No. 23-1072

IN THE

Supreme Court of the United States

ALI HAMZA AL BAHLUL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS IN SUPPORT OF PETITIONER

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BRIEF OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS AS *AMICUS CURIAE*

The Association of Professional Responsibility Lawyers ("APRL") respectfully submits this brief as amicus curiae. APRL appears in order to emphasize the critical importance of the federal Code of Judicial Conduct (the "Code") applicable to circuit judges and to urge the Court to clarify that a federal judge applying 28 U.S.C. § 455 must take account of the requirements of the Code in making a discretionary recusal decision.[1]

INTEREST OF *AMICUS CURIAE*

APRL has more than 400 members in 49 U.S. jurisdictions and in three foreign countries. Its membership includes lawyers who regularly represent other lawyers (and other lawyers' clients) in all aspects of legal ethics and professional responsibility matters, including issues involving risk management, legal malpractice, and other aspects of the laws governing the practice of law. The organization's members also include academics and judges. It is the largest organization of private practitioners in the world devoted exclusively to this area of the law.

APRL and its members are deeply committed to professional responsibility and to advancing and improving the laws governing the practice of law, including professional responsibility rules applicable to judges. APRL marshals the talent, energy, and perspectives of

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[1] Notice pursuant to Sup. Ct. R. 37.2 was given to both parties more than 10 days prior to filing this brief. No party or counsel for a party helped to draft this brief, and no party or counsel to a party made a monetary contribution to fund the filing of this brief. Sup. Ct. R. 37.6.

its members to bring about positive change to legal ethics and professional responsibility law. Its efforts in this regard include issuing public statements and filing amicus curiae briefs, in both state and federal court. *See, e.g., In re Grand Jury*, No. 21-1397 (U.S. 2022); *Schoenefeld v. New York*, No. 16-780 (U.S. 2016); *Nat'l Ass'n. for the Advancement of Multijurisdictional Practice v. Lynch*, No. 16-404 (U.S. 2016).

A vitally important issue in this case is whether a circuit judge should have recused himself under 28 U.S.C. § 455(a) and under Canon 3C of the Code of Judicial Conduct when assigned to a circuit panel reviewing the conviction and life sentence of a prisoner with respect to whom that judge previously acted as counsel for the government in the prisoner's habeas corpus proceeding. APRL's focus is on whether that statute must be construed to incorporate all the disqualification standards of the Code of Judicial Conduct Canon 3C.

That question directly touches APRL's mission. APRL members are called on regularly to advise lawyers, judges, and clients about the scope of their ethical obligations, not only in federal matters but in matters in each of the other jurisdictions in which APRL members practice. APRL has an interest in ensuring that judges are held to the highest standards of integrity, because the confidence of our citizenry in the courts depends upon the belief that our courts – both at the state and federal levels – are beyond reproach with respect to judicial ethics.

SUMMARY OF THE ARGUMENT

It is a bedrock principle of 28 U.S.C. § 455 and of the federal Code of Judicial Conduct, Canon 3C(1) that a federal judge must recuse himself or herself whenever that judge's "impartiality might reasonably be questioned." At least two recusal decisions of the U.S. Court of Appeals, including the one below, seriously undermine that principle by limiting its application only to "rare and exceptional circumstances." But there is no basis in the statutory language, in the Congressional record, or in public policy for that limitation.

Judge Katsas' reliance on that limitation to justify his participation in the matter below undermines that bedrock principle and the importance that it has to public confidence in the judiciary. That decision was wrong, and this Court should grant certiorari, correct the error, and establish unequivocally that recusal is required whenever a judge's "impartiality might reasonably be questioned."

ARGUMENT

I. THE FEDERAL CODE OF JUDICIAL CONDUCT MUST BE A PART OF THE DECISIONMAKING OF A FEDERAL JUDGE IN MAKING RECUSAL DETERMINATIONS UNDER 28 U.S.C. § 455(a).

Before a significant overhaul in 1974, 28 U.S.C. § 455 provided that "[a]ny justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest . . . or is so related or connected with any party or his attorney as to render it improper, in his opinion, to sit on the trial, appeal or other proceeding therein." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1310 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190

(1983) (quoting previous statute). In 1974, Congress set out to remedy two key problems with the former version of the statute: (1) it provided no guidance as to how to determine the substantiality of a judge's interest in a party, and (2) "the sole arbiter of the question of the substantiality of the judge's interest was the very judge whose impartiality was being questioned." *Id.* at 1310-11. Congress sought to establish specific standards, noting that in doing so it could "eliminate the uncertainty and the ambiguity arising from the language in the existing statute and will have aided the judges in avoiding possible criticism for failure to disqualify themselves." *Id.* at 1311 (quoting H.R. Rep. No. 1453 at 6, 93rd Cong. 2d Sess. (1974)).

