No. _____

In the
Supreme Court of the United States

ALI HAMZA SULIMAN AL BAHLUL,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal disqualification statute, 28 U.S.C. §455, compels federal judges to recuse themselves "in any proceeding in which [their] impartiality might reasonably be questioned." *Id.* §455(a). That statute specifies that disqualification is "also" required if a judge, while previously serving in government, "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." *Id.* §455(b)(3).

1. Does §455(b)(3) require recusal when a federal judge is assigned to a case involving the same parties, same facts, and same issues as a case in which they previously appeared as counsel for the government?

2. Does §455(b)(3) provide the exclusive basis for federal judges' disqualification based upon their previous government service, as the D.C. Circuit holds, or is recusal still independently warranted under §455(a), where a judge's previous government service gives rise to reasonable questions about their impartiality, as at least the First, Fourth, Seventh, and Ninth Circuits hold?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ali Hamza Ahmad Suliman al Bahlul, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Honorable Gregory Katsas, Circuit Judge, (App. 1a-7a) is published at 61 F.4th 1008. The decision of the United States Court of Appeals for the D.C. Circuit (App. 16a-43a) is published at 61 F.4th 1008. The decision of the United States Court of Military Commission Review (App. 44a-112a) is published at 603 F.Supp.3d 1151.

JURISDICTION

The United States Court of Appeals for the D.C. Circuit issued its judgment on July 25, 2023, and denied a timely petition for rehearing on October 31, 2023. App. 10a-13a. On January 4, 2024, the Chief Justice granted an extension of time in which to petition for certiorari until March 29, 2024. The jurisdiction of this Court is invoked under 10 U.S.C. §950g(e) and 28 U.S.C. §1254(1).

WAIVER OF DISQUALIFICATION

Justices Gorsuch and Kavanaugh both recused themselves from the consideration of a previous petition filed in this case. *Bahlul v. United States*, 142 S. Ct. 621 (2021). Petitioner has studied the matter closely and for the reasons explained at pages 35-38, *infra*, Petitioner waives their disqualification to the extent permitted by law.

CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS INVOLVED

28 U.S.C. §455(a) provides:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. §455(b) provides, in relevant part:

> He shall also disqualify himself in the following circumstances: … (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy

28 U.S.C. §455(d) provides, in relevant part:

> For the purposes of this section the following words or phrases shall have the meaning indicated: (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation

PRELIMINARY STATEMENT

This petition presents significant, recurring, and unresolved questions as to when federal judges must recuse themselves due to their previous government service. The federal disqualification statute mandates recusal "in any proceeding in which [a judge's] impartiality might reasonably be questioned," 28 U.S.C. §455(a), and "also" where, while "in government employment," a federal judge "participated as counsel . . . concerning the proceeding or expressed an opinion" on the case's merits. *Id.* §455(b)(3).

Because this Court has never authoritatively construed §455(b)(3), lower courts have divided over when previous government service is disqualifying. Relevant here, at least seven circuits have reached the commonsense conclusion that §455(b)(3) compels disqualification in any case involving the same parties, same facts, and same legal issues as a case on which a federal judge previously appeared as counsel for the government. The Tenth and D.C. Circuits, however, have broken with this consensus and construed the term "proceeding" narrowly to exclude prior cases, even if they involve the same parties, facts, and legal issues. Here, that led the D.C. Circuit to hold that federal judges may sit on a defendant's post-conviction appeal even though, as here, they appeared as counsel for the government in a pre-trial collateral attack challenging that prosecution on many of the same grounds that formed the basis of the post-trial appeal.

The lower courts also need guidance on the relationship between §455(a) and §455(b) generally,

and between §455(a) and §455(b)(3) specifically. There is presently a three-way circuit split over whether and when §455(a) and the subsections of §455(b) form independent bases of disqualification. And the circuits have sharply split over whether previous government service can compel disqualification under §455(a) when it is not disqualifying under §455(b)(3).

In the first camp, seven circuits hold that §455(a) and §455(b) are *independent* bases for disqualification, and of those, four have specifically held that prior government service is disqualifying whenever it satisfies either §455(a) or §455(b)(3). In the second camp, two circuits hold that §455(a) and §455(b) are *interrelated* bases for disqualification but have also held that prior government service is disqualifying whenever it satisfies either provision. The D.C. Circuit stands alone in the third camp, holding that §455(a) and §455(b) are *mutually exclusive* bases for disqualification and thus prior government service is not disqualifying unless it satisfies §455(b)(3).

Certiorari is needed to resolve both questions. A supermajority of federal judges come to the bench after serving, often exclusively, as counsel for the government. The questions presented are, therefore, routinely significant. But given that most disqualification questions are resolved ministerially, the opportunity for meaningful review is rare. And even where the questions presented here have been subject to reasoned opinions, the facts giving rise to claimed bases for recusal are often subject to dispute, conjecture, or are otherwise mired in uncertainty.

This case presents both questions squarely. It is the rare judicial disqualification case that comes to

this Court with a published opinion addressing the questions presented and an undisputed record, whose relevant facts are all subject to judicial notice. It involves a high-profile case that garnered an unusual degree of government and public scrutiny. And it offers this Court an opportunity to provide certainty on questions of judicial administration for which predictability is uniquely important to securing public confidence in the judiciary.

