No. 23-1072

In the Supreme Court of the United States

ALI HAMZA AHMAD SULIMAN AL BAHLUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a D.C. Circuit judge's involvement with certain litigation during his prior government service required him to recuse himself from petitioner's appeal of his conviction and sentence by military commission.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Military Commission Review:

United States v. *Al Bahlul*, No. CMCR 09-001 (Sept. 9, 2011) (decision affirming order of military commission)

Al Bahlul v. *United States*, No. CMCR 16-002 (Mar. 21, 2019) (decision following remand by court of appeals)

Al Bahlul v. *United States*, No. CMCR 21-003 (Oct. 5, 2021) (order granting petitioner's extension request following second remand by court of appeals)

Al Bahlul v. *United States*, No. CMCR 21-003 (May 17, 2022) (decision following remand by court of appeals)

United States Court of Appeals (D.C. Cir.):

Al Bahlul v. *United States*, No. 11-1324 (Jan. 25, 2013) (panel decision)

Al Bahlul v. *United States*, No. 11-1324 (July 14, 2014) (en banc decision remanding to original panel)

Al Bahlul v. *United States*, No. 11-1324 (June 12, 2015) (panel decision following remand by en banc court)

Al Bahlul v. *United States*, No. 11-1324 (Oct. 20, 2016) (en banc decision remanding to Court of Military Commission Review)

Al Bahlul v. *United States*, No. 19-1076 (Aug. 4, 2020) (panel decision following remand to Court of Military Commission Review), rehearing en banc denied (Jan. 21, 2021), reconsideration en banc of denial of rehearing en banc denied (Mar. 29, 2021)

Bahlul v. *United States*, No. 22-1097 (Mar. 10, 2023) (opinion of Katsas, J., respecting recusal)

Bahlul v. *United States*, No. 22-1097 (July 25, 2023) (panel decision following remand to Court of Military Commission Review), rehearing en banc denied (Oct. 31, 2023)

Supreme Court of the United States:

Al Bahlul v. *United States*, No. 16-1307 (Oct. 10, 2017) (denying petition for a writ of certiorari)

Al Bahlul v. *United States*, No. 21-339 (Dec. 6, 2021) (denying petition for a writ of certiorari)

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OPINIONS BELOW

The opinion of Judge Katsas (Pet. App. 1a-7a) denying petitioner's disqualification motion is reported at 61 F.4th 1008. The opinion of the court of appeals (Pet. App. 16a-43a) affirming petitioner's conviction and sentence is reported at 77 F.4th 918. Prior opinions of the court of appeals are reported at 967 F.3d 858, 840 F.3d 757, 792 F.3d 1, and 767 F.3d 1. The opinion of the United States Court of Military Commission Review (Pet. App. 44a-112a) is reported at 603 F. Supp. 3d 1151.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2023. Two petitions for rehearing were denied on October 31, 2023 (Pet. App. 10a-11a, 12a-13a). On January 4, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 29, 2024, and the petition was filed

on that date. The jurisdiction of this Court is invoked under 10 U.S.C. 950g(e) and 28 U.S.C. 1254(1).

STATEMENT

Following a trial by military commission, petitioner was convicted of conspiring to commit offenses triable by military commission, in violation of 10 U.S.C. 950v(b)(28) (2006); soliciting others to commit offenses triable by military commission, in violation of 10 U.S.C. 950u (2006); and providing material support for terrorism, in violation of 10 U.S.C. 950v(b)(25) (2006). Pet. App. 20a. He was sentenced to life imprisonment. *Id.* at 21a. The United States Court of Military Commission Review (CMCR) affirmed. *Ibid.* The court of appeals ultimately affirmed petitioner's conspiracy conviction, vacated his other convictions, and remanded as to sentencing. *Id.* at 21a-22a. This Court denied a petition for a writ of certiorari. 583 U.S. 928 (No. 16-1307).

On remand, the CMCR reaffirmed petitioner's sentence. Pet. App. 22a-23a. The court of appeals vacated that decision and remanded to the CMCR for further consideration of the sentence. *Id.* at 23a. This Court denied a second petition for a writ of certiorari. 142 S. Ct. 621 (No. 21-339). On remand, the CMCR again reaffirmed petitioner's sentence. Pet. App. 24a. The court of appeals affirmed. *Id.* at 43a.

