No. 23-281

In the

Supreme Court of the United States

STEVEN C. FUSTOLO,

Petitioner,

v.

THE PATRIOT GROUP, LLC,

Respondent.

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

BRIEF OF THE PATRIOT GROUP, LLC IN OPPOSITION

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October 23, 2023

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QUESTION PRESENTED

Petitioner's opening remarks are incorrect in several respects. Indeed, Petitioner fails to mention that the question he seeks to advance was raised for the first time in his petition for hearing *en banc*, not to the lower courts for their consideration. Next, Petitioner conflates two separate proceedings – two bankruptcy adversary suits – while suggesting that they are the same proceeding. Further, Petitioner mischaracterizes the record, as explained herein.

STATEMENT OF RELATED PROCEEDINGS

The related proceedings within the meaning of Supreme Court Rule 14.1(b)(iii) are:

- *The Patriot Group, LLC v. Steven C. Fustolo*, No. 14-01193 (Bankr. D. Mass.). Judgment entered February 4, 2019.

- *Steven C. Fustolo v. The Patriot Group LLC*, No. 19-10343-TSH (D. Mass.). Order entered February 11, 2020.

- *Steven C. Fustolo v. The Patriot Group, LLC*, No. 20-1308 (1st Cir.). Judgment entered February 8, 2023. Denying rehearing *en banc* on April 11, 2023.

CORPORATE DISCLOSURE STATEMENT

Respondent The Patriot Group, LLC does not have a parent corporation and no publicly held company owns 10% or more of The Patriot Group, LLC's stock.

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OPINIONS BELOW

The underlying bankruptcy court decision is reported at 597 B.R. 1 and is located at App. 15. The decision of the United States District Court for the District of Massachusetts ("District Court") is not reported, but can be found at 2020 WL 636449, and is located at App. 3. The Judgment of the United States Court of Appeal for the First Circuit ("First Circuit") is not reported, but can be found at 2023 WL 2422123, and is located at App 1. The First Circuit's denial of Petitioner's request for hearing *en banc* is not reported and is located at App. 209.

JURISDICTION

The Judgment of the First Circuit was entered on February 8, 2023. The petition for writ of certiorari was filed on September 11, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT

On May 6, 2013, Respondent and two other creditors filed a petition to put the Petitioner into an involuntary Chapter 7 bankruptcy. *See In re Steven C. Fustolo, Debtor*, Case No. 13-12692-JNF (Bankr. D. Mass.). Petitioner unsuccessfully contested the validity of the bankruptcy petition. *See Fustolo v. The Patriot Group, LLC, et al.*, 816 F.3d 1 (1st Cir. 2016). Thereafter, the Respondent filed two bankruptcy adversary proceedings adjacent to the main proceeding.

On September 30, 2014, Respondent filed an adversary complaint alleging that the court should deny Petitioner a discharge of debts on several grounds, including for pre- and post-petition fraudulent transfers, Petitioner's failure to maintain adequate books and records, Petitioner's making of a false oath, and Petitioner's unexplained dissipation of assets. *The Patriot Group, LLC v. Steven C. Fustolo*, No. 14-01193 (Bankr. D. Mass.) (App. 16, n.1) (the "Discharge Adversary Proceeding").

In August/September 2014, Petitioner initiated an internet defamation campaign against Respondent, Respondent's principal, and his family. (App. 166-167). On January 13, 2015, Respondent filed an adversary complaint seeking injunctive relief to halt Petitioner's defamation campaign and address Internet postings. *The Patriot Group, LLC v. Steven C. Fustolo*, No. 15-01015 (Bankr. D. Mass.) (the "Defamation Adversary Proceeding"); (App. 167-176). The bankruptcy court issued a preliminary injunction directed at Petitioner requiring him to refrain from further harassment. (App. at 166-180); *The Patriot Group, LLC v. Fustolo*, No. 15-1015, 2015 WL 411760, at *2, n.3 (Bankr. D. Mass. Jan. 30, 2015). Petitioner moved to dismiss the Defamation Adversary Proceeding because Respondent's claims raised issues and sought relief beyond the court's subject matter jurisdiction. (App. 180-184). The bankruptcy court dismissed Respondent's two-count Verified Complaint or, alternatively, abstained from considering Respondent's claims, noting that Respondent had alternative venues to pursue its harassment claims against Petitioner. (App. 199-207).

Additionally, the bankruptcy court conceded that a state law claim at issue contained an express jurisdictional restriction which Petitioner brought to its attention through his dismissal motion. (App. 190). The bankruptcy court stated that the "egregiousness" of the Petitioner's conduct as presented in case appears to have "circumscribed" the court's consideration of the appropriate relief and forum for Respondent's claims. (*Id.*). Ultimately, the bankruptcy court reversed itself and nullified the injunction against the Petitioner. (*Id.*). In July 2019, Petitioner pleaded guilty to criminal harassment of Respondent's principal. *Commonwealth v. Steven C. Fustolo*, 1681 CR 00467 (Middlesex Superior Court) (pleading guilty to criminal harassment via an Internet defamation campaign).

The Discharge Adversary Proceeding, however, culminated in a six-day bankruptcy court trial in 2016. (App. 16-17). The bankruptcy court expedited the trial as a sanction against Petitioner for willfully violating its order. (App. at 17-18, n.2, 162-163). Specifically, the court had ordered Petitioner to provide information he claimed was protected by his Fifth Amendment right against self-incrimination for *in camera* inspection. (*Id.*). Petitioner refused to obey, after which the court sanctioned him by setting an expedited trial date over his protests. In response, and almost a year and a half into the proceeding, Petitioner moved for the bankruptcy judge to recuse herself. (App. 162-163). Petitioner claims that the bankruptcy court issued a cursory decision denying the motion that "refused to deal with the merits of the motion." (Pet. at 3). The court explained its rationale

for denying Petitioner's recusal motion. (App. 162-163) ("[t]he motion [to recuse] appears to be a transparent and strategic attempt to delay and avoid the sanction of a trial for [Petitioner's] failure to fully comply with this Court's Order dated 12/31/2015[.]")

On February 4, 2019, the bankruptcy court denied Petitioner his bankruptcy discharge on several counts, finding against Respondent on one count and dismissing another count as moot. (App. 158-160). Respondent appealed to the District Court and the First Circuit challenging the bankruptcy court's denial of his recusal motion, but not vigorously challenging the bankruptcy court's factual findings. (App. 10-11; 1a-36a). The District Court found that the evidence on the merits against Petitioner was "overwhelming." (App. 10) ("I will note having reviewed the record evidence and the judge's decision, the findings against Fustolo on these Counts was not a close call, in fact, the evidence against him was overwhelming.")

Ultimately the District Court and the First Circuit denied Respondent's appeal, finding that it lacked merit, to the extent Petitioner did not waive his arguments. (App. 2, 13.) As explained below, Petitioner did not advocate to either the District Court or the First Circuit for the adoption of a national or uniform *de novo* standard of review under the federal recusal statutes 28 U.S.C. Sections 455(a) and 445(b). (App. 1a-36a). The first time Petitioner raised the review stand question was in his request for hearing *en banc*. (App. 37a-45a).

ARGUMENT

Petitioner contends that there is an intractable circuit split regarding whether the *de novo* or the abuse of discretion standard of review should apply to 28 U.S.C. Section 455(a) and 455(b) appeals. As such, Petitioner asserts, the split necessarily impacts numerous litigants and concerns fairness. Further, Petitioner alleges that his case is the appropriate vehicle for the Court to consider the standard of review question. Finally, Petitioner claims that a change in the review standard will bolster public confidence in the judicial system. As explained below, Petitioner's arguments lack merit, and this Court should reject the Petition.

