted fiduciary for investors, creates wealth for billions of people around the world, and is a growing employer of tens of thousands of Americans in the Northern District. In the experience of these professionals, Mr. Dondero prioritized his employees, while the bankruptcy estate often treated those professionals as expendable. Thus, *amicus* has a significant interest in protecting judicial impartiality in this case.*

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* *Amicus* provided timely notice of its intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Public perception of judicial impartiality is a foundation of the rule of law. The rule of law depends on its application by judges, and any bias in that application contradicts the promise of law applied equally. Even the *appearance* of impartiality threatens the rule of law. Not only does a perception of partiality reduce the public's view of the judiciary's legitimacy—the source of its authority—but it undermines the ability of citizens to structure their interactions with each other and with the government. Because an impartial law provides the bedrock for these interactions, any perception that the law may not be applied equally introduces unpredictability. This uncertainty discourages the exchanges that form the basis of our market economy, among many other negative consequences.

This case implicates these exceptionally important principles. By deferring to a trial court's assessment of its own potential bias for recusal under 28 U.S.C. § 455, the decision below undervalues impartiality and its appearance. This Court has repeatedly considered recusal questions under both § 455 and constitutional principles without deference to the lower courts. Such de novo review makes sense, given that § 455 *requires* recusal—it is not a matter of discretion—and uses an objective standard. There is no reason to think that trial judges are uniquely adept at assessing their own potential biases. Misplaced deference on recusal undermines public confidence in an impartial judiciary, threatening rule-of-law values. The Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. Public confidence in the judiciary depends on the appearance of impartiality

The questions presented are exceptionally important, for they implicate "a state interest of the highest order": "public perception of judicial integrity." *Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433, 446 (2015). Inherent in the rule of law is a promise that it be applied equally. And because judicial authority stems in large part from public confidence, both the appearance and the actuality of judicial impartiality are critical. Public perceptions that judges will neutrally apply the law promote predictability in the law, providing a stable background against which private parties can structure their affairs and their interactions with the government. Letting any appearance of impartiality fester in the judiciary undermines those important rule-of-law goals.

A. The rule of law requires impartiality

A cornerstone of American government is the promise that ours is "a government of laws and not of men." Mass. Const. part 1, art. XXX. Yet judges interpret the law. To fulfill this promise, then, judges must "administer justice without respect to persons, and do equal right to" all. 28 U.S.C. § 453. "This principle dates back at least eight centuries to Magna Carta, which proclaimed, 'To no one will we sell, to no one will we refuse or delay, right or justice.'" *Williams-Yulee*, 575 U.S. at 445 (quoting Cl. 40 (1215), in W. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 395 (2d ed. 1914)). A judge must "'observe the utmost fairness,' striving to be 'perfectly

and completely independent, with nothing to influence or controul him but God and his conscience.'" *Id.* at 447 (quoting Address of John Marshall, in *Proceedings and Debates of the Virginia State Convention of 1829–1830*, p. 616 (1830)).

Not only must judges apply the law impartially, they also be must *seen* by the public as applying the law impartially. "[J]ustice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954). "The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government." *Williams-Yulee*, 575 U.S. at 445. "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.'" *Ibid.* (cleaned up) (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton)). "The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions." *Id.* at 445–46.

As this Court has explained, "[a]n insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process." *Williams* v. *Pennsylvania*, 579 U.S. 1, 15 (2016). Rather, it is "an essential means of ensuring the reality of a fair adjudication." *Id.* at 15–16. "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Id.* at 16. "[T]hey concern the ingredients of what constitutes justice." *Offutt*, 348 U.S. at 14. "In matters of ethics, appearance and reality often converge as one." *Liteky* v. *United States*,

510 U.S. 540, 565 (1994) (Kennedy, J., concurring in judgment).

This Court has held that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Though "[f]airness of course requires an absence of actual bias in the trial of cases," "our system of law has always endeavored to prevent even the probability of unfairness." *Ibid.* This prevention "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Ibid.* But that result is necessary for justice "to perform its high function in the best way." *Ibid.* "[I]t preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation omitted) (quoting *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

Due process "demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828 (1986). Judicial disqualification has been refined and regulated by "common law, statute, [and] the professional standards of the bench and bar"—including the federal statute at issue, 28 U.S.C. § 455. *Bracy* v. *Gramley*, 520 U.S. 899, 904 (1997). But regulations such as § 455 serve the same due-process goal: "to

promote public confidence in the integrity of the judicial process." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 859–60 (1988). "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Id.* at 869–70 (cleaned up).

