No. 25-355

In the Supreme Court of the United States

JAMES DONDERO; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; THE DUGABOY INVESTMENT TRUST; NEXPOINT REAL ESTATE PARTNERS, LLC; AND GET GOOD TRUST, PETITIONERS

v.

STACEY G. JERNIGAN; HIGHLAND CAPITAL MANAGEMENT, L.P., RESPONDENTS

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This case presents two important circuit splits. In an amended opinion on rehearing the opposition brief never mentions, the Fifth Circuit stated: "Due to the similarities between the characters in Chief Judge Jernigan's novel and the litigants currently before her court, a strong argument could be made that she had a duty to recuse." App. at 17a–18a. While a "cause for concern," that "strong argument" did not reach the high bar for overturning a judge's declination to recuse on mandamus. *Id.*

The Respondent Highland—speaking through the managers Judge Jernigan appointed to run it—dedicates

most of its opposition to attacking Mr. Dondero or defending Judge Jernigan's decision not to recuse. None of that is reason to defer resolving the split of circuit authority on the standard for appellate review of those arguments. This Court should grant review.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE MULTIPLE RIPE CIRCUIT SPLITS

A. The Respondent Does Not Refute the Split of Circuit Authority on the Standard of Review that Applies to Recusal Decisions

The Seventh Circuit consistently and repeatedly has held that orders denying recusal motions under 28 U.S.C. § 455 are subject to de novo review. *See* Pet. 17–19; *United States v. Balistrieri*, 779 F.2d 1191, 1202–03 (7th Cir. 1985). Every other circuit reviews a judge's recusal decisions under an abuse-of-discretion standard. *See* Pet. 19–23. The Court should resolve this split.

The Respondent claims that the Court's intervention is unnecessary because (according to the Respondent) the Seventh Circuit is "taking steps to align itself" with the abuse-of-discretion standard deployed by other circuits. Opp. 19. The Respondent is incorrect. The Seventh Circuit has only doubled down on its de novo standard in recent years. *See United States v. Simon*, 937 F.3d 820, 826 (7th Cir. 2019) ("[W]e review a preserved § 455(a) claim *de novo*."); *United States v. Atwood*, 941 F.3d 883, 885 (7th Cir. 2019) (Barrett, J.) ("Atwood raised recusal for the first time on appeal, but we review his claim de novo…."); *United States v. Barr*, 960 F.3d 906, 919 (7th Cir. 2020) ("We review preserved claims under § 455(a) *de novo*."); *United States v. Walsh*, 47 F.4th 491, 498 (7th Cir. 2022)

("We review a district court's denial of a defendant's motion for recusal made under 28 U.S.C. § 455 de novo."); *Dunkley v. Ill. Dep't of Human Servs.*, No. 23-2215, 2024 WL 1155448, at *3 (7th Cir. Mar. 18, 2024) ("We review the district court's denial of a motion to recuse de novo.").

The Respondent falsely claims that the ruling in *Walsh* "shows that" the Seventh Circuit "is moving away from *de novo* review." Opp. 20. *Walsh* merely applied deferential review to a district court's *factual* determinations underlying an order denying recusal. *See* 47 F.4th at 498. At the same time, *Walsh* emphatically reaffirmed the Seventh Circuit's longstanding position that the ultimate decision denying recusal is reviewed de novo. *See* 47 F.4th at 498 ("We review a district court's denial of a defendant's motion for recusal made under 28 U.S.C. § 455 de novo."); *id.* ("[W]e stand alone as the only circuit to employ a de novo standard of review to § 455 recusal decisions; every other circuit reviews them for abuse of discretion."). The Seventh Circuit's de novo review standard remains as entrenched today as it was before *Walsh*.

Against all this authority, the Respondent musters only two decades-old decisions citing an outdated standard, *United States v. Franklin*, 197 F.3d 266, 269 (7th Cir. 1999); *Tezak v. United States*, 256 F.3d 702, 716 (7th Cir. 2001), and one unpublished outlier decision that ignores rather than applies the governing circuit precedents, *Whitlow* v. *Bradley Univ.*, 722 Fed. App'x 592, 593 (7th Cir. 2018). The Respondent uses these cases to argue that the Seventh Circuit applies de novo review to recusal decisions only "in some cases," and suggests that the Seventh Circuit is no less likely to use an abuse-of-discretion

standard depending on judicial whims. Opp. 19. But anyone who actually reads the Seventh Circuit's cases will see that the court has consistently applied de novo review to recusal decisions for 25 years, save for one unpublished decision that inexplicably ignores circuit precedent and has never been followed in any subsequent ruling.