1. All but two circuits appear to follow the abuse of discretion standard when reviewing whether recusal is warranted for actual or reasonably perceived bias. *See* 28 U.S.C. Section 455(a) & 455(b). The review standard is not causing consternation amongst litigants or lower courts. There is no Due Process or other fundamental concern at stake; the circuit courts, applying the abuse of discretion standard, appropriately balance judicial review of recusal decisions against creating greater incentives for litigants to attribute an unfavorable outcome to judicial bias, which is precisely this case. *See In re United States*, 158 F.3d 26, 30 (1st Cir. 1998) ("recusal on demand would put a large club in the hands of litigants and lawyers, enabling them to veto the assignment of judges for no good reason."). That a circuit has adopted the *de novo* standard, and another has adopted it in a limited form is not a cry for a

uniform, national standard. Petitioner's argument implies that most circuit courts are presently denying litigants fundamental justice by using an abuse of discretion standard, which is incorrect. The standard is not toothless and is a bulwark against arbitrary decisions. *See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.,* 572 U.S. 559, 564, 134 S. Ct. 1744, 1748, 188 L. Ed. 2d 829 (2014) ("The abuse-of-discretion standard does not preclude an appellate court's correction of a district court's legal or factual error"); *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.") The fact that the standard is articulated differently in two circuits does not mean that litigants across the nation are receiving less justice or unfair treatment. Simply put, this Court should deny certiorari and leave the circuits to apply the standard they deem appropriate to address the policy considerations raised by recusal motions.

2. This case is not ideal for addressing any appellate issue, let alone creating a uniform review standard for a Section 455(a) or Section 455(b) determination. Petitioner's case is weak and unsympathetic – there is no rational basis to support his recusal arguments, assuming he did not waive them. (App. 2). Indeed, the bankruptcy court reconsidered its position and dismissed the Defamation Adversary Proceeding. (App. 207). The court recognized its error and corrected it in Petitioner's favor – which suggests even-handed

justice, the opposite of bias. Next, Petitioner's characterization of the bankruptcy court's recusal determination in the Discharge Adversary Proceeding as without consideration of the "merits" is false – the bankruptcy court specifically noted the reasons for denial, which included a finding that the recusal motion was a tactic designed to delay trial in reaction to the court's prior order. (App. 162-163); *see Liteky v. United States,* 510 U.S. 540, 550–51, 114 S. Ct. 1147, 1155, 127 L. Ed. 2d 474 (1994) ("Also not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant."); *United States v. Grinnell Corp.*, 384 U.S. 563, 582-583, 86 S. Ct. 1698, 1709-1710, 16 L. Ed. 2d 778 (1966) (rejecting claim of bias based on colloquy between judge and attorney). The bankruptcy court made its determination based on events that occurred during the bankruptcy proceedings, which included Petitioner's court order violation and the timing of his motion. *Liteky,* 510 U.S. at 555-56 (explaining that events that occur during the proceeding are not a viable basis for recusal). Petitioner cannot demonstrate that the court "relied upon knowledge acquired outside [the proceedings]" or "displayed deep-seated and unequivocal antagonism that would render fair judgment impossible." *Id.* Further, no reasonable person could view the court as biased for all the same reasons, and the Petitioner cites no authority where a court has required recusal under similar circumstances. Ultimately, there is no

objective basis to adopt Petitioner's speculation that a "more searching" review would change anything. The District Court, moreover, conducted a thorough analysis of the recusal issue and found no grounds supporting Petitioner's complaints. (App. 7-9).

3. Petitioner's appeal to a "crumbling confidence in our system of government" and a "break down in civil order and civic norms, including violence" is misplaced. None of the studies or authority Petitioner cites suggests that public confidence in the judiciary would be enhanced by creating a uniform review standard for recusal appeals. There is no evidence that the citizenry is likely to have more confidence in the court system knowing that *de novo* review is occurring across the federal circuits. Applying Petitioner's logic, any public cynicism might be enhanced if the standard were changed to encourage more meritless recusal litigation, of which this case is an example.

4. Petitioner waived the right to pose his question given that he did not properly raise it with the lower courts despite his statement to the contrary. *Compare* Pet. at 8 ("the issue has been raised before all courts and has been fully briefed therein") *with* App. 1a-36a (briefs filed in the lower courts); *see also* Judgment, App. 1-2 ("Assuming [Petitioner's] claim is not waived for failure to raise it in the district court[.]"). This Court ordinarily does not decide questions not raised or resolved in the lower courts. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46, 112 S. Ct. 1644, 1649, 118 L. Ed. 2d 280 (1992) *Youakim v. Miller,* 425 U.S. 231, 234, 96 S. Ct. 1399, 1401, 47

L.Ed.2d 701 (1976) (*per curiam*) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." These principles help to maintain the integrity of the process of certiorari. *Cf. Oklahoma City v. Tuttle,* 471 U.S. 808, 816, 105 S. Ct. 2427, 2432, 85 L.Ed.2d 791 (1985). Petitioner's lower court briefs do not advocate for adoption of *de novo* as the review standard for the First Circuit or otherwise. Only after the First Circuit denied Petitioner's appeal did Petitioner raise the issue in his request for hearing *en banc*. (App. 37a-45a) In short, Petitioner asks this Court to address a question which was not presented below. The Court should decline to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 23, 2023

APPENDIX

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APPENDIX 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case. No. 19-CV-10343-TSH

[Filed May 6, 2019]

IN RE STEVEN C. FUSTOLO, Debtor:
,
)
)
STEVEN C. FUSTOLO)
Appellant.,)
,)
)
V.)
.)
THE PATRIOT GROUP, LLC;)
50 Thomas Patton Drive LLC;,)
Appellees.)
)

APPELLANT'S BRIEF

(****Table of Contents, Table of Authorities and Exhibit List omitted* ***)

JURISDICTION AND VENUE

Jurisdiction is proper pursuant to 28 U.S.C. § 158. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

RELEVANT PROCEDURAL HISTORY/TIMELINE

- **May 6, 2013**: Under Bankruptcy Petition # 13-12692, the Patriot Group, LLC (Patriot); 50 Thomas Patton Drive LLC (Patton Drive); and Richard Mayer (Mr. Mayer) filed an involuntary petition for an order for relief against Debtor Steven Fustolo (Mr. Fustolo) under Chapter 7 of Title 11 of the United States Code in the United States Bankruptcy Court for the District of Massachusetts (Boston). Ex. S.
- **September 30, 2014:** Patriot and Patton Drive initiated an adversarial proceeding against Mr. Fustolo under proceeding # 14-1193, suing him on eight counts. See Ex. R:
    - Count I: Objection to Discharge,11 U.S.C. § 727(a)(2)(A)
    - Count II: Objection to Discharge, 11 U.S.C. § 727(a)(2)(B)
    - Count III: Objection to Discharge, 11 U.S.C. § 727(a)(3)
    - Count IV: Objection to Discharge, 11 U.S.C. § 727(a)(4)

- Count V: Objection to Discharge, 11 U.S.C. § 727(a)(5)
- Count VI: Non-Dischargeability of Patton Drive Claim, 11 U.S.C. § 523(a)(4).
- Count VII: Non-Dischargeability of Patton Drive Claim, 11 U.S.C. § 523(a)(6).
- Count VIII: Non-Dischargeability of Patton Drive Claim, 11 U.S.C. § 523(a)(2).

- **November 5, 2015:** In the adversary proceeding, on the motion of Patton Drive, the Hon. Joan N. Feeney dismissed Patton Drive's claims against Mr. Fustolo, consisting of Counts VI and VII. See Docket # 14-01193 at entry 102.
- **December 31, 2015**: In the adversary proceeding, after filings by both parties, the Hon. Joan N. Feeney ordered Mr. Fustolo to produce certain documents. Exs. U, V.
- **March 17, 2016**: In the adversary proceeding, after filings by both parties and a hearing, the Hon. Joan N. Feeney granted sanctions against Mr. Fustolo. Ex. T.
- **April 19, 2016**: In the adversary proceeding, Mr. Fustolo filed a motion for recusal with a memorandum in support against the Hon. Joan N. Feeney. Ex. K.
- **May 10, 2016**: In the adversary proceeding, Patriot filed a spoliation/Rule 37 motion and an affidavit in support. Exs. L, M.