28 U.S.C. § 455(a) specifically requires recusal whenever the judge's "impartiality might reasonably be questioned." "The goal of section 455(a) is to avoid even the appearance of partiality." *Liljeberg*, 486 U.S. at 860. "[W]hat matters is not the reality of bias or prejudice but its appearance." *Liteky*, 510 U.S. at 548. Section 455(a) "is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings." *Id.* at 557–58 (Kennedy, J., concurring in judgment). "[T]here are a number of factors that could give rise to a 'probability' or 'appearance' of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior *speeches and writings*, religious affiliation, and countless other considerations." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 892 (2009) (Roberts, C.J., dissenting) (emphasis added).

In short, "[l]itigants ought not have to face a judge where there is a reasonable question of impartiality." H.R. Rep. No. 1453, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6355. Not only does this goal "ha[ve] constitutional dimensions," *Liljeberg*, 486 U.S. at 865 n.12, but as discussed next, it also has

important policy benefits that flow from public confidence in judicial pronouncements.

B. The appearance of partiality reduces confidence and predictability

One of the functions of the rule of law is to "furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). "The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts." *Ibid.* As Justice Scalia put it, "uncertainty has been regarded as incompatible with the Rule of Law." Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

"[T]he existence of a predictable rule of law has made America's enviable economic progress possible." *Perry Cap. LLC* v. *Mnuchin*, 864 F.3d 591, 647 (CADC 2017) (Brown, J., dissenting in part). Dependable, stable, and *impartial* institutions are prerequisites for healthy markets. For instance, "[a]n owner and manager can write a contract because they believe that the state, and its agents the courts, would be impartial enforcers of the contract."[1] By contrast, if either party believes that the enforcers may "be aligned with" the other, "the contract would have little

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[1] Daron Acemoglu et al., *Institutions as a Fundamental Cause of Long-Run Growth* 429, in *Handbook of Economic Growth*, Vol. 1A (2005).

value."[2] "Therefore, the presence of an impartial enforcer is important for contracting."[3]

As above, what matters is not just impartiality but also the *appearance* of impartiality. Parties must *believe* that any disputes will be impartially "resolved by courts on the merits, based on legal rules duly adopted and evidence properly presented to the court."[4] Otherwise, they will hesitate to engage, for the risk of uncertainty via potential bias will weigh as a cost against the transaction. Indeed, in other countries, "the lack of legal institutions that are perceived as efficient, transparent, and impartial for the purposes of dispute resolution has hindered [the] capacity for sustainable development and international competitiveness."[5] As one judge put it, "[t]he most important Rule of Law requirement for a judicial system . . . is that judges must be honest"—*i.e.*, without bias.[6] Impartiality and its appearance are thus necessary for both the rule of law and the benefits that flow from the rule of law, including a stable framework under which parties can engage in commercial activity and interact with the government.

II. The Fifth Circuit and most others are wrong to apply an abuse-of-discretion standard

The questions presented are especially important because the decision below—like decisions from most Courts of Appeals—wrongly defers to a trial judge's

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[2] *Ibid.*

[3] *Ibid.*

[4] Samuel Bufford, *International Rule of Law and the Market Economy—An Outline*, 12 Sw. J.L. & Trade Am. 303, 310 (2006).

[5] *Id.* at 310 n.20.

