

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*

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15(8), Petitioners respectfully submit this supplemental brief in support of their Petition for Rehearing, which is currently set for conference on March 6, 2026. This brief attaches the unredacted resolution of a judicial conduct complaint by the Chief Judge of the United States Court of Appeals for the Fifth Circuit that resulted in Judge Jernigan's recusal from future proceedings in the Highland Capital bankruptcy case.

In the appendix to the petition for rehearing, Petitioners included the redacted version of a judicial conduct complaint resolution that the Judicial Council for the Fifth Circuit posted to its website. Reh'g Pet. at 6a–13a. That redacted version anonymized the outcome to remove the names of the complainant and judge who is the subject of the resolution and many identifying details of the case. An unredacted version is sent to the complainant, and Petitioners pledged that they would submit to the Court the unredacted version of the resolution once they received it. *See* Reh'g Pet. at 5–6. The unredacted version of the resolution is in the supplemental appendix integrated into this brief. Supp. App. 1-9.

In the unredacted version, the Fifth Circuit Chief Judge identifies the complainant as Scott Ellington, former general counsel of Highland Capital Management, L.P. ("Highland") and the subject judge as Chief Judge Stacey G. C. Jernigan of the Bankruptcy Court of the Northern District of Texas. Supp. App. 1. The unredacted version provides background on the case and the details of the alleged judicial misconduct. Supp. App. 1-2. Most relevantly here, the unredacted version details the similarities between Judge Jernigan's novels and the parties in the Highland case. Supp App. 6-7. In doing so, the

unredacted version discusses the Fifth Circuit panel opinion—which declined to intervene and force recusal on mandamus and that is the subject of the instant petition for certiorari—in greater detail. Supp. App. 7-9 & n.4. The Chief Judge seeks to reconcile that opinion with the corrective action effecting recusal the Chief Judge is undertaking. *Id.* The Chief Judge suggests that her powers of corrective action in resolving a judicial conduct complaint are prospective only and explains that they cannot result in the retrospective reversal or voiding of a decision of the case, specifically identifying the pending proceedings in this Court as the appropriate avenue for that. Supp. App. 9 n.4; *see also* Jud. Cond. & Disab. R. 3(h)(3)(A) (noting the inability to reverse a previous merits decision in a case).¹

The aspect of the complaint concerning Judge Jernigan’s novels was “concluded” on the basis of the corrective action of prospective recusal, ethics training, and pledges to avoid future writings on “subject matter a reasonable person could assume are based on matters pending before her.” Supp. App. 8-9 (citing 28 U.S.C. § 352(b)(2)).

The greater detail in this unredacted judicial conduct complaint resolution counsels in favor of granting rehearing. Reh’g Pet. at 8. This case highlights now three, overlapping, and conflicting standards for reviewing whether a judge should be recused. The first arises from petitions

1. Importantly, a chief judge can resolve a complaint through her proposed corrective action only if the subject judge agrees to be bound by it. Jud. Cond. & Disab. R. 11(a). Otherwise, the remedy must be coercively imposed by sanction through referral to the full judicial council of a circuit. *Id.* 11(a)(4).

for mandamus. Courts uniformly hold that mandamus is appropriate for addressing failures to recuse, because a statutorily disqualified judge presiding over a case for years is a harm in itself. Reh’g Pet. at 8; Pet. at 17-19. But in the decision below, the Fifth Circuit created an almost impossibly high standard for relief, requiring parties to demonstrate that the non-recusal decision was a clear and indisputable abuse of discretion. *Id.* This stands in contrast to the Seventh Circuit, which reviews such decisions *de novo*, even on mandamus. This latter standard honors Congress having made recusal mandatory, not discretionary, when a judge’s impartiality may be reasonably questioned. *Id.*

Second, at the very end of a case upon final judgment—but after much harm has been done—the Fifth and several other circuits will reverse a non-recusal decision if it was an abuse of discretion. Reh’g Pet. at 9. The Seventh Circuit, by contrast, reviews those decisions *de novo*. *Id.*

Third is effecting recusal through a judicial conduct complaint to a circuit’s judicial council. Here, complaints about Judge Jernigan’s books resulted in recusal—along with several other corrective action remedies—even when appellate review in the case did not. Supp. App. 7-9 & n.4 (the unredacted judicial complaint resolution contrasting the two outcomes). Strictly speaking, there is no standard of review in judicial conduct proceedings, as they are not “adversarial” as much as they are “inquisitorial and administrative” as part of the “self-regulatory” function of judges’ ensuring the integrity of the broader judicial system. *In re Memorandum of Decision of*