- **May 12, 2016**: In the adversary proceeding, the Hon. Joan N. Feeney denied the motion for recusal. Ex. J.
- **May 16, 2016:** In the adversary proceeding, Mr. Fustolo filed an objection to the spoliation/Rule 37 motion.
- **May 18, 2016:** In the adversary proceeding, the Hon. Joan N. Feeney issued an order on the spoliation/Rule 37 motion.
- **May 22, 2016**: In the adversary proceeding:
    - Mr. Fustolo filed a motion to reconsider the order on the spoliation/Rule 37 order. Ex. O.
    - Patriot filed a motion in opposition to Mr. Fustolo's motion to reconsider. Ex. P.
- **May 23, 2016**: The Hon. Joan N. Feeney denied Mr. Fustolo's motion to reconsider.
- **February 4, 2016**: In the adversary proceeding, after a six-day trial, the Hon. Joan N. Feeney issued a 116-page memorandum decision, granting judgment in favor of Patriot against Mr. Fustolo on four counts. Exhibit H, p. 115:
    - Count I: Objection to Discharge under 11 U.S.C. § 727(a)(2)(A)
    - Count II: Objection to Discharge, 11 U.S.C. § 727(a)(2)(B)

- Count III: Objection to Discharge, 11 U.S.C. § 727(a)(3)
- Count V: Objection to Discharge, 11 U.S.C. § 727(a)(5)

FACTS

The following brief facts summarize the case; any necessary, additional facts will be supplemented in the body of the argument.

In 2007, Steve C. Fustolo, the appellant, sought to develop property he owned on Revere Beach Boulevard in Revere, MA. Ex. H, p. 10. Mr. Fustolo did not own the property personally, but through various companies he owned and controlled. Ex. H, p.10. As part of this development, Mr. Fustolo's company Revere Beach Holdings LLC secured a loan from The Patriot Group, LLC (Patriot), secured by a mortgage on the property and his own personal guaranty. Ex. H, p.10.

The loan was defaulted on, and in 2010 Patriot conducted a public foreclosure sale. Ex. H, p.10. However, at the sale, another company of Mr. Fustolo's, Affinity Investments, LLC (Affinity) submitted the highest bid, tendered a deposit, and executed a sale agreement. Ex. H, p.10. Thereafter, however, Affinity also defaulted on its agreement, and in 2011 Patriot conducted a second foreclosure sale. Ex. H, p.11. Patriot itself was the successful bidder at its second foreclosure sale, and ultimately sold the property for more than it paid at the second foreclosure sale. Ex. H, p.11.

In 2011, Patriot received a judgment against Mr. Fustolo for $20.5 million as a result of the default and his personal guarantee of the loan. Ex. H, p. 11. Patriot made various attempts to collect this from Mr. Fustolo, but ultimately Patriot, 50 Thomas Patton Drive LLC (Patton Drive); and Richard Mayer (Mr. Mayer) forced Mr. Fustolo into involuntary bankruptcy in 2014. Ex. S. Patriot and Patton Drive subsequently initiated adversary proceedings against Mr. Fustolo, arguing that he should not be allowed to discharge the debt owed to them for various reasons. Ex. R.

SUMMARY OF ARGUMENT

The Bankruptcy Court's memorandum decision should be overturned for multiple reasons. First, Mr. Fustolo was denied due process and his right to a fair trial when the Bankruptcy Court entered its spoliation/Rule 37 order. Second, Mr. Fustolo was also denied due process and his right to a fair trial when the judge refused to recuse herself. Third and finally, the evidence did not support judgment against him on any of the counts.

Separately, Mr. Fustolo objects to the short window of time this Court dictated for composing of this brief, and asks that the Court grant him 60 days to file a revised brief, which, if not granted, will deny him due process.

ARGUMENT

A. The May 18, 2016 spoliation/Rule 37 order denied Mr. Fustolo due process, as it denied him the right to present documents to substantiate his defense on the counts.

On May 18, 2016, the Hon. Joan N. Feeney barred Mr. Fustolo from: (1) introducing any document not produced to Patriot before Mr. Fustolo's deposition; (2) any document not produced in electronic format to Patriot, even if produced by the deadline in printed format; and (3) prohibiting Mr. Fustolo from testifying about any of these documents. Ex. I.

The Bankrutpcy Court's order was in error, and violated Mr. Fustolo's right to due process and a fair trial. Mr. Fustolo was forced into a dilemma, to choose in between violating his Fifth Amendment rights or else to harm his ability to defend himself in Bankruptcy Court. Exs. N, O. What is more, the failure to deliver previous documents was based on an error; some documents had been delivered to the Trustee and Patriot's former counsel and therefore erroneously omitted in productions to later Patriot counsel. Ex. N, p. 3. Furthermore, as the Bankruptcy Court itself admitted, Mr. Fustolo did not engage in spoliation, but rather his laptop was lost in 2014. Ex. H, p. 100. For the Bankruptcy Court to punish Mr. Fustolo for asserting his Fifth Amendment rights, not allowing him to supplement production when errors were discovered, and holding him responsible for not delivering "native" formats for documents when they were lost---all of

this was manifestly unreasonable, and denied Mr. Fustolo his right to a fair trial and due process. Thus, reversal of the final judgment and the May 18, 2016 order is warranted, because by punishing Mr. Fustolo for merely asserting his rights, losses beyond his control, and excusable errors in production, the Bankruptcy Court preventing Mr. Fustolo from delivering a full-throated defense, especially in disallowing him the right to bring in documents that would further negate the allegations against him in the complaint.

B. The denial of Mr. Fustolo's recusal motion denied him due process and his right to a fair trial.

On May 12, 2016, the Hon. Joan N. Feeney denied Mr. Fustolo's motion for her recusal. Ex. J. In its denial, the Bankruptcy Court declared that the motion was a transparent attempt to delay the trial and avoid sanctions. Ex. J. Judge Feeney went on to state that "this Court's impartiality cannot be reasonably questioned and recusal…is unwarranted." Ex. J.

28 U.S.C. 455(a) states that"[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "Disqualification [under § 455(a)] is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." *United States v. Sampson*, 12 F.Supp.3d 203 (D. Mass., 2014) (internal citations omitted). Meanwhile, 28 U.S.C.

§455(b)(1) states that a judge should recuse herself when she "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

Here, Judge Feeney's words and actions showed that recusal was warranted under both statues, and the failure to do so caused a denial of due process and the right to a fair trial. Judge Feeney's actions in ordering production of documents before the deposition, placed Mr. Fustolo's Fifth Amendment rights in jeopardy, as his counsel explained to the Court at a hearing. Ex. K, J, U. Judge Feeney condemned Mr. Fustolo for exercising his Fifth Amendment rights. Ex. G, p. 43. Judge Feeney then punished Mr. Fustolo with a "speedy trial" sanction for asserting his Fifth Amendment rights. Ex. K, pp. 16-17. And what is more, Judge Feeney reversed a grant of injunctive relief because, she admitted, her personal feelings about Mr. Fustolo clouded her judgment. Ex. K, p. 18-20.

Judge Feeney's behavior required recusal under both §455(a) and §455(b)(1). It was required under §455(a) because the constant open displeasure of Judge Feeney at Mr. Fustolo's assertion of his constitutional rights, including sanctioning him with a speedy trial punishment, shows that her impartiality might reasonably be questioned. And it was required under §455(b)(1) because Judge Feeney openly admitted that her personal feelings about Mr. Fustolo literally caused her to misapply the law. Ex. K, pp. 18-20.

Therefore, because the recusal motion should have been granted, the judgment should be reversed because it denied Mr. Fustolo his due process and right to a fair trial.

C. The weight of the evidence did not support the judgments against Mr. Fustolo for Counts I, II, III, and V, although, due to the time constraints put onto this brief, Mr. Fustolo cannot describe the evidence in depth here.