[6] *Id.* at 311.

own assessment of her impartiality, thereby undermining the rule-of-law values discussed above. The abuse-of-discretion standard applied below and by most circuits is not the right standard for § 455 recusal, which is mandatory rather than discretionary. The legal question involves the application of a statutory standard to generally settled facts. This Court has always applied § 455 without deference to the lower courts on the ultimate recusal question. And similar claims—including constitutional claims for disqualification—have been reviewed de novo by both this Court and the Courts of Appeals. There are uniquely good reasons to apply the same de novo standard here—most obviously that a judge's ability to self-diagnose partiality or its appearance is likely to be limited.

A. This Court's precedents and § 455's language call for de novo review

To begin, this Court has repeatedly adjudicated the merits of § 455 recusal claims without suggesting any deference. In *Liteky* v. *United States*, the Court "[a]ppl[ied] the principles we have discussed to the facts of the present case" to decide that "[n]one of the grounds petitioners assert required disqualification." 510 U.S. at 556. It did not defer to the lower courts' application of law to fact. Nor did it remand for the lower courts to conduct the inquiry in the first instance, as it would typically do for questions of fact (to which deferential review would then apply). See, *e.g.*, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291–92 (1982). Rather, the Court considered the facts itself in light of § 455's standard and decided that disqualification was not required.

This approach is consistent with this Court's other decisions involving § 455. "[O]f the four Supreme Court cases that have interpreted § 455, none held that a recusal decision is within the challenged judge's discretion." Richard K. Neumann Jr., *Conflicts of Interest in* Bush *v.* Gore, 16 Geo. J. Legal Ethics 375, 394 (2003). Rather, all of them "interpret[ed] the statute as Congress drafted it, with mandatory duties not amenable to discretion." *Ibid.*; see *id.* at 394–97.

Besides *Liteky*, another decision viewed the facts independently and found it "self-evident that a reasonable person would not believe [the judge] had any interest or bias." *Sao Paulo State of Federative Republic of Brazil* v. *Am. Tobacco Co.*, 535 U.S. 229, 233 (2002). Still another agreed with the lower courts "that an objective observer would have questioned [the judge's] impartiality," without suggesting deference to that determination. *Liljeberg*, 486 U.S. at 861. As to the proper remedy, the Court acknowledged that "the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court," but it still declined to suggest any more deference than that the remedy decided below be "afforded [the Supreme Court's] due consideration." *Id.* at 862.

Last, this Court in *United States* v. *Will* held that § 455 did not negate the common-law Rule of Necessity, under which a judge otherwise disqualified was required to nonetheless adjudicate a case if no other judge could. 449 U.S. 200, 213–17 (1980). Once again, nothing suggests that either § 455 or the Rule of Necessity would be a matter of discretion warranting a deferential standard, as the Court emphasized the tension between "requiring disqual-

ification" and "the mandate of the Rule of Necessity." *Id.* at 217.

The Court has used the same approach under 28 U.S.C. § 144, which applies only to district-court judges but otherwise overlaps with § 455. See *Liteky*, 510 U.S. at 548 (noting that § 144 "seems to be properly invocable only when § 455(a) can be invoked anyway"); see also 13D Richard D. Freer, *Federal Practice & Procedure (Wright & Miller)* § 3542 (3d ed.) ("[T]he substantive standard for disqualification based upon actual bias or prejudice is identical under § 144 and § 455(b)(1)."). In *Berger* v. *United States*, the Court held that a judge who allegedly said that German-Americans' "hearts are reeking with disloyalty" was required to recuse—notwithstanding a factual dispute about the statement. 255 U.S. 22, 28, 33 (1921); see *id.* at 39–40 (Day, J., dissenting). The Court again suggested no deference to the lower-court decisions. See Neumann, *supra*, at 396–97.

This Court's consistent de novo review makes sense. The § 455 recusal determination is a classic "mixed question of law and fact: [t]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the relevant statutory standard." *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) (cleaned up); see *Liteky*, 510 U.S. at 556 ("[a]pplying the principles we have discussed to the facts of the present case"). "[T]he standard of review for a mixed question" "depends[] on whether answering it entails primarily legal or factual work." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Vill. at Lakeridge, LLC*, 583 U.S. 387,

396 (2018). Here, § 455's recusal determination turns on primarily legal questions.