Judicial Conf. Comm. on Judicial Conduct & Disability, 517 F.3d 563, 567 (U.S. Jud. Conf. 2008). But as a part of this important function, judicial councils and the circuit chief judges superintending them are likely taking a fresh look to detect “conduct likely to have a prejudicial effect on the administration of the business of the courts,” including “public confidence” in them. Jud. Cond.& Disab. R. 4(a)(7). It would be odd—indeed in tension with the “self-regulatory function”—to defer to the judgments of the judge subject to the complaint about the severity of or justifications for her own conduct.

At the same time, judicial conduct complaints are supposed to be the last line of defense against judicial deviations from conduct standards and legal restrictions.² The first line of defense is *appellate review*. But the Fifth Circuit’s standard of appellate review with respect to recusal necessarily inverts this natural order, leaving judicial councils more empowered to promptly resolve structural bias than appellate courts in the case in question.

These intervening judicial conduct resolutions—highlighted by the now unredacted discussion of the tension of the Fifth Circuit’s merits panel decision under review here and the Chief Judge’s corrective action—counsel granting the petitions for rehearing and for certiorari and setting this case for argument on the merits. It is time to resolve the mature split of circuit authority on the appellate standard of review for recusal decisions.

2. After all, judicial conduct complaints are resolved on no particular schedule (these lingered for more than two years), making them imperfect measures to remedy structural problems in the tribunal deciding a case.

At a minimum, this Court should grant rehearing and call for the views of the Solicitor General, to bring this case on a parallel track with another pending petition in the case for which the Court has done the same. *See* Reh’g Pet. at 11 and *Highland Capital Management, L.P. v. NexPoint Advisors L.P.*, No. 25-119 (calling for the views of the Solicitor General on Oct. 14, 2025, which remain pending). In the alternative, the Court should grant the petition, vacate the decision below, and remand so that the Fifth Circuit as an appellate court can consider the intervening resolution of its Chief Judge in her role on its Judicial Council.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted.

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February 27, 2026

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SUPPLEMENTAL APPENDIX

Order of the Judicial Council for the Fifth
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United States Court of Appeals
Fifth Circuit

FILED
December 29, 2025

Lyle W. Cayce
Clerk

**JUDICIAL COUNCIL
FOR THE FIFTH CIRCUIT**

Complaint No. 05-26-90042

IN RE COMPLAINT OF SCOTT BYRON ELLINGTON
AGAINST
CHIEF UNITED STATES BANKRUPTCY JUDGE
STACEY G. C. JERNIGAN,
NORTHERN DISTRICT OF TEXAS,
UNDER THE JUDICIAL IMPROVEMENTS ACT OF 2002.

ORDER

Scott Byron Ellington has filed a complaint alleging misconduct by Chief United States Bankruptcy Judge Stacey G. C. Jernigan, Northern District of Texas, in *In re Highland Capital Management, L.P.*, Case No. 19-BK-34054 (Bankr. N.D. Tex.) (“*In re Highland*”)—a Chapter 11 bankruptcy proceeding—and related adversary proceedings.¹ *In re Highland* was filed by Highland Capital

1. Ellington initially filed a complaint on April 10, 2023. He filed a supplement to his complaint on April 17, 2023. The allegations in (continued...)

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Management, L.P. (“Highland”), an investment firm that managed billion-dollar, publicly-traded investment portfolios for nearly three decades. *Dondero v. Jernigan*, No. 24-10287, 2025 WL 1122466, at *1 (5th Cir. Apr. 16, 2025). Ellington is the former General Counsel of Highland.

Noting that he did not testify in *In re Highland* and appeared as a witness before Chief Judge Jernigan only once in *In re Acis Capital Management, LP*, Case No. 18-BK-30264 (Bankr. N.D. Tex.) (“*In re Acis*”), Ellington contends that Chief Judge Jernigan “has developed a bias against [him] and the hedge fund industry which employs him,” and that bias “has manifested in abusive and harassing behavior and discrimination towards [him].” Ellington’s specific allegations are addressed below.