The evidence did not support the judgments against Mr. Fustolo on any of the four counts on which the Bankrutpcy Court found for Patriot.

Count I is under 11 U.S.C. § 727(a)(2)(A). Ex. R. "[I] in order for a debtor to be denied a discharge under § 727(a)(2), an objector must show by a preponderance of the evidence that (1) the debtor transferred, removed, destroyed, mutilated, or concealed (2) his or her property (or the property of the estate if the transfer occurs post-petition) (3) within one year of the petition filing date (for prepetition transfers) (4) with intent to hinder, delay or defraud a creditor." *In re Watman*, 301 F.3d 3 (1st Cir. 2002).

Here, Patriot failed on Count I to prove by a preponderance of the evidence that Mr. Fustolo's transfers were intended to hinder, delay, or defraud a creditor. Mr. Fustolo adequately explained all the alleged fraudulent transfers, and it was only Court error, influenced by the Judge's personal dislike of Mr. Fustolo (discussed *supra*), that caused the judgment here against him. Had he been

allowed to provide the documents erroneously excluded by the Court's December 31, 2015 order, Mr. Fustolo could have further shown that any transfer was not of his personal property and/or were not with intent to hinder, delay, or defraud. Because of Patriot's failure to meet the burden of proof on Count I, the judgment should be reversed.

Count II is under 11 U.S.C. § 727(a)(2)(B). Thus, the same standard from *In re Watman*, 301 F.3d 3 (1st Cir. 2002) applies as in Count I.

Here, again, Patriot failed on Count II to prove by a preponderance of the evidence that the contents of the websites and brochures, as well as the good will of his companies, were assets of Mr. Fustolo, and that he transferred them with the intent to hinder, delay, or defraud. Had he been allowed to provide the documents erroneously excluded by the Court's December 31, 2015 order, Mr. Fustolo could have further shown that any transfer was not of his personal property and/or were not with intent to hinder, delay, or defraud. Because of Patriot's failure to meet the burden of proof on Count II, the judgment should be reversed.

Count III is under 11 U.S.C. § 727(a)(3). Proof under this statute is again by preponderance of the evidence. *Lasserman v. Mahfouz (In re Mahfouz),* 529 B.R. 431 (Bankr. D. Mass 2015). There is a two-part burden on the plaintiff here: (1) that the debtor concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information; and (2) that the recorded

information was information from which the relevant financial information might be discerned. *Lassman v. Keefe (In re Keefe),* 380 B.R. 116, 120 (Bankr. D. Mass 2007). The standard for disclosure is one of reasonableness in the particular circumstances. *Raazzaboni v. Schifano (In re Schifano)*, 378 F.3d 60 (1st Cir. 2004).

Here, again, Patriot failed on Count III to prove by a preponderance of the evidence that Mr. Fustolo destroyed or failed to preserve relevant financial information. Mr. Fustolo provided paper versions of the documents, but the Bankruptcy Court erroneously demanded that only native versions be produced. Had he been allowed to provide the documents erroneously excluded by the Court's December 31, 2015 order, Mr. Fustolo could have further shown the relevant financial information. Because of Patriot's failure to meet the burden of proof on Count III, the judgment should be reversed.

Count V is under 11 U.S.C. § 727(a)(5). Proof under this statute is again by preponderance of the evidence. *Lasserman v. Mahfouz (In re Mahfouz),* 529 B.R. 431 (Bankr. D. Mass 2015).

Here, again, Patriot failed on Count V to prove by a preponderance of the evidence that Mr. Fustolo failed to satisfactorily explain any loss of assets. There was no proof, other than a non-experts blithe opinion, that the gemstones were worthless. Mr. Fustolo adequately explained his withdrawals, and, had he been allowed to provide the documents erroneously excluded by the Court's December 31,2015 order, he could have further

satisfactorily explained any loss of assets. Because of Patriot's failure to meet the burden of proof on Count V, the judgment should be reversed.

D. Mr. Fustolo herein objects to the very short time window granted by this Court to file this brief, and asks that more time be granted (60 days) to file a revised brief; otherwise, he has been denied his due process rights to appeal a 116-page order and a six-day trial.

Mr. Fustolo objects to the short time period to compose this brief and reiterates his request more time be granted to file a revised brief. Mr. Fustolo's motion requesting such time can be found on the docket at entry 13. He requests sixty (60) days to do so, because his counsel has just come on this case, and the appeal includes a 116-page brief and six days of trial transcript, as well as other orders, motions, and materials. If this Court denies this, Mr. Fustolo's due process rights are injured, as it severely hampers the ability to file this appeal and fully discuss all issues therein.

CONCLUSION

Mr. Fustolo asks that this Court reverse and vacate the Bankruptcy Court's decision, and that a judgment entered his favor on all counts.

In the alternative, Mr. Fustolo asks that the case be remanded for a new trial and that the orders denying recusal and imposing discovering sanctions be reversed.

In the second alternative, Mr. Fustolo requests oral argument on these issues.

Respectfully submitted,
STEVEN C. FUSTOLO

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2019-05-06
DATE

(*** *Certificate of Service omitted*****)

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-1308

[Filed September 22, 2020]

IN RE: STEVEN C. FUSTOLO

Debtor

STEVEN C. FUSTOLO

Appellant

v.

THE PATRIOT GROUP, LLC;
50 THOMAS PATTON DRIVE LLC

Appellees

APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER OF THE U.S. DISTRICT COURT

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September 15, 2020

(****Table of Contents and Table of Authorities omitted* ***)

LEGEND/KEY TO REFERENCES

- References to the Appendix will be as "APPENDIX:__"
- References to the Addendum will be as "ADDENDUM: __"

JURISDICTION AND VENUE

Jurisdiction is proper pursuant to 28 U.S. Code § 1291. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

QUESTIONS/ISSUES PRESENTED

1. Due Process requires that a litigant be heard before an unbiased, impartial adjudicator, and, if they are not, then this is structural error requiring reversal. Here, the Bankruptcy Court judge admitted in writing that she was so biased against Steven Fustolo that this bias caused her to reach an incorrect legal conclusion against him, but she refused to recuse herself

afterwards. Should her decisions in this matter be reversed?

RELEVANT PROCEDURAL HISTORY/TIMELINE

- **May 6, 2013**: Under Bankruptcy Petition # 13-12692, the Patriot Group, LLC (Patriot); 50 Thomas Patton Drive LLC (Patton Drive); and Richard Mayer (Mr. Mayer) filed an involuntary petition for an order for relief against Debtor Steven Fustolo (Mr. Fustolo) under Chapter 7 of Title 11 of the United States Code in the United States Bankruptcy Court for the District of Massachusetts (Boston).
- **September 30, 2014:** Patriot and Patton Drive initiated an adversarial proceeding against Mr. Fustolo under proceeding # 14-1193, suing him on eight counts.
  - Count I: Objection to Discharge,11 U.S.C. § 727(a)(2)(A)
  - Count II: Objection to Discharge, 11 U.S.C. § 727(a)(2)(B)
  - Count III: Objection to Discharge, 11 U.S.C. § 727(a)(3)
  - Count IV: Objection to Discharge, 11 U.S.C. § 727(a)(4)
  - Count V: Objection to Discharge, 11 U.S.C. § 727(a)(5)

  - Count VI: Non-Dischargeability of Patton Drive Claim, 11 U.S.C. § 523(a)(4).
  - Count VII: Non-Dischargeability of Patton Drive Claim, 11 U.S.C. § 523(a)(6).
  - Count VIII: Non-Dischargeability of Patton Drive Claim, 11 U.S.C. § 523(a)(2).
- **January 13, 2015**: Patriot filed a Verified Complaint in the Bankruptcy Court seeking injunctive relief. ADDENDUM: 4.
- **January 14, 2015:** Patriot moves for injunctive relief. ADDENDUM: 4.
- **January 30,2015**: Judge Feeney Entered a Preliminary Injunction against Mr. Fustolo. ADDENDUM: 9-11.
- **February 10, 2015**: Patriot filed an Amended Complaint. ADDENDUM: 12.
- **March 24, 2015:** Judge Feeney reversed her original grant of preliminary injunction and dismissed the complaint. ADDENDUM: 37.
- **July 17, 2015:** Massachusetts authorities out of Woburn District Court under docket no. 1553-CR-1562 charged Mr. Fustolo with two criminal counts: (1) witness intimidation; and (2) criminal harassment. APPENDIX: 1551-1556.