This Court should grant certiorari and reverse.

STATEMENT

I. Legal background.

1. As codified in 1948, the federal disqualification statute, 28 U.S.C. §455, provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

62 Stat. 908.

In 1974, Congress enacted "massive changes," *Liteky v. United States*, 510 U.S. 540, 564 (1994); to §455's scope and structure. 88 Stat. 1609. Congress added an objective disqualification mandate "in any proceeding in which [a federal judge's] impartiality might reasonably be questioned." 28 U.S.C. §455(a). "The goal of section 455(a)," this Court explained, "is to avoid even the appearance of partiality," which

Congress determined was "necessary to maintain public confidence" in the judiciary. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (cleaned up).

Congress also expanded the former terms of §455 into five non-waivable grounds for disqualification specified in §455(b). This "somewhat stricter provision" requires disqualification "regardless of whether or not the interest actually creates an appearance of impropriety." *Liljeberg*, 486 U.S. at 860. Among these grounds is that a judge, while previously serving in government, "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. §455(b)(3). Congress then defined "proceeding" to include "pretrial, trial, appellate review, or other stages of litigation." *Id.* §455(d)(1).

This Court has considered the interaction between §455(a) and §455(b) on two occasions. In *Liljeberg*, this Court held the scienter requirement contained in §455(b)(4) did not apply to disqualification under §455(a). Holding otherwise, the Court reasoned, would "ignor[e] important differences between subsections (a) and (b)(4)." *Liljeberg*, 486 U.S. at 860 n.8.

In *Liteky*, this Court held that §455(b)(1) implicitly preserved the longstanding rule that, to be disqualifying, a judge's bias or prejudice must ordinarily derive from an "extrajudicial source." 510 U.S. at 552. This Court then reasoned that Congress incorporated this "extrajudicial source" factor into any claim of apparent bias under § 455(a) because "it is unreasonable to interpret § 455(a) (unless the

language requires it) as implicitly eliminating a limitation explicitly set forth in § 455(b)." *Ibid*.

II. Factual background and proceedings below.

This case arises from the military commission prosecution of a Guantanamo detainee. When Petitioner challenged his military commission in a pre-trial habeas petition, future-Judge Gregory Katsas was opposing counsel and, in several public appearances, both advocated against Petitioner's legal challenges and praised his prosecution because it "worked well; life sentence." When Petitioner raised many of the same legal challenges in a post-trial appeal, Judge Katsas declined to recuse himself and then ruled against them.

1. Judge Katsas served with distinction in several senior Justice Department positions from 2001 to 2009. Gregory Katsas, Questionnaire for Judicial Nominees, U.S. Senate Committee on the Judiciary, 2017 ("Questionnaire"),[1] at 31. The defining issue of his tenure was Guantanamo. In an oral history, Attorney General Michael Mukasey said, "The whole issue of the Guantanamo detainees and how their cases were being handled was something that came up literally daily. Greg Katsas described himself as the captain of the Department of Justice javelin-catching team." Michael Mukasey, Oral History, October 8, 2012, Miller Center, University of Virginia, at 85.[2]

Judge Katsas appeared in every Guantanamo case decided by this Court, which he identified as among the most significant matters of his career.

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[1] https://perma.cc/7KNR-DJMG

[2] https://perma.cc/7334-MK4S

Questionnaire, at 36-47. He argued some of the seminal Guantanamo cases decided by the D.C. Circuit. *Center for National Security Studies v. DOJ*, 331 F.3d 918 (D.C. Cir 2003); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008). And he testified several times before Congress on Guantanamo and military commissions. Questionnaire, at 8.

In his Congressional testimony, Judge Katsas consistently demonstrated a mastery of the relevant law, facts, and policy. He testified that the Military Commissions Act of 2006 ("MCA"), 120 Stat. 2600, "afforded far greater protections than did their World War II predecessors or than do counterpart procedures used by international tribunals." Gregory Katsas, Written Testimony, Committee on Armed Services, House of Representatives, No. 110-79, July 26, 2007 (GPO 2009), at 185.[3] He expressed his opinion that "The existing [military commission] system is both constitutional and prudent, and should not be upset." Gregory Katsas, Testimony, Committee on the Judiciary, House of Representatives, No. 110-152, Jun. 26, 2007 (GPO 2009), at 8.[4] He lamented that "Through a series of interlocutory habeas actions, military-commission trials were enjoined [due to *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)] before they had even begun." *Id.* at 16. And responding to criticisms of the military commissions and the treatment of Guantanamo detainees, he opined, "I don't think the United States has anything to be ashamed about[.]" *Ibid.*

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[3] https://perma.cc/59VP-BWU4

[4] https://perma.cc/5RJZ-CRSU

The Bush Administration tasked Judge Katsas with engaging civil society on Guantanamo and military commissions on at least sixteen occasions. Questionnaire, at 16-20. This included a panel discussion in 2007, in which Judge Katsas debated a lawyer from the Office of the Chief Defense Counsel (now Military Commission Defense Organization), on the merits of coercive interrogation and military commissions. Gregory Katsas, Questionnaire for Judicial Nominees, Attachments to Question 12(a), U.S. Senate Committee on the Judiciary, 2017 ("Questionnaire Attachments"),[5] at A-2668. At this debate, Judge Katsas touted the fact that by enacting the MCA, "Congress promptly overruled" this Court's decision in *Hamdan*. *Id*. at A-2673. And he opined, "I am very comfortable with the legal and operational justification for" the use of coercive interrogation and military commissions, which "have prosecuted war crimes throughout American history." *Ibid*.