1. On September 11, 2001, the al Qaeda terrorist organization attacked the United States and killed nearly 3000 people. *Rasul* v. *Bush*, 542 U.S. 466, 470 (2004). In response, Congress authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115

Stat. 224. The President issued a military order authorizing the trial by military commission of noncitizens for certain offenses. See 767 F.3d 1, 6.

In *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), this Court held that the military-commission system that the President had established contravened statutory restrictions on military-commission procedures in the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* 548 U.S. at 613-633, 635. Four Justices joined opinions inviting Congress to clarify the authority of military commissions. See *id.* at 636 (Breyer, J., joined by Kennedy, Souter, and Ginsburg, JJ., concurring) ("Nothing prevents the President" from seeking from Congress "legislative authority to create military commissions of the kind at issue here.").

In response to *Hamdan*, Congress enacted the Military Commissions Act of 2006 (2006 MCA), Pub. L. No. 109-366, 120 Stat. 2600, 10 U.S.C. 948a *et seq.* The 2006 MCA established a military-commission system "to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission." 10 U.S.C. 948b(a) (2006). It "enabled military commissions to 'be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.'" Pet. App. 19a (quoting 10 U.S.C. 948h (2006)).

2. Petitioner, a native of Yemen, went to Afghanistan in the late 1990s to join al Qaeda. Pet. App. 18a. He swore an oath of loyalty to Osama bin Laden and received training at an al Qaeda camp. *Ibid.* Bin Laden assigned petitioner to work in al Qaeda's media office and later appointed him as his personal assistant and secretary for public relations. *Ibid.* Bin Laden directed

petitioner to create a propaganda video highlighting the October 2000 attack on the American destroyer *USS Cole*. *Ibid.* Petitioner's video, which called for jihad against the United States, was distributed "widely" as part of al Qaeda's "recruiting efforts." *Ibid.*

In Afghanistan, petitioner lived in the same house with Mohamed Atta and Ziad al Jarrah, each of whom later piloted one of the aircraft in the 9/11 attacks. 767 F.3d at 64 (Kavanaugh, J., concurring in the judgment in part and dissenting in part). Petitioner administered the two hijackers' oaths of loyalty to bin Laden. *Ibid.* He volunteered to participate in the 9/11 attacks himself, but bin Laden refused because he considered petitioner's media activities to be more important. *Ibid.* Just before the attacks, petitioner traveled to a remote region of Afghanistan with bin Laden, and he operated the radio that bin Laden used to track news of the attacks. *Ibid.*

Petitioner fled to Pakistan, where he was captured in December 2001. Pet. App. 18a. He was turned over to United States custody, and he has been detained at U.S. Naval Station Guantánamo Bay. *Ibid.*

3. The President designated petitioner eligible for trial by military commission in 2003, and military authorities charged him the following year with conspiring to commit war crimes. 767 F.3d at 6. In 2005, petitioner and five other Guantánamo Bay detainees filed a habeas corpus petition in the United States District Court for the District of Columbia challenging their detention as enemy combatants and the lawfulness of the original post-9/11 military commissions. Pet. App. 4a; see *Al Jayfi* v. *Bush*, No. 05-cv-2104 (filed Oct. 27, 2005). After those commissions were disbanded following this

Court's decision in *Hamdan*, petitioner withdrew from the habeas litigation. Pet. App. 4a-5a.

After enactment of the 2006 MCA, the Secretary of Defense designated Susan Crawford, a senior judge of the United States Court of Appeals for the Armed Forces, as the convening authority for the new military commissions. Pet. App. 19a. She convened a military commission to try petitioner under the 2006 MCA for conspiracy, solicitation, and providing material support for terrorism. *Id.* at 20a. All three charges centered on conduct that included petitioner's military training at an al Qaeda camp, swearing loyalty to bin Laden, performing personal services for bin Laden, preparing the *Cole* video, carrying weapons and a suicide belt to protect bin Laden, arranging for two of the 9/11 hijackers to swear loyalty to bin Laden, and preparing the hijackers' "martyr wills." *Ibid.*; 767 F.3d at 7-8 & n.2. The specific substantive offenses underlying the conspiracy charge were murder of protected persons, attacking civilians, attacking civilian objects, murder and destruction of property in violation of the law of war, terrorism, and providing material support for terrorism. Pet. App. 20a.