As Congress was considering amending the statute, the American Bar Association adopted a new ABA Code of Judicial Conduct.[2] *In re Cement Antitrust Litig.*, *supra*, 688 F.2d at 1311. Congress revised 28 U.S.C. § 455 intending to bring it into conformity with Canon 3C of the Code. *Id.; see also* 120 Cong. Rec. 36268 (1974) ("this bill would amend section 455 of title 28, United States Code, by making the statutory grounds for self-disqualification of a judge in a particular case conform generally with recently adopted [C]anon 3(c) of the American Bar Association's Code of Judicial Conduct, which relates to disqualification of judge for bias, prejudice, or conflict of interest").

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[2] The ABA Code of Judicial Conduct was adopted in August 1972. The Code of Conduct for United States Judges "was approved by the Judicial Conference of the United States in September 1973 and is a virtually identical adaptation of the ABA Code." *Va. Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 407 F. Supp. 323, 327 n.8 (E.D. Va. 1976), *vac'd on other grounds sub nom. In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir. 1976).

That Congress revised 28 U.S.C. § 455 intending to bring it into line with Canon 3C has been recognized in one Supreme Court opinion. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 870-71 (1988) (Rehnquist, White, and Scalia, JJ., dissenting) ("Section 455 was substantially revised by Congress in 1974 to conform with the recently adopted Canon 3C of the American Bar Association's Code of Judicial Conduct (1972)," explaining that "Subsection (a) was drafted to replace the subjective standard of the old disqualification statute with an objective test" and that "Congress intended the provisions of § 455(b) to remove any doubt about recusal in cases where a judge's interest is too closely connected with the litigation to allow his participation").

Critical to this analysis is the opening "catch-all" provision of § 455(a), which states that a judge shall disqualify "himself" in any case in which the judge's "impartiality might reasonably be questioned." That objective test is substantively identical to the Code's Canon 3C(1).

Courts across the country have recognized that Canon 3C(1) and § 455 are functionally the same. *See, e.g.*, *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 136, 140 (2d Cir. 2007) (discussing 28 U.S.C. § 455 "and its more-or-less identical analogue in the Code of Conduct"); *In re School Asbestos Litigation*, 977 F.2d 764, 783 (3d Cir. 1992) (Section 455 "was based on the nearly identical language of Canon 3C of the Code"); *Ragozzine v. Youngstown State Univ.*, 783 F.3d 1077, 1080 (6th Cir. 2015) ("28 U.S.C. § 455 is almost word-for-word identical, with merely editorial differences, to Canon 3C of the Code of Conduct for United States Judges"); *Veneklase v. City of Fargo*, 236 F.3d 899, 901-02 (8th Cir. 2000) (same); *Benson v. Fort*

Mill Sch. / York Cty. Dist. 4., C. A. 22-614-SAL-SVH, 2023 WL 3467648, at *1 (D.S.C. Apr. 19, 2023) (same).

Courts have therefore drawn on the provisions of the Code of Conduct, and interpretations of it, to inform their decisions under § 455. For example, in *In re School Asbestos Litigation, supra*, the Third Circuit explained that the near-identical nature of the statute and Code "suggests that appearances of partiality are likely if conduct is inconsistent with the related canons of judicial ethics regarding judges' out-of-court associations with actual and potential litigants." 977 F.2d at 783. Similarly, in *Draper v. Reynolds*, 369 F.3d 1270, 1280 (11th Cir. 2004), the Eleventh Circuit drew on an advisory opinion issued by the Committee on the Codes of Conduct of the Judicial Conference of the United States addressing recusal in a similar situation to inform its conclusion.

In *United States v. Microsoft Corp.*, 253 F.3d 34, 114 (D.C. Cir. 2001) (en banc), the D.C. Circuit stated that, because "[t]he very purpose of § 455 is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible . . . violations of the Code of Conduct may give rise to a violation of § 455(a) if doubt is cast on the integrity of the judicial process" (internal quotation marks omitted, citing *Liljeberg v. Health Servs. Acquisition Corp., supra*). The en banc court concluded that the district judge in that case violated both the Code and the statute because his interviews with reporters created an appearance that he was not acting impartially. *Id.* at 115-16.