First, recusal under § 455 is mandatory. This Court has said that the statute "defines the circumstances that *mandate* disqualification of federal judges." *Liljberg*, 486 U.S. at 862 (emphasis added). That follows from the statutory text, which provides circumstances in which a judge "shall" "disqualify himself." 28 U.S.C. § 455. The term "shall" generally "imposes a mandatory duty"—especially where, as here, the "statute distinguishes between 'may' and 'shall.'" *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 172 (2016); see also 28 U.S.C. § 455(e) (noting when judges "may" accept a waiver of a "ground for disqualification"). Thus, there is "nothing discretionary or equivocal in" § 455's recusal requirement. *In re United States*, 158 F.3d 26, 36 (CA1 1998) (Torruella, C.J., dissenting). "To the contrary, this is a directive that allows for no deviation. The judge *must* recuse him or herself if his or her impartiality might reasonably be questioned." *Ibid.* In fact, the judge must recuse even absent any "action to invoke the statute" by a party. 13D *Federal Practice & Procedure*, *supra*, § 3550.

Thus, while "decisions on 'matters of discretion' are reviewable for 'abuse of discretion.'" *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) (cleaned up), § 455 recusal is not a matter of discretion. Commentators and jurists have recognized that "[b]ecause the disqualification statutes are mandatory," "there is a strong argument that appellate courts should apply a de novo standard in reviewing recusal decisions." 13D *Federal Practice &*

Procedure, *supra*, § 3553. Even the Third Circuit, which applies an abuse-of-discretion standard, acknowledged that "[i]t is somewhat strange to speak in terms of an abuse of discretion where the underlying statute, 28 U.S.C. § 455, states that a judge 'shall' disqualify himself or herself if certain grounds are present." *In re Kensington Int'l Ltd.*, 368 F.3d 289, 301 n.12 (CA3 2004). The Third Circuit explained that "[t]he abuse of discretion standard may be an anachronistic vestige of an earlier version of § 455," which gave judges "broad discretion to deny a recusal request even if the grounds for recusal were present." *Ibid.* But "under the post-1974 version of § 455," "disqualification must follow" if the statutory standards are met. *Ibid.*

Further, the statutory disqualification standard of § 455 is an "objective" one that applies a reasonable-person test. *Liteky*, 510 U.S. at 548; see *Liljeberg*, 486 U.S. at 861 ("an objective observer"). Such objective tests are generally reviewed de novo, for there is no particular reason that a trial court would have better insight into a "reasonable person" than an appellate court. See, *e.g.*, *Ornelas*, 517 U.S. at 696–97; *Bard Peripheral Vascular, Inc.* v. *W.L. Gore & Assocs., Inc.*, 682 F.3d 1003, 1006–07 (CA Fed. 2012); *United States* v. *Jones*, 678 F.3d 293, 299 (CA4 2012). And to the extent the recusal decision is based on facts, "[t]hey are 'facts' flowing from the [judge's] perceptual cortex, not facts unearthed through discovery, hearing, or trial, weighed by a neutral factfinder, and made of public record for all to inspect." Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 Brook. L. Rev. 589, 662–63 (1987); cf. *Williams-Yulee*, 575 U.S. at 447

("The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record."). Thus, "applying the law" in the context of § 455 "involves developing auxiliary legal principles of use in other cases" involving recusal, confirming that de novo review is proper. *U.S. Bank*, 583 U.S. at 396.