Chief Judge Jernigan’s Comments Regarding Stalking Lawsuit

Ellington states that he filed a lawsuit in a Texas state court in 2022 in which he made claims that a former Highland employee was liable for stalking him. Ellington takes issue with comments made by Chief Judge Jernigan during a hearing regarding whether men could be subject to stalking. Ellington also alleges that Chief Judge Jernigan referred to his stalking lawsuit in “scare-quotes” in an order on a motion to recuse filed in *In re Highland* and cited the lawsuit as an example of how things had gotten “contentious” and “seemingly personal” among different parties involved in the bankruptcy.

Ellington claims that the foregoing comments and actions are “harassing and discriminatory” and violate

both the original complaint and the supplement are addressed herein.

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Rules 4(a)(2) and (3) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (“JC&D Rules”).

JC&D Rule 4(a) defines cognizable misconduct as “conduct prejudicial to the effective and expeditious administration of the business of the courts.” Under Rule 4(a)(2)(B),² cognizable misconduct includes “treating litigants . . . or others in a demonstrably egregious and hostile manner.” Under Rule 4(a)(3), cognizable misconduct “includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability.”

Pursuant to JC&D Rule 11(b), I requested a written response to the complaint from Chief Judge Jernigan. In her response, Chief Judge Jernigan admitted to making the comments cited in the complaint and explained her view as to why they had not been unreasonable or improper. She also pointed to the fact that Ellington had not sought any relief associated with the alleged stalking.

In subsequent communications with me regarding this complaint, Chief Judge Jernigan acknowledged that comments based on stereotypes about who can or cannot suffer harassment are not appropriate and agreed to refrain from making such comments in the future. I find that this action constitutes appropriate corrective action that acknowledges and remedies the problems raised by the complaint. *See* Rule 11(d).

This aspect of the complaint is therefore subject to conclusion under 28 U.S.C. § 352(b)(2) (a chief judge may “conclude the proceeding if the chief judge finds that

2. Though Ellington references Rule 4(a)(2) generally, only subsection B of that rule is potentially applicable.

appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events”).

Chief Judge Jernigan’s Comments and Opinions Regarding Ellington’s Integrity and Character

Ellington also takes issue with negative comments made about his character and credibility and actions against him taken by Chief Judge Jernigan during a February 19, 2020 hearing and a January 8, 2021 hearing. Ellington states that at the latter hearing, Chief Judge Jernigan enjoined him and his subordinate, Isaac Leventon, from sharing confidential information they received as in-house attorneys for Highland without permission, even though they were not parties to the adversary proceeding and they were not present at the hearing.

Ellington states that Chief Judge Jernigan’s “willingness to make credibility assessments about [him] without hearing from him is evidence of her repeated animus, and has otherwise caused a loss of public confidence in the Court as an instrument of justice” in violation of Rule 4(a)(2)(B) of the JC&D Rules. Though Ellington frames Chief Judge Jernigan’s statements as “mak[ing] credibility assessments about [him] without hearing from him,” Ellington appears to be alleging that Chief Judge Jernigan formed a negative view or bias against him based on her prior dealings with him in a prior proceeding, *In re Acis*. The Supreme Court has long recognized that “opinions formed by [a] judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion. . . .” *Liteky v. United States*,

510 U.S. 540, 555 (1994) (emphasis added). Further, “judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.” *Id.* This includes “expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.” *Id.* at 555–56.³

Chief Judge Jernigan’s alleged opinions of Ellington and her related comments are consistent with the types of comments and efforts at judicial administration described in *Liteky* that do not constitute evidence of improper judicial bias. For the same reasons, the comments are not demonstrably egregious or hostile under JC&D Rule 4(a)(2)(B) or “prejudicial to the effective and expeditious administration of the business of the courts” under 28 U.S.C. § 351(a).

These allegations are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as “lacking sufficient evidence to raise an inference that misconduct has occurred.” To the extent these allegations are “directly related to the merits of a decision or procedural ruling,”

3. In a similar vein, the Committee on Codes of Conduct of the Judicial Conference of the United States, Advisory Opinion 66, June 2009, provides: “Strongly stated judicial views rooted in the record, a stern and short-tempered judge’s efforts at court administration, expressions of impatience, dissatisfaction, annoyance and even anger directed to an attorney or a party should not be confused with judicial bias.” Guide to Judiciary Policy, Vol. 2B, Ch. 2, at 95.

they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii).