Petitioner pleaded not guilty but admitted to committing the charged conduct, except for wearing a suicide belt. 767 F.3d at 7. The military commission convicted petitioner on all the charges and sentenced him to life imprisonment. Pet. App. 20a-21a. The convening authority approved the findings and sentence. *Id.* at 21a. The CMCR affirmed. *Ibid.*

4. Petitioner filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. See 10 U.S.C. 950g. The court of appeals, through multiple rounds of panel and en banc review,

ultimately affirmed petitioner's conviction for conspiracy and vacated his convictions for solicitation and providing material support for terrorism. Pet. App. 21a-22a. The court remanded the case to the CMCR to reassess the sentence by determining the effect, if any, of the two vacaturs on sentencing. *Id.* at 22a. This Court denied petitioner's petition for a writ of certiorari. 583 U.S. 928.

On remand, the CMCR reaffirmed petitioner's life sentence for conspiracy. Pet. App. 22a. The court "concluded that the military commission would have sentenced [him] to confinement for life even absent the error with respect to his" vacated convictions. *Ibid.* (citation and internal quotation marks omitted). The court also rejected petitioner's new argument that Crawford had been appointed as convening authority in violation of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. Pet. App. 22a-23a.

Petitioner again sought review in the D.C. Circuit. The court of appeals rejected petitioner's Appointments Clause claim, as well as his claim that the CMCR erred by addressing his sentence without remanding to a military commission. Pet. App. 23a. But the court agreed with petitioner that the CMCR had applied the wrong legal standard in evaluating the sentence, and thus remanded for application of the correct standard. *Ibid.* This Court again denied petitioner's petition for a writ of certiorari. 142 S. Ct. 621. And on remand, the CMCR again affirmed petitioner's life sentence for conspiracy. Pet. App. 24a.

5. The court of appeals affirmed. Pet. App. 16a-43a.

After the panel for petitioner's appeal was announced in advance of oral argument, petitioner moved to disqualify one of the panel members, Judge Katsas,

under 28 U.S.C. 455(a) and (b)(3). Pet. App. 1a. In petitioner's view, Judge Katsas was obligated to recuse himself based on his role in supervising certain Guantánamo Bay litigation and appearing as counsel in the habeas case discussed above (*Jayfi*), see pp. 4-5, *supra*, during his service in the Department of Justice (DOJ), between 2006 and 2009, as Principal Deputy Associate Attorney General and Assistant Attorney General for the Civil Division. Mot. to Disqualify 2 (Feb. 23, 2023).

Section 455(a) states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). Section 455(b)(3), in turn, states that such a judicial officer "shall also disqualify himself * * * [w]here he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. 455(b)(3). Petitioner also invoked canons of the Code of Conduct for United States Judges that "impose[] the same requirements," Pet. App. 2a.

Judge Katsas denied the motion. Pet. App. 1a-7a. Addressing Section 455(b)(3) first, he agreed with petitioner that a judge may not hear cases that the judge previously participated in as counsel or supervised, and made clear that he has accordingly "recused [him]self from all Guantanamo detainee litigation that [he] was personally involved in * * * at DOJ, as well as from all Guantanamo detainee litigation handled by the Civil Division while [he] supervised it." *Id.* at 2a-3a. He explained, however, that this was not such a case, because petitioner's prosecution and ensuing appeals were handled by the Department of Defense and DOJ's National

Security Division, neither of which Judge Katsas ever served in or oversaw. *Id.* at 3a-4a.

While Judge Katsas did appear as counsel in *Jayfi*, he observed that it had been a distinct proceeding involving distinct legal issues—namely, the legality of petitioner's preventive detention as an enemy combatant and the original post-9/11 military commissions. See Pet. App. 4a-5a. And Judge Katsas explained that petitioner's reliance on Justice Gorsuch's and Chief Judge Srinivasan's recusals "in earlier iterations of this case" was misplaced, observing that they had materially "different work portfolios" when they served in senior positions at DOJ. *Id.* at 5a-6a.