In January 2008, President Bush appointed Judge Katsas to head the Civil Division and the press touted his leading role in the Guantanamo litigation. Philip Shenon, *Bush Announces 5 Justice Nominees*, N.Y. Times, November 16, 2007. During his confirmation, Judge Katsas noted that he "advis[ed] Administration lawyers who were working with Congress to secure enactment of the Military Commissions Act." Questionnaire Attachments, at A-1669. And following this Court's *Boumediene* decision, Judge Katsas personally directed the litigation of the detainee habeas cases, including Petitioner's. *See*, *e.g.*, Gregory Katsas, to Royce Lamberth, Thomas Hogan, June 30,

[5] https://perma.cc/XEU6-PM3L

2008 ("Katsas Habeas Letter");[6] Gregory Katsas, Declaration, *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C, August 28, 2008).

Out of government, Judge Katsas remained a sought-after authority on Guantanamo and military commissions, *see*, *e.g.*, Mark Sherman, *Terror Trials Differ in Civilian, Military Courts*, Associated Press, November 22, 2009, and participated in at least thirteen public events on those topics after entering private life. Questionnaire, at 9-16. In the notes of his remarks for one event, he gave a broad outline of his work at the Justice Department, including his contributions to the "proc for military commissions." Questionnaire Attachments, at A-2741. And at another, he recalled his advocacy within the Bush Administration to "protect military commissions." *Id*. at A-2538.

At another event, Judge Katsas defended the use of coercive interrogation, "especially with respect to Al Qaeda, lose battle vs. lose NYC." Questionnaire Attachments, at A-2560. He described torture as a "tough line-draw/extreme 'inflict *severe* phys[ical]/ment[al] suffer[ing],'" which he understood as limited to "beatings, electric shock, hangings," and stated the "most aggressive tech[niques] auth[orized] at GTMO [fell] far short of that." *Id*. at A-2566. He defended the use of so-called "enhanced interrogation techniques" and opined that President Obama's restraints on their use "in future make us less safe." *Id*. at A-2583.

[6] https://perma.cc/5YRH-KN46

At his confirmation hearing to the D.C. Circuit, Judge Katsas was asked, "What forms of coercive interrogation do not equal torture?" He responded, the "ones that had been disclosed as previously used by the Department of Defense at Guantanamo Bay." Gregory Katsas, Responses to Questions for the Record, Oct. 24, 2017, at A-5.[7]

2. Petitioner was among the first detainees taken to Guantanamo in January 2002. Upon arrival, he was subject to a systematic policy of coercive interrogation that the Senate Armed Services Committee found was based upon methods derived from "Chinese Communist techniques used during the Korean war to elicit false confessions." Inquiry into the Treatment of Detainees in U.S. Custody, United States Senate, Committee on Armed Services, S. Prt. 110-54, Nov. 20, 2008, at 76 (GPO 2009).[8]

In March 2004, a military prosecutor preparing Petitioner's case for trial by military commission internally objected that there was "reason to believe that al Bahlul had suffered … mistreatment or torture." CPT John Carr to COL Fred Borch, March 15, 2004 *in* Hearing before the Committee on the Judiciary, United States Senate, Serial No. J-109-95, July 11, 2006 (GPO 2009), at 266-276.[9] Three months later, the government convened a military commission to prosecute Petitioner on a single count of conspiracy based near-exclusively upon his statements to

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[7] https://perma.cc/FP7C-REQZ
[8] https://perma.cc/BLM5-R4YE
[9] https://perma.cc/89FM-29LG

interrogators. *United States v. Bahlul*, Convening Order (Jun. 28, 2004).[10]

Petitioner consistently objected to his prosecution by military commission. He joined a letter to Congress objecting to the military commissions' rules, including the use of evidence obtained through torture. Neal Katyal, *et al.*, to John Warner, *et al.*, June 1, 2004.[11] And when *Hamdan* was pending before the D.C. Circuit, Petitioner separately asserted the military commissions' denial of his right to self-representation. *Hamdan v. Rumsfeld*, Case No. 04-1519, Brief Amicus Curiae of Philip Sundel as Military Counsel for Ali Hamza Al Bahlul (D.C. Cir., Dec. 29, 2004).

In December 2005, Petitioner sought to enjoin his prosecution via habeas corpus. *Jayafi v. Bush*, No. 05-2104, Supplemental Petition for a Writ of Habeas Corpus (D.D.C., Dec. 14, 2005). That petition alleged that Petitioner "has been the subject of continued, intensive, and enhanced interrogation, which ended only after [he] was detailed counsel for his military commission." *Id.* at 8. It asserted eight grounds for relief, including: 1) the Convening Authority "lacks power to exercise military authority to appoint a military commission," 2) "his accusers can introduce unreliable evidence of the worst sort – unsworn allegations, derived from coerced confessions with no right of confrontation," and 3) the charges were "created after the fact" in violation of the Define and Punish and Ex Post Facto Clauses. *Id.* at 13-33. In January 2006, the district court administratively closed Petitioner's habeas case until the then-pending

[10] https://perma.cc/7J6U-Z7ML
[11] https://perma.cc/G9PQ-LKPB

Boumediene litigation was resolved. *Jayafi v. Bush*, No. 05-2104, Order (D.D.C., Jan. 11, 2006).