- **November 5, 2015:** In the adversary proceeding, on the motion of Patton Drive, the Hon. Joan N. Feeney dismissed Patton Drive's claims against Mr. Fustolo, consisting of Counts VI and VII. See Docket # 14-01193 at entry 102.

- **December 31, 2015**: In the adversary proceeding, after filings by both parties, the Hon. Joan N. Feeney ordered Mr. Fustolo to produce certain documents.

- **March 17, 2016**: In the adversary proceeding, after filings by both parties and a hearing, the Hon. Joan N. Feeney granted sanctions against Mr. Fustolo.

- **April 19, 2016**: In the adversary proceeding, Mr. Fustolo filed a motion for recusal with a memorandum in support against the Hon. Joan N. Feeney. APPENDIX: 1556-1576.

- **May 12, 2016**: In the adversary proceeding, the Hon. Joan N. Feeney denied the motion for recusal. ADDENDUM: 47.

- **October 13, 2016**: The Massachusetts state criminal charges out of Woburn District Court under docket no. 1553-CR-1562 were disposed of by nolle prosequi. APPENDIX: 1551-1556.

- **February 4, 2019**: In the adversary proceeding, after a six-day trial, the Hon. Joan N. Feeney issued a 116-page memorandum decision, granting judgment in favor of Patriot against Mr. Fustolo on four counts. APPENDIX: 1577-

- Count I: Objection to Discharge under 11 U.S.C. § 727(a)(2)(A)
- Count II: Objection to Discharge, 11 U.S.C. § 727(a)(2)(B)
- Count III: Objection to Discharge, 11 U.S.C. § 727(a)(3)
- Count V: Objection to Discharge, 11 U.S.C. § 727(a)(5)

- **February 11, 2020:** After appeal by Mr. Fustolo and briefing by both parties, the District Court affirmed Judge Feeney's memorandum decision in a nine-page decision. ADDENDUM: 38-46.

RELEVANT FACTUAL HISTORY

This matter is long and convoluted, having been drawn out for nearly a decade, involving multiple related court cases and even a previous appellate decision by this Circuit. However, most of the previous court machinations are irrelevant to this appeal. For brevity and clarity, the following summarizes the necessary facts relevant to this appeal, reserving a few additional facts will be supplemented in the body of the argument.

A. The Business relationship between Mr. Fustolo and Patriot

In 2007, Steve C. Fustolo, the appellant, sought to develop property he owned on Revere Beach Boulevard in Revere, MA. APPENDIX: 1585-1588. Mr. Fustolo did not

own the property personally, but through various companies he owned and controlled. *Id.* As part of this development, Mr. Fustolo's company Revere Beach Holdings LLC secured a loan from The Patriot Group, LLC (Patriot), secured by a mortgage on the property and his own personal guaranty. *Id.*

The loan was defaulted on, and in 2010 Patriot conducted a public foreclosure sale. APPENDIX: 1585-1588. However, at the sale, another company of Mr. Fustolo's, Affinity Investments, LLC (Affinity) submitted the highest bid, tendered a deposit, and executed a sale agreement. *Id.* Thereafter, however, Affinity also defaulted on its agreement, and in 2011 Patriot conducted a second foreclosure sale. *Id.* Patriot itself was the successful bidder at its second foreclosure sale, and ultimately sold the property for more than it paid at the second foreclosure sale. *Id.*

In 2011, Patriot received a judgment against Mr. Fustolo for $20.5 million as a result of the default and his personal guarantee of the loan. APPENDIX: 1585-1588. Patriot made various attempts to collect this from Mr. Fustolo, but ultimately Patriot, 50 Thomas Patton Drive LLC (Patton Drive); and Richard Mayer (Mr. Mayer) forced Mr. Fustolo into involuntary bankruptcy in 2013, and launching an adversarial proceeding against him in the Bankruptcy Court in 2014. APPENDIX: 1585.

B. Patriot's Multiple Adversarial Complaints, The Preliminary Injunction, And the Reversal of The Grant of The Preliminary Injunction and Dismissal of The Complaints

On January 13, 2015, Patriot filed a Verified Complaint against Mr. Fustolo, seeking injunctive relief ADDENDUM: 4. As part of this complaint, Patriot alleged that Mr. Fustolo had engaged in "cyber-bullying" by posting fabricated stories about criminal activity allegedly engaged in by Patriot and its founder/CEO. *Id.* One day after filing the complaint, Patriot moved for injunctive relief to enjoin Mr. Fustolo from publishing defamatory statements against Patriot, its founder/CEO, and "related persons." ADDENDUM: 4-5. Patriot represented that the cyber-bullying was for the purpose of forcing Patriot to withdraw its objection to the discharge of debt in bankruptcy court that Mr. Fustolo owed to Patriot. ADDENDUM: 5.

Mr. Fustolo opposed the injunction, and a hearing was held on January 22, 2015. ADDENDUM: 7. During the hearing, Patriot referenced numerous state and federal statutes that they alleged Mr. Fustolo had violated. *Id.* After the hearing, the parties submitted briefs on the matter, wherein Patriot argued that Mr. Fustolo had also violated M.G.L. 258E, § 1. ADDENDUM: 10.

On January 30, 2015, Judge Feeney granted the preliminary injunction against Mr. Fustolo, ordering him to cease making the defamatory statements and ordering him to remove them from the internet or any other

platforms. ADDENDUM: 12-14. Judge Feeney also stated that "an injunction against continuous false statements intended to bully a person into relinquishing legal remedies in a bankruptcy case, including the right to commence discharge litigation against a debtor, is harassment under Mass. Gen. Laws 258E, § 3(a)(i)." ADDENDUM: 11. Judge Feeney also ordered that Patriot amend its complaint to "make clear" that Patriot was it is seeking to restrain harassment in violation of Massachusetts law." ADDENDUM: 12. On February 10, 2015, Patriot filed its Amended Complaint, adding two additional counts: restraint of harassment under M.G.L. 258E, § 3(a), and for declaratory judgment. ADDENDUM: 12-13.

Mr. Fustolo moved to dismiss the Amended Complaint. ADDENDUM: 15-17. Mr. Fustolo argued that (1) the bankruptcy lacked subject-matter jurisdiction over the adversary proceeding; and (2) that the three counts do not state claims upon which relief could be granted, particularly the 258E count. ADDENDUM: 15-17. Patriot opposed, stating that Judge Feeney had already ruled as to subject matter jurisdiction and had already exercised jurisdiction over Patriot's claims by entering the preliminary injunction. ADDENDUM: 17-19.

On March 24, 2015, Judge Feeney issued a memorandum order reversing her earlier ruling and dismissed the Amendment Complaint in its entirety. ADDENDUM: 3- 37. Therein, regarding the 258E claim, Judge Feeney stated that she intended to "reconsider" her rulings that Patriot had shown a likelihood of success

under 258E. ADDENDUM: 21. Furthermore, she ruled that:

> the Court is compelled to observe from its examination of both the original Complaint and the Amended Complaint that the egregiousness of the Debtor's conduct, which he did not adequately rebut, appears to have circumscribed thoughtful consideration of the appropriate relief obtainable by the Plaintiff and the best forum in which to obtain it.
>
> ADDENDUM:22.