The D.C. Circuit more recently echoed this line of reasoning in *In re Al-Nashiri*, 921 F.3d 224, 234 (D.C. Cir. 2019), in which it again cited *Liljeberg* and explained that 28 U.S.C. § 455 and the Code of Conduct

for United States Judges (in addition to other authorities) "speak with one clear voice when it comes to judicial recusal: judges 'shall disqualify' themselves in any 'proceeding in which [their] impartiality might reasonably be questioned.'" In light of that "one clear voice," the panel concluded that recusal was required when a judge in a Guantanamo capital case had applied to work for the U.S. Department of Justice, because "Unbiased, impartial adjudicators are the cornerstone of any system of justice worthy of the label" and "'a judge cannot have a prospective financial relationship with one side yet persuade the other that he can judge fairly in the case." 921 F.3d at 233-35 (quoting *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985)).[3]

Thus, the provisions of the Code must be applied by federal judges as an authoritative guide to the meaning of § 455, particularly including § 455(a).

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[3] As detailed by the petitioner in this case, *see* Petition for Certiorari, *Bahlul v. United States,* No. 23-1072 at 26-28, a few D.C. Circuit decisions have left that circuit standing alone among the circuits with respect to whether § 455(a) and § 455(b) operate as independent bases for recusal. *See In re Hawsawi,* 955 F.3d 152, 159-60 (D.C. Cir. 2020). Given the D.C. Circuit's prior 2001 and 2019 en banc and panel decisions agreeing that § 455 and the Code of Conduct both apply, that stance on the relationship between § 455(a) and § 455(b) is puzzling. The *Hawsawi* panel decision, which cited each of *United States v. Microsoft Corp.* and *In re Al-Nashiri,* nevertheless strayed from the principles they embraced without acknowledging their holdings on the appearance of impropriety. *Hawsawi* instead relied heavily on *Baker & Hostetler LLP v. Dep't of Commerce,* 471 F.3d 1355 (D.C. Cir. 2006), discussed in Part II.

II. RECENT RECUSAL DECISIONS, INCLUDING THIS ONE, DEMONSTRATE THAT FEDERAL JUDGES NEED GUIDANCE FROM THIS COURT ON HOW TO EXERCISE DISCRETION UNDER 28 U.S.C. § 455(a) WITH RESPECT TO THEIR OBLIGATIONS UNDER THE CODE OF JUDICIAL CONDUCT.

The language of both § 455 and of Code Canon 3C(1) show that the "catch-all" language is not displaced by the subsequent, more specific, provisions of the subsections that follow them, but that the obligations are cumulative. Section 455(b) follows § 455(a) by stating that a judge shall "also" disqualify himself in the described circumstances, including § 455(b)(3) relating to government attorneys. Canon 3C(1), for its part, states that the "catch-all" provision "includes but is not limited to" (emphasis added) the additional listed circumstances, including Canon 3C(1)(e), which is similar to § 455(b)(3).

In *Baker & Hostetler LLP v. Dep't of Commerce*, 471 F.3d 1355 (D.C. Cir. 2006), then-newly-appointed Circuit Judge Brett Kavanaugh declined to recuse himself in a case about a Freedom of Information Act ("FOIA") request related to documents relevant to the Department of Commerce's investigation of Canadian softwood lumber imports, an issue on which he had participated on policy issues as part of the George W. Bush administration. After concluding that § 455(b)(3) (which addresses the recusal of judges who formerly served in government in "the proceeding" or expressed an opinion on "the particular case") did not require his recusal, Judge Kavanaugh turned to § 455(a) and stated as follows:

> To be sure, Congress could not foresee every conceivable recusal scenario that might occur. Therefore, rare and extraordinary circumstances arising out of prior government employment – but not covered or envisioned by § 455(b)(3) – conceivably could occur and support recusal under § 455(a).