With his habeas petition in abeyance, Petitioner's military commission began pre-trial proceedings. Most other military commission prosecutions had been stayed pending this Court's resolution of *Hamdan v. Rumsfeld*. As a result, Petitioner's prosecution was the first to begin and among the only to conduct proceedings on the record in 2006.

Petitioner again objected to being denied the right to self-representation and to the government's use of evidence "yielded under --- under torture." *United States v. Bahlul*, Record of Trial (2006), at 147.[12] His military counsel also challenged the use of statements obtained under torture, prompting the military judge to respond that such statements were not inadmissible under the military commissions' rules. *Id*. at 222-226. In his briefing to this Court, the petitioner in *Hamdan* highlighted the proceedings in Petitioner's case as confirmation that the military commissions could "admit testimony obtained by torture." *Hamdan v. Rumsfeld*, Case No. 05-184, Reply Brief for Petitioner (U.S., Mar. 15, 2006), at 2 n.3.

3. The Convening Authority dismissed the original charges against Petitioner following this Court's decision in *Hamdan* and in February 2008, recharged Petitioner with three inchoate crimes codified by the MCA, including conspiracy. When pre-trial proceedings recommenced, Petitioner reasserted his earlier objections and again protested the use of

[12] https://perma.cc/FV4X-R9HJ

torture in Guantanamo. *United States v. Bahlul*, Record of Trial (2008), at 26-27, 61.[13]

As Petitioner's military commission case approached trial, this Court decided *Boumediene* and Petitioner's habeas case was re-opened. Judge Katsas appeared as opposing counsel and submitted several pleadings advancing the position that "the filing of charges against a detainee before a military commission should require the detainee's habeas proceeding to be dismissed or held in abeyance pending resolution of the commission proceeding." *Jayafi v. Bush*, No. 05-2104, Notice (D.D.C., Jul. 9, 2008). This echoed an argument Judge Katsas had personally pressed to postpone "the factual returns for the approximately 20 detainees charged with war crimes under the Military Commissions Act of 2006 after the returns for other current detainees; as discussed below, we believe habeas proceedings for such detainees should be dismissed or held in abeyance pending resolution of their pending prosecution." Katsas Habeas Letter, at 7-8.[14]

Judge Katsas made similar arguments to Congress, where he testified in detail about ongoing military commission litigation. Gregory Katsas, Testimony, Committee on Armed Services, House of Representatives, No. 110-167, Jul. 31, 2009 (GPO 2010), at 6.[15] He pressed lawmakers to bar detainees such as Petitioner from challenging their military commission prosecutions via habeas "to ensure that

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[13] https://perma.cc/PR85-WVFE

[14] Though twenty detainees were charged, only seven military commission prosecutions were ongoing.

[15] https://perma.cc/E2XL-9N3A

the trials move forward so that terrorists can be brought to justice." *Ibid.*

Another pleading filed under Judge Katsas' name in Petitioner's habeas case described Petitioner's background, the procedural history of his case, his detention status, that he "has been charged with crimes triable by military commission under the Military Commissions Act of 2006." *Jayafi v. Bush*, No. 05-2104, Respondent's Status Report (D.D.C., Jul. 18, 2008).

By October 2008, Petitioner's habeas case had not proceeded toward the merits. Petitioner voluntarily dismissed his case without prejudice, *Jayafi v. Bush*, No. 05-2104, Minute Order (D.D.C., Oct. 24, 2008), and his trial by military commission began a week later. The bulk of the trial testimony came from interrogators who recounted admissions Petitioner allegedly made in Guantanamo. Following the denial of his right to self-representation, Petitioner declined to mount a defense on the merits. The military commission found Petitioner guilty on all charges and sentenced him to life imprisonment.

Petitioner appealed to the Court of Military Commission Review ("CMCR"), which affirmed his conviction and sentence. Petitioner timely petitioned for review in the D.C. Circuit, where he challenged his conviction because, *inter alia*, the charges violated the Ex Post Facto Clause. From 2011 to 2016, the D.C. Circuit ordered four rounds of merits briefing and two rehearings en banc. The ultimate result was the vacatur of Petitioner's conviction, save for the conspiracy charge, and remand to the CMCR to "determine the effect, if any, of the two vacaturs on

sentencing." *Bahlul v. United States*, 767 F.3d 1, 31 (D.C. Cir. 2014) (en banc).

4. While this appellate litigation was ongoing, Judge Katsas spoke regularly at public events about Guantanamo and military commissions. At one event, he compared the "Bush – [military commissions]" with their "tailor[ed] rules," including "no right to self-representation," to the reforms enacted by Congress in 2009. Questionnaire Attachments, at A-2546. At another event, Judge Katsas described the Obama Administration as "Scitzo" on the use of military commissions, adding that President Obama "ran against" the military commissions in 2008 only to "now defend [their] constitutionality." *Id*. at A-2463.