Judge Feeney therein reviewed 258E and concluded that (1) she lacked jurisdiction to enter the a 258E order or to enforce it; and (2) 258E only applied to natural persons, not entities. ADDENDUM: 23-33. After reviewing the law, Judge Feeney concluded that Patriot "in its Amended Complaint has failed to state a plausible claim to relief" under 258E. ADDENDUM: 23-33. Judge Feeney also ruled that the declaratory judgment count also failed to state a plausible claim for relief: "[t]he declarations sought are conclusory statements of the obvious; no court would rule that the Debtor had a right to publish defamatory statements or the right to harass and intimidate the Plaintiff or interfere with a creditor's right to proceed in a bankruptcy case or adversary proceeding." ADDENDUM: 33-34. Finally, she ruled that the sole remaining count not only did not set forth a cause of action, but that abstention was warranted because there were other remedies available under state and federal law. ADDENDUM: 34-

36. As a result, the entire Amended Complaint was dismissed and the preliminary injunction lifted more than two months after the entry. ADDENDUM: 37.

C. Mr. Fustolo moves to recuse Judge Feeney

On April 19, 2016,Mr. Fustolo moved for Judge Feeney to be recused under 28 U.S.C. §§ 455(a) and 455(b)(1). APPENDIX: 1556-1576. In this motion, Mr. Fustolo cited the above reversal as one of the grounds for recusal, emphasizing that Judge Feeney's statement about her lack of circumspection in granting the prelamination injunction amounted to an admission of unfair bias, in violation of the statutes. APPENDIX: 1573-1575.

In a one-page summary decision, Judge Feeney denied the motion to recuse. ADDENDUM: 47. Judge Feeney stated that the motion was a "appears to be a transparent and strategic attempt to delay and to avoid the sanction of a trial for the Defendant's failure to fully comply with this Court's Order." ADDENDUM: 47.

D. The trial and Judge Feeney's decision

A six-day trial j was held in front of Judge Feeney between May 23-June 23, 2016. APPENDIX: 1577-1578. Nearly three years after trial concluded, Judge Feeney released a 116-page memorandum, finding against Mr. Fustolo on all remaining counts. APPENDIX: 1577-1692.

E. The District Court's Consideration of the Appeal

After the decision, Mr. Fustolo appealed to the U.S. District Court for the District of Massachusetts. APPENDIX: 1693-1709. Mr. Fustolo argued that recusal motion should have been granted, that Mr. Fustolo's Due Process rights had been violated, and that the verdict was not against the weight of the evidence. APPENDIX: 1693-1709. The Opposition sought sanctions for a frivolous appeal. APPENDIX: 1710- 1760. On February 11, 2020, the Hon. Timothy Dillman released a nine-page decision, affirming Judge Feeney's rulings, finding that Due Process was not violated and recusal had not been appropriate, but denying the sanctions. ADDENDUM: 38-36.

SUMMARY OF ARGUMENT

Mr. Fustolo was denied Due Process and his right to a fair trial when the Bankruptcy judge refused to recuse herself, despite the fact that she had admitted bias against Mr. Fustolo in her March 24, 2015 memorandum. Judge Feeney's refusal to recuse herself denied Mr. Fustolo his Due Process rights to an impartial adjudicator, causing structural error necessitating a reversal of her ultimate decision in the case and a remand of the entire case before a different judge.

ARGUMENT

A. Standard of Law for Review of the Denial of a Motion to Recuse.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process." *Marshall v. Jerrico, Inc*, 446 U.S. 238, 242 (1980). "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." *Williams v. Pennsylvania,* 136 S. Ct. 1899, 1909 (2016). A failure to recuse in violation of the Due Process Clause is a structural error requiring reversal. *Id.*

However, the Due Process Clause is not the only basis for recusal, for it "demarks only the outer boundaries of judicial disqualifications." *Williams* at 1908. Recusal may also be had statutorily under both 28 U.S.C. § 455(a) and 28 U.S.C. § 455(b)(1).

Under 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Under 28 U.S.C. § 455(b)(1), a judge must disqualify herself when she "has a personal bias or prejudice concerning a party, or personal knowledge of

disputed evidentiary facts concerning the proceeding." Where, as here, a motion to recuse is made under both 455(a), and 455(b)(1), a Court need only focus on 455(a) analysis, "because it covers the same ground and reaches even further" than 455(b)(1). *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997). For violations of §455, Courts may vacate final judgments under Fed. R. Civ. P. 60(b)(6); in such circumstances, "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 864 (1987).

Recusal under 455(a) is appropriate when "the charge is supported by a factual basis, and when the facts asserted provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." *In Re Boston's Children First*, 244 F.3d. 164, 167 (1st Cir. 2001) (internal quotation omitted). "[I]f the question of whether 455(a) requires disqualification is a close one, the balance tips in favor of recusal." *Id.* In short, "justice must satisfy the appearance of justice." *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 864 (1987) , quoting *In re Murchison*, 349 U.S. 133, 136 (1955).

In the First Circuit, the denial of a motion to recuse under either 455(a) or 455(b) is reviewed under an abuse of discretion standard. *In Re Bulger*, 710 F.3d 42, 45 (1st Cir. 2013). It is not the "standard of Caesar's wife"; instead, "an abuse of discretion will be found only if a

reasonable reading of the record fails to support the conclusion that the judge's impartiality was not subject to question." *In Re Bulger*, 710 F.3d 42, 45 and 47 (1st Cir. 2013) (internal citations omitted). This is despite the urging of Judge Torruella that this Circuit should adopt *de novo* review of recusal motions because they are mixed questions of law and fact. *In re U.S.*, 158 F.3d 26, 36 (1st Cir. 1998) (Torruella, J. dissent). The Seventh Circuit also reviews appeals of denials of recusal motions *de novo*. *In re Gibson*, 950 F.3d 919, 923-924 (7th Cir. 2019).

The First Circuit has found recusal appropriate based on one single-sentence statement by a judge. See *In Re Boston's Children First*, 244 F.3d. 164 (1st Cir. 2001).

B. Judge Feeney's Admission of Bias in her March 24, 2015 Memorandum Shows that her Denial of the Recusal Motion was an Abuse of Discretion Requiring Vacatur of the Verdict

In her March 24, 2015 Memorandum Decision granting Mr. Fustolo's motion to dismiss the amended complaint, Bankruptcy Judge Feeney wrote:

> the egregiousness of the [Mr. Fustolo's] conduct….appears to have circumscribed thoughtful consideration of the appropriate relief obtainable by the Plaintiff and the best forum in which to obtain it.

ADDENDUM: 22. Judge Feeney thus admitted in writing that her impartiality was removed, and that she had a bias against Mr. Fustolo for perceived "egregiousness" of his

conduct that was so severe that it clouded her as judgment to the correct application of law. Such an admission required recusal, and Judge Feeney's refusal to recuse herself after admitting this bias violated Mr. Fustolo Due Process rights. Therefore, Judge Feeney's final verdict should be reversed and vacated and the case, be remanded for a new trial before a different judge.

Judge Feeney's statement in her reversal was a plain admission of bias. She quite literally stated in that March 2015 opinion that her perception of Mr. Fustolo's conduct had caused her to not adequately think about the proper application of the law and to rule against him. Her judgment was impaired by her dislike of Mr. Fustolo, and she admitted to it. Thus, bias permeated her actions and decisions in this matter, and she should have recused herself at that moment, or, at the very least, when Mr. Fustolo moved to have her recused.

The fact that Judge Feeney correctly reversed her error in that same March 2015 Memorandum is of no consequences, although she should be commended for admitting that it was bias that led her to rule against Mr. Fustolo. The fact that bias had affected her ability to judge the law properly was both an admission to actual bias requiring recusal under 455(b) and, under 455(a), caused the appearance of bias to any reasonably intelligent observer. Even though she had "fixed" the error that her biased had caused, the bias still remained, requiring her recusal. She did not "fix" her bias, but merely fixed one error she noticed her bias had caused.