Turning to Section 455(a), Judge Katsas observed that petitioner "d[id] not press a distinct argument under" that provision. Pet. App. 6a. And he reasoned that, in any event, recusal under that general provision, when it is not required by an on-point paragraph of subsection (b), "should occur only in 'rare and extraordinary circumstances'" that were "not present here." *Id.* at 7a (citation omitted).

The court of appeals subsequently affirmed petitioner's conviction and sentence in a unanimous panel decision authored by Judge Pan. Pet. App. 16a-43a. It found petitioner's renewed Appointments Clause challenge to be foreclosed by circuit precedent, *id.* at 26a-35a; adhered to its prior determination that the CMCR could assess the validity of petitioner's sentence without remanding to a military commission, *id.* at 36a-38a; and upheld the CMCR's affirmance of the sentence on the merits, *id.* at 38a-41a. And the court declined to review, on the ground that petitioner had not preserved the issue, petitioner's invocation of a law enacted after his

trial that restricts the admissibility of certain evidence in military commissions. *Id.* at 41a-43a.

ARGUMENT

Petitioner does not challenge the court of appeals' decision on the merits, but contends (Pet. 22-25, 30-33) that Judge Katsas was required to recuse himself under 28 U.S.C. 455. Judge Katsas correctly rejected that contention, and his factbound decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Neither Section 455(b)(3) nor Section 455(a) required Judge Katsas to recuse himself in this case.

a. Under Section 455(b)(3), a judge must disqualify himself "[w]here he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. 455(b)(3). The statute defines "proceeding" to "include[] pretrial, trial, appellate review, or other stages of litigation." 28 U.S.C. 455(d)(1). Here, Judge Katsas never participated in any capacity in any prior stage of this proceeding.

As Judge Katsas explained, he "never appeared as counsel in either [petitioner's] underlying prosecution or the ensuing proceedings for judicial review"; he "never supervised either the prosecution or the review proceedings"; he "never expressed an opinion on the merits of the prosecution or the review proceedings"; and he "gained no knowledge of disputed evidentiary facts regarding the prosecution or the review proceedings" in this case. Pet. App. 3a-4a.

Although petitioner cites, for the first time, public statements made by Judge Katsas about the Guantánamo

Bay military commissions, Pet. 7-11, 14-17, those remarks did not "concern[] the merits of the particular case in controversy" here, and many were made when Judge Katsas was not "in governmental employment" at all. 28 U.S.C. 455(b)(3).[1] Section 455(b)(3) is inapplicable by its terms.

Petitioner emphasizes Judge Katsas's appearance as government counsel in *Jayfi*, *supra*. Pet. 21, 23 & n.19. "But this proceeding is not that one, and it involves no direct, collateral, or any other review of that case." Pet. App. 4a. While petitioner seeks to define the relevant "proceeding" under Section 455(b)(3) as all cases involving "the same parties, same facts, and same legal issues," *e.g.*, Pet. 21, that definition is not the one in the statutory text, which refers to the judge's prior involvement in "*the* proceeding" in which his qualification to sit is in question, 28 U.S.C. 455(b)(3) (emphasis added). See *Nielsen* v. *Preap*, 586 U.S. 392, 407-408 (2019) (definite article "the" suggests specificity); *United States* v. *Gipson*, 835 F.2d 1323, 1326 (10th Cir.) (Section 455(b)(3) does not extend to previous cases involving the same defendant), cert. denied, 486 U.S. 1044 (1988). Moreover, even assuming petitioner's gloss on the statutory definition were correct, his claim would still fail, given the substantial differences, highlighted by Judge Katsas, between the facts and issues in *Jayfi* and in this case. See Pet. App. 4a-5a.