471 F.3d at 1358 (emphasis added). Judge Kavanaugh concluded that the facts in that case were not "such an extraordinary situation." *Id.*

APRL submits that the decision in *Baker & Hostetler* was correct, and that the language quoted above was unnecessary to that decision. That a former government official had a policy role with respect to an international trade matter does not without more mean that, once the official became a judge, that judge could not both be fair and be perceived as fair in resolving issues under FOIA to the discoverability of documents related to the trade matter. The problem, however, is the deference that later decisions have given to the quoted language, as if *Baker & Hostetler* (an opinion by one judge) had established as precedent a new "rare and extraordinary circumstances" test under § 455(a). Indeed, the *Baker & Hostetler* opinion acknowledged that Congress had taken "guidance" from the Code, and it offered no textual or other support to suggest that the decision was intended to introduce a new limitation on § 455(a). *Id.* at 1357-58.

Congress, in adopting § 455(a), expressly intended to clarify the previously vague standards of the statute. That express intent is contravened if the statute's application depends on the *subjective* judgment of the judge about whether the circumstances are sufficiently "rare and extraordinary" to warrant its application, rather than on the *objective* reasonableness standard

that § 455(a) was adopted to accomplish. The *Baker & Hostetler* opinion offered no justication to reverse that Congressional intent, so appears not to have intended such a result.

However, the decision by Judge Katsas not to recuse himself in this case (*Bahlul v. United States*, 61 F.4th 1008 (D.C. Cir. 2023)), relied almost entirely upon the "rare and extraordinary circumstances" language in *Baker & Hostetler*. Although Judge Katsas stated that the Code "imposes the same requirements" as § 455, 64 F.4th at 1009, he ignored both the statute's and the Code's cumulative language and expressly downplayed § 455(a) as a "general 'catch-all' provision" that should not "lightly" be used to "shift the lines specifically drawn in section 455(b)." 61 F.4th at 1011. Instead he said that should occur only in "rare and extraordinary circumstances." *Id.* He then posited tersely that such circumstances are "not present here," thus effectively writing § 455(a) out of the statute for all cases where § 455(b)(3) applies as well.[4]

In fairness to Judge Katsas, the "rare and extraordinary circumstances" test had since 2006 become a bulwark against recusal in the cases, with *Baker & Hostetler* cited by several subsequent recusal decisions as if it were controlling authority rather than an

[4] Also of significant note is Canon 3(D) of the Code of Judicial Conduct which, with respect only to the "catch-all" language of Canon 3(C)(1), permits a judge to remain on a case despite facts in which the judge's impartiality might reasonably be questioned but only if the parties and their counsel all agree in writing or on the record that the judge "should not be disqualified" and only if the judge is then willing to participate. The distinction drawn by Canon 3(D) would make no sense if the "catch-all" language were not separately enforceable beyond the specific language in subsections (a) through (e), language which is paralleled in § 455(b).

opinion by one judge in one context. *See Perry v. Schwarzenegger*, 630 F.3d 909, 915 (9th Cir. 2011); *Rahmann v. Johanns*, 501 F. Supp. 2d 8, 15 (D.D.C. 2007); *In re Hawsawi*, 955 F.3d 152, 159-60 (D.C. Cir. 2020); *Rubashkin v. United States*, Nos. 13-CV-1028-LRR & 08-CR-1324-LRR, 2016 WL 237119 at *31 (N.D. Iowa 2016); *Montgomery v. Barr*, 502 F. Supp. 3d 155, 170-71 (D.D.C. 2020); *Penate v. Kaczmarek*, C. A. 3:17-30119-KAR, 2021 WL 4312007 at *8 (D. Mass. 2021); *Wine v. U.S. Dep't of Interior*, No. 1:21-CV-03349, 2022 WL 888197 at *1 (D.D.C. 2022); *Common Cause Florida v. Lee*, No. 4:22-cv-109-AW-MAF, 2022 WL 2343366 at *4 (D.D.C. 2022); *Yaeger v. United States*, No. 5:21-CV-00064, 2022 WL 3137725 at *1 (C.D. Cal. 2022) (all citing *Baker v. Hostetler* as requiring "rare and extraordinary circumstances" for recusal under § 455(a)).

This Court has never adopted the "rare and extraordinary circumstances" language from the *Baker & Hostetler* opinion. This Court's most recent decision construing § 455(a) (as opposed to decisions of an individual justice – *e.g., Cheney v. U.S. District Court*, 541 U.S. 913 (2004) (Scalia, J.)) was thirty years ago, in *Liteky v. United States*, 510 U.S. 540 (1994). In that case, the Court unanimously decided that the trial judge's previous rulings in the case did not require recusal, but the decision was divided on whether bias or prejudice needed to be from an extrajudicial source.