The Respondent observes that this Court has previously denied petitions presenting this issue. Opp. 18–19. But the reasons for denying certiorari in those cases are not present here. The petitioners in *Kadamovas v. United States*, No. 18-7489, and *Mikhel v. United States*, No. 18-7835, were death-row inmates who brought feeble recusal claims and invoked the split in a last-ditch effort to obtain a delay of their execution dates. And the recusal claims brought in the other two cases were so weak that it was not even conceivable that the standard of review might have affected the ultimate outcome. *See Lechuga v. United States*, No. 20-745, U.S. Opp. Br. at 6; *Fustolo v. The Patriot Group, LLC, et al.*, No. 23-281, Opp. Br. at 6 ("[T]here is no rational basis to support his recusal arguments, assuming he did not waive them"). In this case, by contrast, the court of appeals recognized that "a strong argument could be made that [the Bankruptcy Judge] had a duty to recuse" but that the case for recusal did not meet the deferential standard review it was applying. Pet. App. 17a. None of these previous denials is reason to allow a 12-1 circuit split to linger into perpetuity.

B. There Is an Additional Circuit Split on the Standard of Review When Litigants Challenge a Recusal Decision through Mandamus

Certiorari is also appropriate because the petition presents an additional circuit split over the standard for reviewing recusal decisions in mandamus proceedings. *See* Pet. 23–25.

The Respondent incorrectly denies the existence of this split of circuit authority. Opp. at 20–23. The Respondent's insistence that the Fifth Circuit applied only one level of deference to the lower courts on Judge Jernigan's recusal is contrary to the text of the opinion. It explained that "recusal decisions are reviewed for abuse of discretion" and that, when presented on mandamus, "it must be clear and indisputable that Chief Judge Jernigan is required to recuse." Pet. App. 8a; *see also id.* 17a–18a (the district court "didn't *abuse its discretion* in finding that the Dondero Parties lack a *clear and indisputable* right to mandamus relief") (emphasis added).[1]

And the Respondent fails to account for the Seventh Circuit's application of de novo review in mandamus proceedings. *See In re Hatcher*, 150 F.3d 631, 637 (7th Cir.

1. The Respondent mischaracterizes the decisions of the Fourth and Ninth Circuits, which make clear that litigants on mandamus must make a clear and indisputable showing of an abuse of discretion. *See In re Moore*, 955 F.3d 384, 388 (4th Cir. 2020) ("This is not a direct appeal, in which we would review a judge's recusal decision under the ordinary abuse-of-discretion standard. Instead, Moore is seeking a writ of mandamus …. So to prevail here, Moore must show … that he has a 'clear and indisputable' right to that relief."); *In re Creech*, 119 F.4th 1114, 1120–21 (9th Cir. 2024) (requiring a "clear abuse of discretion" before reversing a recusal decision on mandamus).

1998); *In re Sherwin-Williams Co.*, 607 F.3d 474, 477–78 (7th Cir. 2010); *In re Gibson*, 950 F.3d 919, 924 (7th Cir. 2019) (the Seventh Circuit has not "overrule[d] the prior holdings on using a *de novo* standard for mandamus petitions"). So there is, at the very least, a split between the Fifth and Seventh Circuits over the standard of review for recusal petitions in mandamus proceedings.

And, contrary to the Respondent's argument (Opp. 23), both the Fifth Circuit's and the Seventh Circuit's approaches conflict with the law of the Third Circuit, which applies a collapsed abuse-of-discretion standard when reviewing recusal decisions on mandamus. *In re Kensington Int'l Ltd.*, 368 F.3d 289, 301 (3d Cir. 2004) ("When the need for a writ of mandamus is determined by this court to be 'clear and indisputable,' a district judge's decision not to recuse … necessarily also will have been an abuse of discretion or a clear legal error.").