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[1] For example, petitioner highlights (Pet. 7, 17, 33) a reference, in Judge Katsas's personal notes for a 2010 panel discussion, to petitioner's prosecution by military commission as: "Al Bahlul - worked well; life sent[ence]." The note postdates Judge Katsas's DOJ tenure; does not show that the general mechanism of commission "worked well" in petitioner's case *because* he received a life sentence; and does not clearly indicate that Judge Katsas in fact "expressed an opinion," 28 U.S.C. 455(b)(3), on the proceeding here.

b. Judge Katsas's prior DOJ service also did not obligate him to recuse under Section 455(a), which requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). As this Court has noted, it would be "poor statutory construction to interpret (a) as nullifying the limitations (b) provides," such that a judge who falls outside the scope of an on-point provision of Section 455(b) would nevertheless be disqualified on essentially the same basis by Section 455(a). *Liteky* v. *United States*, 510 U.S. 540, 553 n.2 (1994); see Pet. App. 7a (the "more general 'catch-all' provision" should not be used "lightly * * * to shift the lines specifically drawn in section 455(b)") (citation omitted); see also *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 646 (2012) (applying the specific-governs-the-general principle).

And with regard to the particular circumstances here, petitioner assigns (Pet. 31-33) too much weight to certain recusals by Justice Robert H. Jackson that predate Section 455's enactment altogether and involved different circumstances, and to the decisions of other judges—who were differently situated from Judge Katsas, see Pet. App. 5a-6a—to recuse from this case. Nor does petitioner provide any support for his amorphous suggestion that Section 455(a) necessarily requires recusal whenever it is possible to assert that the judge has been "closely identified with high-profile, high-priority litigation." Pet. 32.

2. Judge Katsas's case-specific determination not to recuse from this case does not warrant this Court's review. Petitioner errs in suggesting (Pet. 19-22, 26-30) that it implicates disagreement among the courts of appeals.

Petitioner asserts (Pet. 19-20 & n.18) that various circuits use petitioner's elastic definition of the relevant "proceeding" under Section 455(b)(3), see p. 10, *supra*. That is incorrect. Most of the cited cases simply apply Section 455(d)(1)'s definition of "proceeding" to include all stages of the *same* case.[2] And the others likewise do not set forth a rule that would require Judge Katsas to recuse in the circumstances here. *Murray* v. *Scott*, 253 F.3d 1308 (11th Cir. 2001), for example, involves an unrelated provision of Section 455 requiring recusal of a judge who has personal knowledge of disputed evidentiary facts. See *id.* at 1312; 28 U.S.C. 455(b)(1).[3]

Petitioner also asserts (Pet. 21-22) a circuit conflict as to whether Section 455(b)(3)'s reference to prior "participat[ion]" in the proceeding is satisfied by having had supervisory responsibility over the case, or instead requires more direct involvement. But Judge Katsas's

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[2] See *United States* v. *Smith*, 775 F.3d 879, 880 (7th Cir. 2015) (judge in supervised-release-revocation proceeding was prosecutor in earlier revocation proceeding); *United States* v. *Lindsey*, 556 F.3d 238, 246 (4th Cir.) (judge in sentence-reduction proceeding was prosecutor at original sentencing), cert. denied, 558 U.S. 867 (2009); *United States* v. *Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994) (judge presiding over new-trial motion was U.S. Attorney during pretrial investigation); *Mixon* v. *United States*, 620 F.2d 486, 487 (5th Cir. 1980) (per curiam) (magistrate judge in collateral-review proceeding was prosecutor in sentence-reduction proceeding); *United States* v. *Amerine*, 411 F.2d 1130, 1133 (6th Cir. 1969) (trial judge was U.S. Attorney during pretrial proceedings).

[3] See also *United States* v. *Sciarra*, 851 F.2d 621, 635-636 (3d Cir. 1988) (addressing the unrelated question whether "non-party witnesses" can move to disqualify a judge under Section 455); *Jenkins* v. *Bordenkircher*, 611 F.2d 162, 166 (6th Cir. 1979) (stating that a judge must recuse from a case that "is the same as or is related to" a case he oversaw as U.S. Attorney, without elaborating on the scope of relatedness), cert. denied, 446 U.S. 943 (1980).

decision would not implicate any such conflict because, for reasons that he explained, Section 455(b)(3) did not disqualify him even assuming supervisory responsibility is enough. See Pet. App. 2a-3a. And the application of Section 455(b)(3) to judges who formerly served as the relevant district's U.S. Attorney does not address judges who (like Judge Katsas) served as officials with broader and less direct responsibility for cases across the country. See *United States* v. *Ruzzano*, 247 F.3d 688, 695 (7th Cir. 2001), overruled in part on other grounds by *Fowler* v. *Butts*, 829 F.3d 788 (7th Cir. 2016); *United States* v. *Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994); *Kendrick* v. *Carlson*, 995 F.2d 1440, 1444 (8th Cir. 1993).