Against all this support for a de novo standard is one remark in the legislative history of § 455. The congressional conference report said that "while the proposed legislation would adopt an objective test, it is not designed to alter the standard of appellate review on disqualification issues." H.R. Rep. No. 93-1453, *supra*, 1974 U.S.C.C.A.N. at 6355. It goes on to say that "[t]he issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." *Ibid.*

But this justification for an abuse-of-discretion standard fails for several reasons. First, legislative history (or congressional wishes) cannot overcome statutory text. See, *e.g.*, *Bostock* v. *Clayton Cnty., Georgia*, 590 U.S. 644, 674 (2020); *McGirt* v. *Oklahoma*, 591 U.S. 894, 907 (2020) ("wishes are not laws"). And § 455's text makes disqualification mandatory based on an objective test. Second, why the conference report believed that the existing disqualification test was abuse-of-discretion is unclear; as discussed next, constitutional disqualification cases widely use de novo review. Third, though the report is right that disqualification involves considering all the facts, it foremost involves applying the disqualification standard to settled facts. As

discussed, such mixed questions that lean toward the legal side are reviewed de novo. Of course, resolution of a factual dispute that is a precursor to the disqualification determination might warrant some deference, but the disqualification determination itself should not. See *Google LLC* v. *Oracle Am., Inc.*, 593 U.S. 1, 24 (2021) ("[A] reviewing court should try to break [a mixed] question into its separate factual and legal parts, reviewing each according to the appropriate legal standard."); see also *Ornelas*, 517 U.S. at 697–99.

In sum, this Court's § 455 precedents and the statutory language strongly support a de novo standard.

B. Similar constitutional disqualification decisions use a de novo standard

More support for a de novo standard comes from the related constitutional due process disqualification cases. "When considering whether a district court's decision should be subject to searching or deferential appellate review—at least absent 'explicit statutory command'—[this Court] traditionally look[s]" first to "whether the history of appellate practice yields an answer." *McLane Co.* v. *EEOC*, 581 U.S. 72, 79 (2017) (cleaned up). Here, that history suggests de novo review. In constitutional disqualification cases, both this Court and the Courts of Appeals have repeatedly adjudicated claims without suggesting deference—often expressly *rejecting* a deferential standard.

"In all the Supreme Court due process cases—*Tumey* v. *Ohio*, *In re Murchison*, *Ward* v. *Village of Monroeville, Gibson* v. *Berryhill*, and *Aetna Life*

Insurance Co. v. *Lavoie*—the Court reviewed the decisions below de novo, and not a word in any of those decisions even implies that discretion is possible in these circumstances." Neumann, *supra*, at 397. For instance, in *Tumey* v. *Ohio*, the Court held that a judge who received money "only when he convicts the defendant"—in that case, $12—could not constitutionally adjudicate the case. 273 U.S. 510, 531 (1927). The Court said that it could not "regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling, or insignificant interest." *Id.* at 532. No deference was suggested to the contrary decision below.

Other opinions by this Court about constitutional disqualification are to the same effect. In *Williams* v. *Pennsylvania*, this Court considered the facts underlying the controversy itself before holding that the judge's "failure to recuse" "presented an unconstitutional risk of bias." 579 U.S. 1, 11 (2016). The Court again did not suggest deference to the lower courts' determinations.

Even Courts of Appeals that apply an abuse-of-discretion standard under § 455 apply a de novo standard to constitutional disqualification questions. See, *e.g.*, *United States* v. *Brocato*, 4 F.4th 296, 301 (CA5 2021); *Echavarria* v. *Filson*, 896 F.3d 1118, 1131 (CA9 2018); *Lucio-Rayos* v. *Sessions*, 875 F.3d 573, 576 (CA10 2017); *Hassan* v. *Holder*, 604 F.3d 915, 921 (CA6 2010); *United States* v. *Wessels*, 539 F.3d 913, 914 (CA8 2008).

There is no apparent reason to apply a different standard to § 455 and constitutional disqualification decisions. Both involve mandatory disqualification.

See *supra* pp. 12–13; *Lavoie*, 475 U.S. at 828 (explaining the issue as "under what circumstances the Constitution *requires* disqualification" (emphasis added)). Both use an objective test. See *supra* pp. 13–14; *Rippo* v. *Baker*, 580 U.S. 285, 287 (2017). Both focus on questions of potential bias. See 28 U.S.C. § 455(a), (b)(1); *Rippo*, 580 U.S. at 287. Thus, the widespread use of a de novo standard for review of constitutional disqualification questions supports the same standard under § 455.