II. THERE ARE NO VEHICLE PROBLEMS THAT COUNSEL AGAINST CERTIORARI

A. The Decision Below Raises the Questions Presented

The Respondent contends the Fifth Circuit considered only whether the *district court* abused its discretion by denying mandamus, rather than asking whether the bankruptcy judge abused her discretion by denying recusal. Opp. 12–14. Mr. Dondero, however, is asking this Court to resolve whether orders denying recusal are reviewed de novo or for abuse of discretion, and that issue is presented regardless of whether the Fifth Circuit reviewed the original ruling of the bankruptcy judge or the district court's order denying mandamus relief. If this

Court agrees with the Seventh Circuit, then de novo review will apply at *all* stages of review—the district court's initial review of the bankruptcy judge's recusal decision, and any subsequent review of the district court's ruling in the court of appeals or the Supreme Court of the United States.

The argument is also a misreading of the opinion, which clearly held that "recusal decisions are reviewed for abuse of discretion" and that, when presented on mandamus, "it must be clear and indisputable that Chief Judge Jernigan is required to recuse." Pet. App. 8a.

To the extent the Fifth Circuit later stated it viewed the district court's denial of mandamus also as discretionary, the Fifth Circuit might have been applying an *additional*, third layer of deference to the lower courts. Whether the Fifth Circuit's layers of deference to the lower courts' decisions with respect to recusal are two or three, they are both too many and in tension with the approach of other circuit courts.

B. The Record Status of the Novels and the Alleged Untimeliness of Recusal Requests Are Irrelevant to Certworthiness

The Respondent then turns to threshold arguments against the reversing the recusal decision that the Fifth Circuit did not take up. The Fifth Circuit instead addressed the merits of recusal directly, albeit under a deferential standard of review that conflicts with other circuits.

If this Court grants the petition and adopts the de novo standard of review for recusal decisions, then the lower courts could consider any such lingering arguments

on remand, if they have not been waived. This Court, after all, is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

The arguments are also wrong. The Respondent complains that the novels were not physically placed in the court record. Opp. 15. But they are *published books*, which courts pull from the shelves and use, rather than having them placed in the record. *See, e.g., Werk v. Parker*, 249 U.S. 130, 133 (1919). Indeed, that the Bankruptcy Judge extrajudicially published her views on hedge funds and Mr. Dondero to the world in bound volumes, for all to buy and read, is the problem here.

Nor were the recusal requests untimely. Opp. 15. *Hedging Death* has a publication date of 2022, and there is no dispute that Mr. Dondero raised it as it began to more widely circulate and came to his attention.

C. The Respondent's Ad Hominem Attacks on Mr. Dondero Are Irrelevant to the Certworthiness of the Questions Presented

The Respondent argues that certiorari should be denied because Mr. Dondero has "unclean hands," and its entire opposition is rife with ad hominem attacks on Mr. Dondero. Opp. 1, 2, 17.

How these accusations affect the certworthiness of the questions presented is beyond our comprehension. This Court does not hesitate to grant certiorari petitions from those under indictment for serious crimes and other allegedly unsavory characters so long as their petitions present certworthy issues in need of this Court's resolution. This Court simply does not consider the asserted moral

standing of a litigant when deciding whether to grant certiorari.

The allegations are also wrong. The Respondent claims that Mr. Dondero threatened "to burn the place [the Highland fund] down," if the bankruptcy did not go his way. Opp. at 1, 5, 17. That is false, and its sole source is the self-serving and -perpetuating assertion of the manager that the Bankruptcy Judge appointed to run Highland. Pet. App. 66a (referring to the asserted and hearsay statement). To the contrary, when the same manager fired all of Highland's employees and voided their promised compensation, Mr. Dondero saved them and their families by covering these losses with his personal funds and hiring them into new endeavors.[2] That manager also obfuscated the financial condition of Highland in order to justify offloading its assets and paying himself and other bankruptcy professionals hundreds of millions. Pet. 5.

For objecting to these and other steps unnecessarily to liquidate Highland, the manager and the Bankruptcy Judge, at various points, have labelled Mr. Dondero a "serial litigator" or "litigious" or "vexatious." Opp. 1, 5–6. The Respondent's harping on this reflects little more than the difficulties inherent in seeking relief from a court that has demonstrated evidence of bias.

To the extent that the Respondent quotes appellate decisions reviewing the Bankruptcy Judge's negative characterizations of Mr. Dondero while imposing sanctions on him, it is worth noting that the district courts and

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2. Hr'g Tr. at 146:5–16, 170:10–21, *Highland Capital Mgmt., L.P. v. Dondero*, No. 20-03190-sgj (Bankr. N.D. Tex. Mar. 25, 2021) (ECF No. 138).