Petitioner additionally asserts that the D.C. Circuit treats Section 455(a) as categorically inapplicable when a relevant provision of Section 455(b) does not disqualify a judge, while other circuits treat subsections (a) and (b) as "independent," even if "interrelated," bases for disqualification. Pet. 26-30 (emphasis omitted). But that misunderstands D.C. Circuit precedent, which recognizes—as did Judge Katsas, Pet. App. 7a—that there may be circumstances in which subsection (a) requires recusal even when the germane paragraph of subsection (b) does not. See *In re Hawsawi*, 955 F.3d 152, 160 (D.C. Cir. 2020). Although such circumstances will be "rare and extraordinary" circumstances, *ibid.* (citation omitted), that view of the subsections' relationship adheres to this Court's own refusal "to interpret § 455(a) (unless the language *requires* it), as implicitly eliminating a limitation explicitly set forth in § 455(b)," *Liteky*, 510 U.S. at 553; see also *Microsoft Corp.* v. *United States*, 530 U.S. 1301, 1302-1303 (2000) (Rehnquist, C.J., respecting recusal) (applying Section

455(a) by reference to the analysis under subsection (b)).

There is no meaningful disagreement on that issue between the D.C. Circuit and the other circuits petitioner cites. Other circuits recognize the relevance of Section 455(b) to the interpretation of Section 455(a),[4] and frequently resolve the inquiry under each provision on the same or similar grounds, see *United States* v. *Stone*, 866 F.3d 219, 230-231 (4th Cir. 2017); *Sensley* v. *Albritton*, 385 F.3d 591, 600 (5th Cir. 2004); *Gibbs* v. *Massanari*, 21 Fed. Appx. 813, 815 (10th Cir. 2001), cert. dismissed, 535 U.S. 1015 (2002); *Arnpriester*, 37 F.3d at 467. The other circuit decisions petitioner cites merely observe that Section 455(a) and (b) are separate provisions with distinct coverage,[5] or do not discuss the

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[4] See *United States* v. *Rechnitz*, 75 F.4th 131, 143, 144 (2d Cir. 2023) (per curiam) (stating that subsections (a) and (b) can be "considered in tandem," and that the former can require recusal when the latter is only "technically" inapplicable); *In re Gibson*, 950 F.3d 919, 927 (7th Cir. 2019) (stating that "[t]he lack of a § 455(b) violation is instructive," though not "conclusive," under Section 455(a)).

[5] See *United States* v. *Liggins*, 76 F.4th 500, 505-506 (6th Cir. 2023) (describing subsection (b)'s "enumerat[ion of] specific instances requiring recusal," "in contrast to subsection 455(a)'s general dictate"); *In re Certain Underwriter*, 294 F.3d 297, 305 (2d Cir. 2002) ("A fact's failure to give rise to recusal under § 455(b) does not *automatically* mean that same fact does not create an appearance of partiality under § 455(a).") (emphasis added); *United States* v. *DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998) (stating only that "it is possible" for subsection (a) to require recusal when subsection (b) does not), cert. denied, 526 U.S. 1137 (1999); see also *Vazirabadi* v. *Denver Health & Hosp. Auth.*, 782 Fed. Appx. 681, 685 (10th Cir. 2019), cert. denied, 140 S. Ct. 2568 (2020); *United States* v. *Herrera-Valdez*, 826 F.3d 912, 918 (7th Cir. 2016); *United States* v. *Randall*, 440 Fed. Appx. 283, 286 (5th Cir. 2011) (per curiam) (stating that "Section 455(a) and § 455(b)(1) 'afford separate, though

provisions' relationship at all.[6] Under no circuit's law would Judge Katsas clearly be required to recuse from this case, and his decision not to do so accordingly implicates no circuit conflict requiring this Court's intervention.