At another event, Judge Katsas expressed his opinion on the merits of the legal challenges Petitioner was mounting to his conviction. Questionnaire Attachments, at A-2543. His notes are recorded as answers to questions for discussion:

> Does the law of war (Common Article 3 or other) limit the jurisdiction of military commissions?
>
> - No.
>
> Does the U.S. constitution impose a limit? Applicability of *Ex parte Milligan*? *Quirin*?
>
> - not for aliens.
>
> What considerations should determine whether a particular suspect is tried in Article III court or military commissions?

> - In general, use military commissions if you can.

Id. at 2544. Then at the bottom of his notes, he opined on the three military commission cases to reach a verdict by that time:

> Hicks – plea
>
> Hamdan – short sentence
>
> Al Bahlul – worked well; life sent[ence].

Ibid.

5. On remand from the D.C. Circuit to the CMCR, Petitioner sought resentencing and reasserted his challenge the Convening Authority's power to appoint his military commission under this Court's intervening decisions in *Lucia v. SEC*, 585 U.S. 237 (2018) and *United States v. Arthrex*, 141 S. Ct. 1970 (2021). In his briefing, Petitioner emphasized that resentencing was required, in part, because the record evidence supporting his sentence was comprised of uncorroborated, coerced confessions, which Congress subsequently made inadmissible when it reformed the MCA in 2009. 10 U.S.C. §948r (2009). The CMCR affirmed both his conviction and sentence.[16] App. 44a.

Petitioner timely petitioned for review to the D.C. Circuit. The questions before the Court were: 1) was the military commission improperly appointed; 2) was resentencing required because Petitioner's prior sentence had been based upon coerced confessions; and 3) was resentencing required because the D.C.

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[16] The D.C. Circuit remanded a second time after the CMCR applied the wrong standard of review on the first remand. *Bahlul v. United States*, 967 F.3d 858 (D.C. Cir. 2020).

Circuit had vacated two of the three charges of conviction on *ex post facto* grounds?

Thirty days before oral argument, the Court announced that Judge Katsas was assigned to the merits panel in Petitioner's case. Petitioner promptly moved to disqualify Judge Katsas under 28 U.S.C. §§455(a); (b)(3), and Code of Conduct for United States Judges, Canons 3(C)(1)(b); 3(C)(1)(e). In that motion, Petitioner cited Judge Katsas' prominent role in the Guantanamo litigation and his appearance as opposing counsel in Petitioner's habeas case.[17] The government took no position.

Judge Katsas denied the motion. App. 1a. He rejected the §455(b)(3) challenge on the grounds that the post-trial appeal from Petitioner's military commission was not the same "proceeding" as Petitioner's pre-trial habeas challenge to his prosecution. And he further rejected the §455(a) challenge, because in the D.C. Circuit, §455(b)(3) is construed as the exclusive basis for disqualification based upon a judge's previous government service.

On July 25, 2023, the panel affirmed. App. 16a. This petition followed.

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[17] In support of his motion, Petitioner was able to cite to Judge Katsas' judicial questionnaire, which is publicly available, but had not yet obtained a copy of the attachments.

REASONS FOR GRANTING THE PETITION

I. Certiorari is necessary to resolve confusion in the lower courts on the important federal question of when previous government service is disqualifying under §455(b)(3).

Under §455(b)(3), recusal is required whenever a judge, while previously serving in government, "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. §455(b)(3). A "proceeding," in turn, "include[s] pretrial, trial, appellate review, or other stages of litigation." *Id.* §455(d)(1). Because this Court has never authoritatively construed this open-ended statute, lower courts are confused as to its scope, and at least two sharp divisions have emerged. Certiorari is needed to correct the decision below and bring uniformity to an important area of federal law.

A. Lower courts are deeply divided over when previous government service requires recusal.

Two sharp circuit splits have emerged over when §455(b)(3) compels disqualification. There is a 7-2 circuit split on whether "proceeding" is defined broadly using commonsense, or "restrictive[ly]" to exclude prior cases. And there is an acknowledged 3-2 circuit split on what role a federal judge must have played in such proceedings to require recusal.

1. At least seven circuits have interpreted "proceeding" in §455(b)(3) to include any litigation that involves the same parties, same facts, and same legal issues as a matter on which the judge previously

worked.[18] Even where the litigation is complex, spans multiple jurisdictions, and extends over decades, these circuits have held, "[a] district judge who previously served as counsel of record for a related case may be disqualified" under §455(b)(3). *Murray*, 253 F.3d at 1312. This same commonsense definition was also applied to the stricter word "case" in the pre-1974 version of §455. *See*, *e.g.*, *United States v. Amerine*, 411 F.2d 1130, 1133 (6th Cir. 1969) (holding that a complaint that was later withdrawn was part of the same "case" as a prosecution brought by indictment after the judge had been appointed).