The case of *In Re Boston's Children First*, 244 F.3d. 164 (1st Cir. 2001), cited *supra*, is instructive here. *In Re Boston's* was a case where the Petitioners sought class certification in a case regarding school assignments for Boston public schoolchildren. *Id.* at. 165. The presiding Federal trial court judge ordered discovery on the issues of standing and class certification. *Id.* at 165. While this discovery was ongoing, the Boston Herald newspaper then printed an article, in which the Petitioners complained that class certification had not yet been granted *Id.* at 165-166. Also in the article, the Petitioners negatively compared the speed of the certification process with another case (called the "Mack" case). that the same judge had presided in, wherein she had granted class certification. *Id.*. at 166.

The judge of *In Re Boston's* then sent a letter to the Herald and also had a telephone interview with the paper, responding to what she perceived as inaccuracies in the article. *Id.* at 166-167. The Herald published a follow up article, quoting the judge as stating that "[i]n the [Mack] case, there was no issue as to whether [the plaintiffs] were injured. It was absolutely clear every woman had a claim. [*In Re Boston's*] is a more complex case." *Id.* at 166.

The Petitioners moved for recusal based on this quote. *Id.* at 166. The Petitioners argued that the quote was proscribed by the Code of Judicial Conduct, "constituted a comment on the merits of a pending motion, and meant that the court had 'placed itself in the apparent position of advising the defendants.'" *Id.* at 166. The judge denied the motion, stating that her comments were merely an

attempt to correct the record from a "gross misrepresentation" by Petitioners. *Id.* at 166. Instead, the judge stated that she had merely made the statements to explain the procedures of the court for public information. *Id.* at 166-167. The Petitioners filed for a writ of mandamus, arguing that the judge's comments provided the defendants with a "ready-made" argument to distinguish it from the Mack case. *Id.* at 167.

The First Circuit reversed the denial of the recusal motion. First, it noted that the "crux" of the Petitioners recusal motion was that the judge's public comments suggested that the Petitioners' claims were less meritorious in comparison to the Mack case. *Id.* at 167. Next, the First Circuit looked at Canon 3(A)(6) of the Code of Judicial Conduct but cautioned that it was not deciding the case solely on that basis. *Id.* at 168. In fact, the Court noted that a judge could, in some circumstances, comply with the Code completely and still be required to recuse herself. *Id.* at 168. The First Circuit also stated that it was "not at all clear" that the judge had been commenting on the merits of the motion in front of her. *Id.* at 168. Furthermore, the Court noted the judge only spoke out in response to "provocative attempts to influence public opinion" that themselves might run afoul of professional ethics." *Id.* at 168.

However, what the First Circuit found dispositive was precisely the ambiguity of the statements. The Court observed that there was a "real possibility that a judge's statements may be misinterpreted because of the ambiguity of those statements." *Id.* at 170. It went on to

note that even "a judge's defense of her own orders, prior to the resolution of appeal, may create the appearance of partiality." *Id.* at 170. The First Circuit emphasized that this reflected no *actual* bias or prejudice by the judge, but that the ambiguity of the statement might give rise to a perception of bias. *Id.* at 170.

Here, we have yet another public statement made by a judge, just as was *In Re Boston's* case, that gives rise to the perception of bias. For a judge to admit that Mr. Fustolo's conduct so rankled her that she incorrectly ruled against him and did not take the appropriate time to consider Patriot's requests demonstrates palpable bias that is far less ambiguous than contained in the judge's statements to the Herald in *In Re Boston's*. Judge Feeney here stated in a public opinion that she ruled incorrectly because she didn't like Mr. Fustolo, a far more antagonistic statement of prejudice than the more ambiguous statement in *In Re Boston's*.

What is more, the Petitioners of *In Re Boston's* had the higher hurdle of mandamus to overcome, as the First Circuit noted: "[m]oreover, a petition for a writ of mandamus raises additional hurdles for the party seeking recusal….the jurisprudence of mandamus requires that an applicant for the writ . . . show both that there is a clear entitlement to the relief requested, and that irreparable harm will likely occur if the writ is withheld." *In re Boston* at 167 (citing and quoting other cases). In other words, in this matter, we have a combination of a much *more* damning admission of bias than in *In re Boston* combined with a *lower* hurdle for relief. Hence, the First Circuit

decision to reverse the denial of recusal here should be easier to grant than in the case of *In Re Boston's*.

In failing to recuse herself upon motion, Judge Feeney compounded her bias into a violation of Due Process. Mr. Fustolo literally brought to Judge Feeney's attention her bias, and how it now appeared to outside observers that she was biased. APPENDIX: 1556-1576. Yet Judge Feeney effectively hand-waved away these arguments in a summary decision, chalking Mr. Fustolo's motion up to merely being a delay tactic with no merit. ADDENDUM: 47. Thus, not only Judge Feeney exhibit bias against Mr. Fustolo, but she did not take seriously her expression of such bias in writing. Such insouciance in the face of her own words accusing her violated Mr. Fustolo's Due Process right to have an adjudicator who took accusations of bias seriously, especially when that adjudicator had admitted bias.

C. Judge Feeney's Failure to Recuse Herself Upon Motion Created A Structural Error Requiring A Complete Reversal and Vacatur Of Judge Feeney's Rulings.

The First Circuit is appropriately loathe to waste judicial resources, and the vacating of a 116-page decision after a six-day trial would, on first blush, appear to be so wasteful as to cause the denial of any motion to vacate it. However, at issue here is something more important than the judicious use of resources; it is Mr. Fustolo's Due Process right to an impartial adjudicator. The U.S. Supreme Court has made clear that violation of the Due

Process right to an impartial, non-biased adjudicator is a structural error requiring reversal. *Williams v. Pennsylvania,* 136 S. Ct. 1899, 1909 (2016). This admonition requires

Furthermore, even if structural error were not present from her statement alone, the fact that Judge Feeney self-admitted to her bias publicly and *then* refused to even treat seriously the motion to recuse—dismissing it in one-page, and stating it was merely a delay tactic--created a Due Process violation serious enough to warrant a new trial. Judge Feeney was aware of her prejudice, admitted to publicly, and even made a biased ruling that she reversed, all signs that, to a neutral observer, could be interpreted as proof that Mr. Fustolo could not receive a fair trial before her. Yet even when challenged directly about her bias with a motion to recuse herself, she rebuffed even considering the effects of her bias on Mr. Fustolo's Due Process rights. This out of hand disregard for the recusal motion created more of an appearance of bias, as it implied that Judge Feeney was not attempting to curb her bias in a manner that allowed Mr. Fustolo to have a fair trial. This caused a further perception that Judge Feeney had such a disregard for Mr. Fustolo's Due Process that inevitably her fairness became questionable to any observer. Thus, reversal of her final decision in this matter, and remand for a new judge to be appointed to hear the matter, is the constitutionally sound decision. The waste of judicial resources is not enough to overcome Mr. Fustolo's constitutional protections.

CONCLUSION

Mr. Fustolo asks that the First Circuit reverse the District Court's affirmation of the Bankruptcy Court's holdings, and order that the case be remanded to the Bankruptcy Court that Judge Feeney's holdings and final decision be reversed and vacated; and that Judge Feeney be recused.

Respectfully submitted,
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DATE

(*** *Certificate of Service and Addendum omitted****)

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-1308

[Filed March 8, 2023]

IN RE: STEVEN C. FUSTOLO

Debtor

STEVEN C. FUSTOLO

Appellant

v.

THE PATRIOT GROUP, LLC;
50 THOMAS PATTON DRIVE LLC

Appellees

PETITION OF APPELLANT STEVEN FUSTOLO FOR (1) PANEL REHEARING and (2) HEARING *EN BANC*

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(***Table of Contents and Table of Authorities omitted ***)

FED. R. APP. P. 35(b) STATEMENT
and
INTRODUCTION

Appellant Steven Fustolo requests a panel rehearing and an *en banc* hearing of this appeal for two reasons:

- it being "necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1).
- this appeal involves "question[s] of exceptional importance." Fed. R. App. P. 35(a)(2).