3. At all events, this case would be an unsuitable vehicle for considering the issues raised in the petition for a writ of certiorari for several additional reasons. For one thing, petitioner seeks review of a decision that was made by a single judge and lacks precedential effect. Courts of appeals often construe the relevant provisions of 28 U.S.C. 455 in precedential decisions, as the other cases cited in the petition show. For another, petitioner's motion to disqualify failed to develop any "distinct argument under section 455(a)," Pet. App. 6a, making review in the first instance in this Court inappropriate, see *Johnson* v. *Williams*, 568 U.S. 289, 299 (2013) ("Federal courts of appeals refuse to take cognizance of arguments that are made in passing without proper development.").

Petitioner's recusal motion was also untimely. 13D Charles Alan Wright et al., *Federal Practice and Procedure* § 3550, at nn.9-10 & accompanying text (3d ed. 2024) ("Most courts * * * hold that recusal under the statute can be waived or forfeited."); see, *e.g.*, *United States* v. *Siegelman*, 640 F.3d 1159, 1188 (11th Cir.

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overlapping, grounds for recusal'") (quoting *Andrade* v. *Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003), cert. denied, 541 U.S. 935 (2004)); *Gipson*, 835 F.2d at 1324-1325; *Rice* v. *McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).

[6] See *United States* v. *Norwood*, 854 F.3d 469, 471-472 (8th Cir.) (per curiam), cert. denied, 583 U.S. 936 (2017); *In re Bulger*, 710 F.3d 42, 45 (1st Cir. 2013) (Souter, J.); *United States* v. *Cheatwood*, 42 Fed. Appx. 386, 393 (10th Cir.), cert. denied, 537 U.S. 1037 (2002); *Russell* v. *Lane*, 890 F.2d 947, 948 (7th Cir. 1989).

2011) (per curiam) ("A motion for recusal based upon the appearance of partiality must be timely made when the facts upon which it relies are known."), cert. denied, 566 U.S. 1043 (2012). More than two years before he filed the motion, petitioner sought rehearing en banc in his prior D.C. Circuit appeal (see p. 6, *supra*) that would likewise appear to be encompassed by his rule, without moving to disqualify Judge Katsas, even though the facts underlying his later recusal motion were public knowledge at the time. Pet. for Reh'g En Banc, *Bahlul* v. *United States*, No. 19-1076 (Sept. 18, 2020). Judge Katsas joined in denying that petition, along with petitioner's motion for reconsideration of that denial, without any complaint regarding his ability to participate under Section 455. See Orders of Jan. 21 and Mar. 29, 2021, No. 19-1076 (D.C. Cir.).

Further review is also unwarranted because any error in the denial of the disqualification motion would have been harmless. See *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 862 (1988) (holding that failures to recuse under Section 455 are subject to harmless-error review).[7] The court of appeals affirmed petitioner's conviction and sentence unanimously and on straightforward grounds. In rejecting petitioner's challenges to the appointment of the convening authority and the CMCR's assessment of his sentence, the panel adhered to determinations that the D.C. Circuit

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[7] This Court has held that an erroneous failure to recuse is structural error if it is of *constitutional* dimension. *Williams* v. *Pennsylvania*, 579 U.S. 1, 14 (2016). But petitioner has pressed no constitutional claim here. Cf. *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("most matters relating to judicial disqualification do not rise to a constitutional level") (brackets and citation omitted).

had already made, including in previous iterations of this case. See Pet. App. 26a-38a. And in rejecting petitioner's challenge to his sentence, the panel found strong support for the CMCR's analysis in the factual record and declined to consider one new argument for garden-variety procedural reasons. See *id.* at 38a-43a. No judge of the court of appeals called for a vote on petitioner's subsequent petition for rehearing en banc. *Id.* at 12a-13a. In these circumstances, Judge Katsas's decision to participate in this case could not have posed any "risk of injustice" to petitioner or to parties "in other cases," nor could it have "undermin[ed] the public's confidence in the judicial process," *Liljeberg*, 486 U.S. at 864.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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