C. Disqualification questions are especially suited for de novo review

Questions about disqualification under § 455 do not lend themselves to deferential review because bias is "difficult to discern in oneself." *Williams*, 579 U.S. at 8. That others could see bias in oneself is perhaps even more difficult to discern. Thus, "basic principles of institutional capacity counsel in favor" of de novo review. *McLane*, 581 U.S. at 81.

"[T]he reason" that de novo review seems apt for recusal questions "is easy to divine": "To commit to the judge a decision upon the truth of the facts gives chance for the evil against which [recusal] is directed." *Berger*, 255 U.S. at 36. "[N]othing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." *Ibid.* "Judges asked to recuse themselves" may "hesitate to impugn their own standards." *In re Mason*, 916 F.2d 384, 386 (CA7 1990). "That is difficult for even a saint to do." *In re United States*, 441 F.3d 44, 67 (CA1 2006). And "a judge may be especially reluctant to recuse himself when to do so requires him to admit that his actual bias or prejudice has been proved." *United States* v.

Balistrieri, 779 F.2d 1191, 1203 (CA7 1985). "A recusal motion usually attacks the judge's own conduct—something the judge said but perhaps should not have even contemplated saying, a failure to keep track of and disclose to the parties the nature of investments or the employment of relatives, and so on—and the judge is usually the person least able to evaluate the propriety of that conduct." Neumann, *supra*, at 392.

Further, § 455(a) recusal extends to even the *appearance* of impropriety, and recognizing that others might perceive bias in oneself seems particularly unlikely. "[O]utside observers are less inclined to credit judges' impartiality and mental discipline than the [judge herself] will be." *In re Hatcher*, 150 F.3d 631, 637 (CA7 1998). Drawing 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." *Ibid.* As Chief Judge Torruella put it, "favor[ing] the discretion of the challenged judge over the appearance that his or her actions might reasonably convey to the citizenry[] is particularly egregious considering that it directly conflicts with Congress's purpose in enacting § 455(a)"—to provide an objective standard for recusals. *In re United States*, 158 F.3d at 36 (dissenting opinion).

In some ways, deferring to a judge's recusal decision may *contribute* to an appearance of bias by the judiciary. "Having a judge rule on the propriety of his own conduct, without the benefit of adversarial argument, without the need to explain his decision, and subject to a deferential standard of review or no

review at all" hardly inspires public confidence in judicial impartiality. Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 Rev. Litig. 671, 719 (2011). Deference on a denial of recusal suggests some protection by the reviewing court in the judge's favor, which may exacerbate any appearance of partiality.

In short, de novo review of recusal questions under § 455 best "reflect[s] [the] societal interest in an impartial judiciary." 13D *Federal Practice & Procedure*, *supra*, § 3553.

D. An overly deferential standard reduces public confidence in the judiciary

The widespread use of an abuse-of-discretion standard when reviewing recusal decisions is an important problem warranting this Court's review. First, the error undermines the fundamental public interest in promoting "confidence in a judge's ability to administer justice without fear or favor." *Williams-Yulee*, 575 U.S. at 445. As explained, stacking a deferential standard on top of a personal determination by a judge about her own bias tends to undermine the public appearance of impartiality and rule of law values.

Second, this error is widespread. As the petition shows, all the Courts of Appeals but the Seventh Circuit use this incorrect standard. Thus, in the vast majority of cases, recusal appeals are being decided in the context of problematic deference to the initial judge's denial of recusal.

Third, this error changes outcomes. Even the court below has acknowledged that § 455 recusal appeals

may turn on whether review is de novo or for an abuse of discretion. See *In re Billedeaux*, 972 F.2d 104, 106 & n.4 (CA5 1992); see also Charles Gardner Geyh, *Judicial Disqualification: An Analysis of Federal Law* 102–03, Fed. Jud. Ctr. (3d ed. 2020) (similar). As this Court has said, "the difference between a rule of deference and the duty to exercise independent review is much more than a mere matter of degree"; "[w]hen de novo review is compelled, no form of appellate deference is acceptable." *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 238 (1991) (cleaned up).