Fifth Circuit reviews those for an "abuse of discretion." *Conner v. Travis County,* 209 F.3d 794, 799 (5th Cir. 2000). That only underscores the importance of ensuring the bankruptcy judge's impartiality.

Nevertheless, the allegations of past litigation conduct are not relevant. Lower courts and judges are assigned to police the boundaries of zealous advocacy by imposing sanctions on litigants and lawyers who engage in vexatious or unreasonable litigation tactics. But the Supreme Court does not sanction litigants by denying their certiorari petitions as punishment for their alleged past misdeeds.

The Respondent should focus on arguments that are actually relevant to certiorari. It insults the Court to launch ad hominem attacks and expect a justice or pool-writer to recommend against certiorari on the ground that Dondero is supposedly a bad guy.[3]

D. The Respondent's Arguments on the Merits of Whether Recusal is Warranted Do Not Matter to Certworthiness

The Respondent argues that certiorari should be denied because it insists that Dondero's recusal arguments would fail under any standard of review. Opp. 7–12. The premise of this argument is dubious. The Fifth Circuit certainly suggested this case turned on the standard of review, finding on rehearing that "a strong argument could be made that [Judge Jernigan] had a duty to

3. Petitioners served Judge Jernigan with the petition two days after the petition was filed (September 22, 2025), as reflected in an amended certificate of service filed with the Court. *See* Opp. at 17.

recuse," but it also found that this "strong argument" did not rise to the level required to clear the hurdle of its standard of review. App. 8a, 17a–18a. The Respondent, remarkably, fails to mention the issuance of this amended opinion, much less this key passage.

In any event, this argument against certiorari is a non sequitur. To obtain certiorari, Mr. Dondero needs only to demonstrate a circuit split on the questions presented. If the Respondent's merits arguments somehow have any ballast, the Court can remand to the Fifth Circuit to consider them.

Even if it were relevant at this stage, the Respondent's list of dissimilarities between the books and Mr. Dondero's life does little to address reasonable questions of her impartiality. A step back is appropriate: Judge Jernigan wrote books featuring a bankruptcy judge as protagonist and denigrating the hedge-fund industry in general and the literary hedge fund and its manager in particular. She called that hedge fund *the same name* that Mr. Dondero's hedge fund had been called and built a character (Cade Graham) with remarkable parallels to the real Mr. Dondero.[4] She should not have been doing that, at least while presiding over cases involving the hedge-fund industry and Mr. Dondero.

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4. Contrary to the Respondent's argument that the judge was unaware of the Ranger name of Mr. Dondero's fund (Opp. 9-10 n.1), the record of the cases before her had repeatedly referred to it. Pet. at 7 n.12; *see also In re Acis Capital Mgmt., L.P.*, Case No. 18-03078-sgj, Dkt. 85-2 at 190; *In re Highland Capital Mgmt., L.P.*, Case No. 19-34054-sgj, Dkts. 74-2 at 5; 247 at 59-60; 400 at 6; 675 at 23; 883 at 57; 1719 at 7; 1761 at 33; 1810-1 at 8; 1811 at 6; 1875-5 at 6; 1895-1 at 46; 1895-6 at 60-61; 1943 at 159.

In an effort to blunt that problem, the Respondent managers claim that they now represent the hedge-fund industry, such that bias against it is somehow an equal issue for both sides. Opp. at 33. That is incorrect. These managers were appointed by Judge Jernigan to close and liquidate a hedge fund; they are not representatives of the hedge-fund industry.

The same type of arguments made to excuse Judge Jernigan's conduct here — the use of literary license to inject some dissimilarities between an allegedly fictional character and a real-life person of similar order — have not served as defenses to defamation claims against fiction writers. Pet. at 33. They certainly do not dispel that a judge's "impartiality might be reasonably questioned." 28 U.S.C. § 455(a).

Judge Jernigan has further compromised the appearance of her impartiality by using the recusal controversy to sell more books. In her latest marketing materials, she commented on the merits of the recusal issue and exploited its existence to show she "is recognized as a public figure." Pet. at 11–12, 12 n.23. To this, Judge Jernigan appends a large picture of Mr. Dondero himself. Her appointed managers offer no defense of this conduct.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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