Applying this commonsense definition, the Ninth Circuit held that disqualification was mandated under §455(b)(3) where the investigation that ultimately led to indictment was opened during that judge's previous tenure as U.S. Attorney. *Arnpriester*, 37 F.3d at 467. The Seventh Circuit disqualified a magistrate, who had once appeared for the government in a parole revocation hearing, from presiding over another parole revocation proceeding involving the same defendant several years later. *Smith*, 775 F.3d at 881. The Eleventh Circuit disqualified a district judge, who had served as counsel for the government in an environmental case involving the same parties, from a tangentially related fraud suit brought decades later. *Murray*, 253 F.3d at 1313. And the Fifth Circuit

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[18] *United States v. Sciarra*, 851 F.2d 621, 635 (3d Cir. 1988); *United States v. Lindsey*, 556 F.3d 238, 246 (4th Cir. 2009); *Mixon v. United States*, 620 F.2d 486, 591 (5th Cir. 1980); *Jenkins v. Bordenkircher*, 611 F.2d 162, 166 (6th Cir. 1979); *United States v. Smith*, 775 F.3d 879, 881 (7th Cir. 2015); *United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994); *Murray v. Scott*, 253 F.3d 1308, 1313 (11th Cir. 2001).

disqualified a magistrate, who had appeared for the government at a sentencing proceeding, from presiding over the same defendant's habeas case a decade later. *Mixon*, 620 F.2d at 487.

The Tenth and D.C. Circuits, by contrast, read "proceeding" narrowly to exclude any "prior case involving the defendant." *United States v. Gipson*, 835 F.2d 1323, 1326 (10th Cir. 1988). The Tenth Circuit, for its part, construed Congress' substitution of the word "case" in the pre-1974 statute with the word "proceeding" as indicative of an intent to adopt "a more restrictive standard." *Ibid.* And the decision below concluded that §455(b)(3) should only reach litigation occurring within the trial and appellate review process, excluding any litigation that predated charges being withdrawn and a defendant being recharged. App. 4a-5a.

Collateral attacks are a routine stage of criminal litigation. And Petitioner's habeas case involved the same parties, same facts, and same legal issues raised in the post-trial appeal of his military commission conviction. Petitioner's case would, in short, have been resolved differently in seven other circuits. And this creates inconsistency where public confidence depends upon clarity and uniformity. ABA Model Code of Judicial Conduct, Application, cmt. 1 (2020).

2. There is also an acknowledged circuit split as to what role a judge must have played in earlier proceedings for recusal to be required under §455(b)(3).

The Tenth Circuit, joined by the Fifth Circuit, has construed §455(b)(3) to apply only when "a judge had previously taken a part, albeit small, in the

investigation, preparation, or prosecution of a case." *Gipson*, 835 F.2d at 1326; *Mangum v. Hargett*, 67 F.3d 80, 83 (5th Cir. 1995). This splits with the Seventh, Eighth, and Ninth Circuits, who each hold that a judge "participated" in a proceeding whenever they served as U.S. Attorney, or relevant supervisory counterpart, irrespective of their direct involvement. *United States v. Ruzzano*, 247 F.3d 688 (7th Cir. 2001); *Kendrick v. Carlson*, 995 F.2d 1440, 1444 (8th Cir. 1993); *Arnpriester*, 37 F.3d 466, 467; *see also United States v. Jones*, 55 M.J. 317, 319 (C.A.A.F. 2001) (acknowledging the split and recommending that lower court judges recuse themselves from cases over which they had supervisory responsibility).

B. The decision below is wrong.

The minority rule applied in the decision below cannot be squared with the statutory text or Congress' purposes in revising the federal disqualification statute. There are at least three reasons this Court should grant certiorari to reverse.

First, the word "proceeding" is a defined term. Congress codified an open-ended definition that broadly includes, not just trial and appellate proceedings, but also all "other stages of litigation." 28 U.S.C. §455(d)(1). Neither the Tenth Circuit, nor the decision below, accounted for this statutory definition in construing "proceeding" narrowly.

Second, as this Court observed in *Williams*, the risks to judicial impartiality are heightened, rather than diminished, in "a complex criminal justice system, in which a single case may be litigated through multiple proceedings taking place over a period of years." *Williams v. Pennsylvania*, 579 U.S. 1,

10 (2016). This case illustrates those very risks, insofar as Petitioner's prosecution has been pending in near-identical substance for twenty years, albeit before six different tribunals and under three different statutes.[19] By defining "proceeding" broadly, Congress adopted a commonsense standard for disqualification under §455(b)(3) that included not just the trial and appellate review stages, but also open-endedly included all "other stages of litigation."

Third, while it is axiomatic that judges should not recuse from cases where disqualification is not warranted, treating that principle as a reason to narrowly construe §455 runs counter to Congress' 1974 reforms. S.Rep. No. 93-419, 93d Cong., 2d Sess. 5 (1973); H.R.Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974); *Liljeberg*, 486 U.S. at 871 (Rehnquist, J., dissenting) ("The amended statute also had the effect

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[19] Petitioner filed his pre-trial habeas petition whilst facing prosecution before a military commission convened under the Uniform Code of Military Justice, 10 U.S.C. ch. 47; prosecutions this Court invalidated in *Hamdan*. Judge Katsas determined that his post-trial appeal was a different "proceeding" because Petitioner was recharged under the 2006 MCA, 10 U.S.C., ch. 47A, which itself was superseded by the Military Commissions Act of 2009, 123 Stat. 2190. The MCA's statutory amendments, however, were largely immaterial to Petitioner's claims for relief. As Judge Katsas himself observed in several public remarks, the 2006 "MCA overrule[d] every aspect of *Hamdan*." Questionnaire Attachments, at A-2574. And had Petitioner prevailed in his habeas case, that judgment would have had res judicata and/or collateral estoppel effects after he was recharged because his subsequent military commission prosecution involved the same parties, same facts, and same issues. *See Yates v. United States*, 354 U.S. 298, 335 (1957).

of removing the so-called 'duty to sit,' which had become an accepted gloss on the existing statute.").