In sum, the Bankruptcy Judge's comments displayed bias that merited recusal. When the recusal was denied after a motion, the denial both violated Mr. Fusotlo his Due Process rights and also contradicted *In Re Boston's Children First,* 244 F.3d. 164 (1st Cir. 2001). Furthermore, the current standard of review for a denial of a motion to recuse in this Circuit is the abuse of discretion standard. However, this is not uniform among the circuits; both the

Seventh Circuit and, in certain circumstances, the Tenth Circuit have *de novo* review on the issue. Furthermore, at least one dissent in this Circuit has urged adopting *de novo* review as well. *In re U.S.*, 158 F.3d 26, 36 (1st Cir. 1998) (Torruella, J. dissent). Mr. Fustolo asks for this petition to be granted to address the question of whether the current standard remain or whether the *de novo* standard be adopted.

QUESTIONS/ISSUES PRESENTED

1. Did the Bankruptcy Judge's refusal to recuse herself after admitting bias violate Mr. Fustolo's constitutional rights to Due Process as well as federal statutes?

2. Did the refusal to recuse and the affirmation on appeal cause a contradiction with *In Re Boston's Children First,* 244 F.3d. 164 (1st Cir. 2001)?

3. Should the standard of review for a denial of a motion to recuse remain or should *de novo* review be adopted?

ARGUMENT

A. After admitting that her bias against Mr. Fustolo affected her judgment, the Bankruptcy Judge's failure to grant the subsequent motion to recuse violated Mr. Fustolo's Due Process rights, and the panel was incorrect to find that this was not an abuse of discretion.

On March 24, 2015, the Bankruptcy Judge issued a pre-trial order reversing an earlier ruling she had made,

writing that "the Court is compelled to observe... that the egregiousness of the [Mr. Fustolo's] conduct, which he did not adequately rebut, appears to have circumscribed thoughtful consideration of the appropriate relief obtainable by the Plaintiff and the best forum in which to obtain it." In other words, the Bankruptcy Judge admitted that her bias against Mr. Fustolo affected her judgment of relevant legal issues.

On April 19, 2016, still pre-trial, Mr. Fustolo moved to recuse the Bankruptcy Judge on the grounds of, *inter alia*, her admission of bias in the March 24, 2015 order. The Bankruptcy Judge denied the motion to recuse in a summary decision that refused to deal with the merits of the motion, but instead merely stated (without evidence) that the motion was just an attempt to delay. On appeal, a First Circuit panel in a summary decision stated without elaboration that the Bankruptcy Judge did not abuse her discretion in denying the motion to recuse.

"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." *Williams v. Pennsylvania,* 136 S. Ct. 1899, 1909 (2016). A failure to recuse is a structural error requiring reversal. *Williams* at 1909. However, the Due Process Clause is not the only basis for recusal, for it "demarks only the outer boundaries of judicial disqualifications." *Williams* at 1908. Recusal may also be had statutorily under both 28 U.S.C. § 455(a) and 28 U.S.C. § 455(b)(1), under both of which Mr. Fustolo moved to recuse.

Here, pre-trial, the Bankruptcy Judge admitted that bias affected her decision-making in this case; it was a clear-cut statement by the Bankruptcy Judge of bias, both in appearance and in reality. Mr. Fustolo properly moved for recusal pre-trial so as to prevent this bias from affecting the trial. As such, the Bankruptcy Judge abused her discretion in denying the motion to recuse, as it was plainly obvious bias had affected her judgment, and the First Circuit panel was in error to uphold the denial. Therefore, Mr. Fustolo asks that this petition be granted to correct the violation of his Due Process rights.

B. The court rulings conflict with *In Re Boston's Children First,* 244 F.3d. 164 (1st Cir. 2001).

As discussed in Part A, *supra*, t the motion to recuse was based on, *inter alia*, a statement by the Bankruptcy Judge that admitted bias. However, despite this, the Bankruptcy Judge refused to recuse, and a First Circuit panel summarily found that this was not an abuse of discretion.

These rulings are in conflict with *In Re Boston's Children First*, 244 F.3d. 164 (1st Cir. 2001). In that case, the First Circuit reversed a denial of a motion to recuse based upon a single sentence uttered by a trial judge to a newspaper. The sentence was a comparison of a previous case (called the "*Mack*" case) with the *In Re Boston's* matter: "[i]n the [*Mack*] case, there was no issue as to whether [the plaintiffs] were injured. It was absolutely clear every woman had a claim. [*In Re Boston's*] is a more complex case." *In Re Boston's* at 168. The First Circuit

reversed the denial of the motion to recuse not because the trial judge had commented on the merits of the case, but because there was a "real possibility that a judge's statements may be misinterpreted because of the ambiguity of those statements." *In Re Boston's* at 170. The First Circuit emphasized that this reflected no *actual* bias or prejudice by the judge, but that the *ambiguity* of the statement might give rise to a perception of bias. *Id.* at 170.

Here, the trial court and First Circuit panel's rulings conflict with the *In Re Boston's* ruling. In both cases, a single statement by a trial judge displayed the possibility of bias, or at least displayed ambiguity in the possible bias a statement reflected. However, while *In Re Boston's* reversed the denial of a motion to recuse on these grounds, the summary decision here upheld the denial of a motion to recuse. As such, Mr. Fustolo asks for this petition to be granted to resolve this non-uniformity of rulings.

C. The First Circuit should revisit the current standard of review on a motion to recuse and replace it with *de novo* review and then re-evaluate Mr. Fustolo's appeal under that standard.

In the First Circuit, the denial of a motion to recuse is reviewed under an abuse of discretion standard. *In re U.S.*, 158 F.3d 26, 36 (1st Cir. 1998) (Torruella, J. dissent). This is despite the urging of Chief Judge Torruella that this Circuit should adopt *de novo* review of recusal motions because such motions are mixed questions of law and fact.

In re U.S., 158 F.3d 26, 36 (1st Cir. 1998) (Torruella, J. dissent). Chief Judge Torruella argued that the abuse of discretion standard as applied to review of motions to recuse "runs contrary to both the letter and spirit of § 455(a)" [one of the statutes under which Mr. Fustolo sought recusal]. *In re U.S.*, 158 F.3d at 36. Judge Torruella found the abuse of discretion standard "is particularly disconcerting because it departs from the standard of review universally applied to mixed questions of law and fact, according to which legal conclusions are reviewed *de novo.*"*In re U.S.*, 158 F.3d at 36.

Furthermore, in *U.S. v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985), the Seventh Circuit established that *de novo* review was appropriate for motions to recuse under 28 U.S.C. § 455(b)(1) [the other statute under which Mr. Fustolo sought recusal]. The Seventh Circuit reasoned that de novo was appropriate because "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." *Balistrieri* at 1203.

In addition, the Tenth Circuit also applies *de novo* review to a denial of a motion to recuse if the lower court judge "did not create a record or document her decision not to recuse." *SAC & Fox Nation of OK v. Cuomo*, 193 F.3d 1162, 1168 (10th Cir. 1999). Such a situation is found here, where the Bankruptcy Judge summarily denied the motion to recuse without discussing the underlying biased statement and merely claimed the motion was in bad faith by Mr. Fustolo to delay trial.

Furthermore, the Brennan Center of Justice has also advocated for de novo review of interlocutory appeals of recusal motions. See Pozen, Sample, and Young, *Fair Courts: Setting Recusal Standards (*Brennan Center for Justice, 2008).

The rationale behind *de novo* review in these arguments is weighty, and Mr. Fustolo believes that the First Circuit should consider such arguments and replace the current standard with *de novo.* As such, he asks that the petition be granted so he may advocate for this change of standard.

CONCLUSION

Mr. Fustolo asks that this petition for rehearing and for *en banc* hearing be granted.

Respectfully submitted,
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By His Attorney,
/s/_____

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(*** *Certificate of Service and Addendum omitted****)