This case proves the point. The Fifth Circuit acknowledged that "[d]ue to the similarities between the characters in Chief Judge Jernigan's novel and the litigants currently before her court, a strong argument could be made that she had a duty to recuse." Pet. 17a. In addition to those similarities, see Pet. 7–11, substantial evidence suggests that reasonable observers would not consider the judge to be impartial. One observer quoted in an *American Lawyer* article on this issue said: "Dondero's definitely a character worthy of novelization, but a judge shouldn't write thinly fictionalized versions of individuals in pending cases, if only because of the possible appearance of bias."[7] Another said that "Judge Jernigan's vilifying of hedge-fund company managers in her self-published 'legal thriller' novels may very well appear to a reasonable person to undermine her independence, integrity, and impartiality."[8] Even on TikTok, a recent

[7] Dan Roe, *Federal Bankruptcy Judge's 'Vilifying' Novels Raise Questions Over Impartiality*, Am. Lawyer (July 23, 2024), https://bit.ly/4o13H7n (quoting Prof. Adam Levitin).
[8] *Ibid.* (quoting Prof. Anthony Alfieri).

video from LawyerLori—a South Carolina lawyer with over 600,000 followers—wondered "how can a judge be impartial . . . when she's written a book where you resemble the villain and she basically lets you know that she thinks you're a piece of dirt?"[9] These facts suggest "precisely the kind of appearance of impropriety that § 455(a) was intended to prevent." *Liljeberg*, 486 U.S. at 867.

Fourth and finally, the standard-of-review error only further discourages recusal motions. Such motions are already (and unsurprisingly) rare: "empirical data confirms the common sense lawyer intuition that a failed recusal strategy will stoke judicial animosity and risk reprisal in ways large and small."[10] As a former judge put it, "you get one shot," and "[i]f you miss, then you've got that judge, and they're not happy with you."[11] That concern is only exacerbated if appellate review defers to the judge's denial of a recusal motion, as the "one shot" becomes that much riskier.

In sum, the questions presented here have extraordinarily important implications for judicial impartiality and its appearance—both of which are critical in a country that depends on the rule of law.

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[9] TikTok (May 13, 2024), http://bit.ly/3WcRMHt.

[10] Roe, *supra* note 7.

[11] *Ibid.*; see also *Judicial Disqualification: Hearing before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary on S. 1064*, 93d Cong. 14 (1973) (statement of Sen. Birch Bayh, Member, S. Comm. on the Judiciary) ("There is a great reluctance on the part of counsel to suggest to the judge that he is prejudiced, because they are going to have to go ahead and practice before that judge later.").

CONCLUSION

For these reasons, the Court should grant the petition.

Respectfully submitted,

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OCTOBER 24, 2025

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. 25-355

---X

JAMES DONDERO, ET AL.,

Petitioner,

v.

STACEY G. JERNIGAN, ET AL.,

Respondents.

---X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Mariana Braylovskiy, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Amicus Curiae.*

That on the 24th day of October, 2025, I served the within *Brief for Investment Professionals Concerned with Judicial Impartiality as Amicus Curiae in Support of Petitioners* in the above-captioned matter upon:

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by sending three copies of same, addressed to each individual respectively, through FedEx Overnight Mail. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies of the within *Brief for Investment Professionals Concerned with Judicial Impartiality as Amicus Curiae in Support of Petitioners* through the Overnight Next Day Federal Express, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 24th day of October, 2025.

Mariana Braylovskiy

Sworn to and subscribed before me this 24th day of October, 2025.

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2027
#131646

SUPREME COURT OF THE UNITED STATES

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,493 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 24th day of October, 2025.

Mariana Braylovskiy

Sworn to and subscribed before me this 24th day of October, 2025.

Robyn Cocho
Notary Public State of New Jersey
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