In fact, the most significant deviation this Court made from the Code of Conduct for United States Judges in its own code of conduct was the inclusion of the provision that "A Justice is presumed impartial and has an obligation to sit unless disqualified." Code of Conduct for Justices of the Supreme Court (2023, Canon 3(B)(1). This difference was warranted, this Court explained, because "Lower courts can freely substitute one district or circuit judge for another." *Id*. at 10. This case therefore provides this Court a well-timed opportunity to clarify whether lower courts should continue to apply the "duty to sit" principle, and whether, when confronted with competing interpretations of §455(b), they should err on the side of sitting when they should not, or err on the side of recusal when another judge can freely substitute.

Clarifying that §455(b)(3) compels disqualification whenever a judge previously served as counsel in a case involving the same parties, same facts, and same legal issues will provide uniformity around a commonsense standard. That standard is generally used to determine whether different cases form part of the same overall litigation for collateral estoppel and res judicata purposes. *United States v. Mendoza*, 464 U.S. 154, 158 (1984); *Montana v. United States*, 440 U.S. 147, 153 (1979). And it harmonizes judicial disqualification with the general professional conduct rules that bar former government attorneys from appearing in matters on which they worked for the government. *See*, *e.g.*, 18 U.S.C. §207; ABA Model Rules of Professional Conduct, Rule 11 (1983).

This Court should therefore grant certiorari to clarify that "proceeding" in §455(b)(3) comports with the commonsense notion that judges should not hear a case involving the same parties, same facts, and same issues as a case in which they appeared as government counsel.

II. Certiorari is also needed to resolve a three-way circuit split on the important federal question of whether §455(a) and §455(b) form independent bases for disqualification.

The second question presented, on the relationship between §455(a) and § 455(b), cries out for this Court's resolution. In *Liljeberg*, this Court emphasized that §455(a) and § 455(b) formed independent bases for disqualification. 486 U.S. at 860 n.8. Six years later in *Liteky*, however, this Court held that §455(b) can limit the scope of §455(a), when necessary to avoid "nullifying the limitations (b) provides." 510 U.S. at 553 n.2. As Justice Kennedy's concurrence in *Liteky* noted, these two holdings are in "unfortunate" tension. *Id*. at 557 (Kennedy, J., concurring).

That tension has led to considerable confusion, as is starkly illustrated in the Federal Judicial Center's official guidance on recusal. In one breath, citing *Liljeberg*, it states, "Any circumstance in which a judge's impartiality might reasonably be questioned, whether or not touched on in section 455(b), requires recusal under section 455(a)." Federal Judicial Center, *Recusal: Analysis of Case Law under 28 U.S.C. §§455 & 144*, 5 (2002). Then, in the very next breath, citing *Liteky*, it states, "where section 455(b) sets forth a particular situation requiring recusal, it will tend to control any section 455(a) analysis with respect to that

specific circumstance." *Ibid.* And, specific to §455(b)(3), lower courts have expressed uncertainty over whether §455(a) can compel disqualification based upon prior government service, when §455(b)(3) does not. *See*, *e.g.*, *United States v. Gorski*, 48 M.J. 317 (C.A.A.F. 1997) (Effron, J.). Only this Court can provide certainty on this important question of judicial administration.

A. There is a three-way split over whether, and when, §455(a) and §455(b) operate as independent bases for recusal.

Attempting to reconcile the tension between *Liljeberg* and *Liteky*, lower courts have divided into three camps. And in cases where previous government service is the basis for a judge's disqualification, the circuits have further and irreconcilably split over whether a judge's previous government service can be disqualifying under §455(a) when it is not under §455(b)(3).

1. The first camp – comprised of the First, Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits – treats §455(a) and §455(b) as *independent* bases for disqualification.[20]

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[20] *See*, *e,g.*, *In re Bulger*, 710 F.3d 42, 45 (1st Cir. 2013) (Souter, J.); *United States v. Rechnitz*, 75 F.4th 131, 143 (2d Cir. 2023); *United States v. Stone*, 866 F.3d 219, 229 (4th Cir. 2017); *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998); *United States v. Randall*, 440 F. App'x 283, 286 (5th Cir. 2011); *Sensley v. Albritton*, 385 F.3d 591, 588-601 (5th Cir. 2004); *United States v. Liggins*, 76 F.4th 500, 506 (6th Cir. 2023); *United States v. Norwood*, 854 F.3d 469, 471-472 (8th Cir. 2017); *United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994).

The Second Circuit, for example, reversed in a case where the district court held "that where recusal is sought under §455(a) and (b), analysis under §455(a) is limited only to those facts not implicated by the analysis under §455(b)." *In re Certain Underwriter*, 294 F.3d 297, 305 (2d Cir. 2002). The Circuit held:

> A fact's failure to give rise to recusal under §455(b) does not automatically mean that same fact does not create an appearance of partiality under §455(a). … Even where the facts do not suffice for recusal under §455(b), however, those same facts may be examined as part of an inquiry into whether recusal is mandated under §455(a).