To the point of this case, both the majority and concurring opinions in *Liteky v. United States* agreed that § 455(a) is broader than the specific limitations in § 455(b). The majority opinion noted that § 455(a) was "entirely new" in the 1974 amendments, adding to the provisions of paragraphs (b)(2) through (b)(5) which "merely rendered objective and spelled out in detail the 'interest' and 'relationship' grounds of recusal that had previously been covered by § 455." 510 U.S. at 548.

The remaining justices in *Liteky* pointed to *Liljeberg v. Health Services Acquisition Corp., supra*, a case in which a judge was unaware of a financial interest he had in a litigation, which "asked [the Supreme Court] to interpret § 455(a) in light of § 455(b)(4), which provides for disqualification only if the judge 'knows that he . . . has a financial interest . . . .'" 510 U.S. at 566. This Court in *Liljeberg* rejected that view and emphasized the "important differences between subsections (a) and (b)":

> *Liljeberg* teaches . . . that limitations inherent in the various provisions of § 455(b) do not, by their own force, govern § 455(a) as well.

Id. Judges Katsas's view that § 455(b)(3) negates § 455(a) therefore cannot stand, as a matter of textual analysis, of Congressional intent, or of this Court's precedent dating back to 1988.[5]

The *Baker & Hostetler* opinion, moreover, did not attempt to shed light on what a "rare and extraordinary circumstance" might actually be. Nowhere in the federal case law or in the statutory history is there any support for that language as a controlling test. In the 18 years following the *Baker & Hostetler* decision, not one federal court has encountered such a "rare and extraordinary circumstance."

Perhaps until now.

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[5] Had the *Baker & Hostetler* opinion been intended to set a new precedent under § 455(a), it no doubt would have analyzed *Liteky v. United States* 510 U.S. 540 (1994), and *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847 (1988), this Court's controlling precedents, but neither Supreme Court decision was cited or discussed in the opinion.

III. JUDGE KATSAS'S RELIANCE ON THE "RARE AND EXTRAORDINARY CIRCUMSTANCES" LANGUAGE TO NEGATE THE REASONABLE PERSON TEST OF § 455(a) AND OF CODE OF CONDUCT § 3C(1) IN THE CONTEXT OF A LIFE SENTENCE OF IMPRISONMENT CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

As compared with a FOIA document dispute (the subject of the *Baker & Hostetler* litigation), the context and consequences of a case involving a person's conviction to a life sentence of imprisonment without parole are of far greater weight. This might be, therefore, the first ever "rare and exceptional circumstance" meeting even the *Baker & Hostetler* language.

As was carefully detailed in Mr. Bahlul's certiorari petition at pages 26-28, the issue in this case has generated a clear split of authority among the circuits – one in which the D.C. Circuit stands alone in its recent interpretation of the relationship between §§ 455(a) and 455(b) upon which Judge Katsas relied. That alone warrants a grant of certiorari in this critically "important matter" under U.S. Supreme Ct. Rule 10(a), which relates to public confidence in the federal judiciary.

But also among the standards in U.S. Supreme Ct. Rule 10(a) for grant of certiorari is where a decision of a Court of Appeals on an important federal question has "so far departed from the accepted and usual course of judicial proceedings . . . so as to call for the exercise of this Court's supervisory powers." Judicial ethics have become a matter of serious concern by some among our citizenry in recent years, this Court recently affirmed the importance of judicial ethics by

formally applying a version of the Code of Conduct to its own activities, and the nation is watching to see how this Court applies those principles to the rest of the federal judiciary. While APRL believes that this is a "rare and extraordinary case" (whatever the *Baker & Hostetler* opinion may have meant by that phrase 18 years ago), in that it involves a foreigner being imprisoned for life by our nation in the highly-public and controversial context of imprisonment in Guantanamo Bay, that language has no sound basis in federal law as a test under the statute, and this Court should reject any such use of that language.

APRL therefore respectfully submits that this is a perfect case for this Court to provide tangible guidance to the lower federal judiciary on a topic that rarely sees appellate review, establishing that the boundaries of judicial discretion in recusal matters do not include relegating the question under the Code of whether a judge's impartiality "might reasonably be questioned" even to a small class of such extraordinary cases as this, but that whenever a judge's impartiality might be questioned by fair-minded persons, both § 455(a) and Canon 3C(1) of the Code objectively require that the judge recuse himself or herself to ensure the appearance of impartiality, over and above the more specific requirements of § 455(b) and of Canon 3C(1)(a)-(e).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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