Chief Judge Jernigan's Novels

Ellington contends that Chief Judge Jernigan has “expressed overtly hostile views toward the hedge fund industry” in two fictional novels she authored, *He Watches All My Paths* and *Hedging Death*, and that there are many parallels between Chief Judge Jernigan and the novels’ protagonist. Ellington states that the *In re Highland* and *In re Acis* proceedings “have many parallels to these books, such that [Chief] Judge Jernigan appears to be making negative and hostile commentary through her books concerning the litigants in her court.” He therefore accuses her of bias against the hedge fund industry and the litigants in these proceedings that is “reasonably likely to lower public confidence in her ability to fairly adjudicate, and in turn, have a prejudicial effect on the administration of the court,” in violation of Rule 4(a)(7) of the JC&D Rules.

JC&D Rule 4(a)(7) states that “[c]ognizable misconduct includes conduct occurring outside the performance of official duties if the conduct is reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.”

In her response to my request to address the allegations in this complaint, Chief Judge Jernigan advised that: her novels are not about Highland or anything that happened in *In re Highland*; the references in her novels to hedge funds are “relatively infrequent”; such references

are not “gleaned from knowledge or information from” *In re Highland*; and that in the beginning of her novels she states that the opinions expressed or implied by the characters in her novels are not necessarily her opinions. Chief Judge Jernigan further states that she has presided “over countless cases in [her] lifetime and worked on even more, before becoming a judge, involving hedge funds, private equity funds, and exotic financial products” and that “[u]ntil now, [she] is not aware of anyone suggesting that [she] ha[s] shown any biases or animus where they are concerned.”

The Fifth Circuit has also addressed the matter. In an appeal of a district court order denying their petition for mandamus, James Dondero and others challenged Chief Judge Jernigan's decision not to recuse in the Highland bankruptcy proceedings. The Fifth Circuit held:

From the information we have in the record before us, whether a reasonable reader and observer of these proceedings could question Chief Judge Jernigan's impartiality in this case is debatable. 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. But, while some similarities between the books and the cases before Chief Judge Jernigan may raise cause for concern, the similarities are not close enough to find that the district court abused its discretion denying the petition.

Dondero, 2025 WL 1122466, at *7.

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Regardless of the merits of these allegations, the issue of whether Chief Judge Jernigan's conduct amounts to misconduct under 28 U.S.C. § 351(a) need not be decided because she has taken appropriate corrective action that acknowledges and remedies the problems raised by the complaint. *See* JC&D Rule 11(d).

In communications with me regarding this complaint, Chief Judge Jernigan assured me that her forthcoming novel does not involve subject matter that could reasonably be perceived as being based on matters pending before her or her work as a bankruptcy judge; agreed that any future extrajudicial writings will not include scenarios or subject matter that a reasonable person could assume are based on matters pending before her, or include characters that a reasonable person could assume are based on parties or witnesses in matters before her; agreed to complete three hours of ethics training, with a particular focus on avoiding conduct that might lead to the appearance of impropriety; and agreed to consult available ethics resources (e.g., codes of conduct, commentary, etc.) when ethical dilemmas arise in the future and, if questions remain after consulting those sources, to seek particularized guidance in the form of either informal guidance from the Fifth Circuit's representative on the Committee on Codes of Conduct of the Judicial Conference of the United States or from Committee counsel, or in the form of a confidential advisory opinion from the Committee.

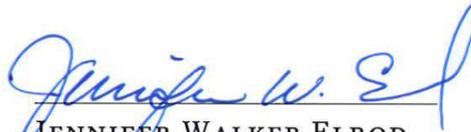
While Chief Judge Jernigan remains steadfast that she has no bias or animus against any party in any matter pending before her, she has also recused herself from all

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matters related to *In re Highland* that are currently pending before her.⁴

I find, without regard to the veracity of the allegations in the complaint, that these actions constitute appropriate corrective action that acknowledges and remedies the problems raised by the complaint. This aspect of the complaint is therefore subject to conclusion under 28 U.S.C. § 352(b)(2).

The complaint is CONCLUDED in part and DISMISSED in part, and this matter is hereby closed.



JENNIFER WALKER ELROD
Chief Judge

4. Neither Chief Judge Jernigan's recusal nor anything in this order should be interpreted as an opinion or reflection on the merits of Chief Judge Jernigan's prior decision not to recuse, which has been addressed by the Fifth Circuit and is currently pending before the Supreme Court, or the validity of any decision, ruling, or order that she has issued in any judicial proceeding.