Id. at 305–06; *see also Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003) ("whenever a judge's partiality might reasonably be questioned, recusal is required under §455(a), irrespective whether the circumstance is covered by §455(b).").

Within this camp, the First, Fourth, and Ninth Circuits have held that recusal under §455(a) is warranted when a judge's previous government service calls their impartiality into question, irrespective of whether §455(b)(3) compels the same result. *See*, *e,g.*, *Bulger*, 710 F.3d at 45; *Arnpriester*, 37 F.3d at 467; *Rice v. McKenzie*, 581 F.2d 1114, 1117 (4th Cir. 1978). And the Eighth Circuit has evaluated them independently in such cases, albeit in denying disqualification. *Norwood*, 854 F.3d at 472.

2. The second camp – comprised of the Seventh and Tenth Circuits – treats the terms of §455(b) as *interrelated* bases for disqualification. *See*, *e.g.*, *In re*

Gibson, 950 F.3d 919, 927 (7th Cir. 2019); *Vazirabadi v. Denver Health & Hosp. Auth.*, 782 F. App'x 681, 685 (10th Cir. 2019).

With respect to prior government service, the Seventh Circuit holds that recusal under §455(a) is warranted whenever a judge's previous government service calls their impartiality into question, irrespective of whether §455(b)(3) compels the same result. *See*, *e.g.*, *United States v. Herrera-Valdez*, 826 F.3d 912, 919 (7th Cir. 2016); *Russell v. Lane*, 890 F.2d 947, 948 (7th Cir. 1989). The Tenth Circuit has also evaluated §455(a) and §455(b)(3) independently, albeit in denying disqualification. *See*, *e.g.*, *United States v. Cheatwood*, 42 F. App'x 386, 392-393 (10th Cir. 2002); *Gibbs v. Massanari*, 21 F. App'x 813, 815 (10th Cir. 2001); *Gipson*, 835 F.2d at 1326.

3. In the third camp, the D.C. Circuit stands alone in holding that §455(a) and §455(b) provide *mutually exclusive* bases for disqualification.

In the D.C. Circuit, "if an issue is within the scope of section 455(b), section 455(a) should not be read to require disqualification if section 455(b) does not." *In re Hawsawi*, 955 F.3d 152, 159–60 (D.C. Cir. 2020). The D.C. Circuit is also alone in holding that §455(b)(3) occupies the field in the absence of "rare and extraordinary circumstances," whenever a judge's previous government service is raised as the basis for disqualification. *Ibid.*; *see also Baker Hostetler v. Commerce*, 471 F.3d 1355, 1358 (D.C. Cir 2006) (Kavanaugh, J.).

The D.C. Circuit's break with its sister circuits traces to then-Judge Kavanaugh's decision in *Baker Hostetler*, in which he held that §455(b)(3) did not

apply where he had never been involved at any stage of the appellant's litigation and where his only potential relationship to the questions presented was prior government service in a policymaking role. Justice Kavanaugh applied the reasoning of *Liteky* to conclude that mere participation in policymaking did not give rise to appearance of partiality under §455(a) and opined more generally that §455(a) cannot compel disqualification where §455(b)(3) does not.

Given the uncertainty over the interplay between §455(a) and §455(b), judges in both in the D.C. Circuit and other circuits have interpreted the broadest language from Justice Kavanaugh's opinion in *Baker Hostetler* as license to treat §455(a) as permitting whatever §455(b) does not forbid. In *Bulger*, for example, Whitey Bulger moved to recuse a district judge, who had "held a variety of managerial and supervisory appointments within the U.S. Attorney's Office" at the time Bulger claimed to have received immunity as an informant. *Bulger*, 710 F.3d at 44. The judge denied having had direct involvement in Bulger's case and, citing *Baker Hostetler*, declined to recuse. *United States v. Bulger*, No. 99-10371, Order, 3 n.2 (D. Mass, Jul. 17, 2012). This, in turn, compelled the First Circuit, in an opinion written by Justice Souter, to issue a writ of mandamus, disqualifying the judge under §455(a), and directing the case to be "reassigned to a judge whose curriculum vitae does not

implicate the same level of institutional responsibility described here." *Bulger*, 710 F.3d at 49.[21]

B. The decision below is wrong.

Outside the policymaking context at issue in *Baker Hostetler*, neither the text and purposes of §455(b)(3), nor the holding of *Liteky*, support a general rule that presumptively exempts previous government service from scrutiny under §455(a). And the facts of this case illustrate why such a rule must be wrong.

1. The text of §455(b) states that judges "must *also* disqualify" themselves, irrespective of whether the relevant facts call their impartiality into question. And construing §455(b)(3) to cover the field leads to absurd results, insofar as §455(b)(3) excludes a judge's prior service in several government positions (such as adjudicatory positions), where the need for disqualification is well-settled. *See*, *e.g.*, *Fowler v. Butts*, 829 F.3d 788, 790 (7th Cir. 2016); Code of Conduct for United States Judges, Canon 3(C)(1)(e).

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[21] Likewise, in *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011), Judge Reinhardt relied upon *Baker Hostetler*, rather than Ninth Circuit precedent, to decline recusal in a case where his wife was the director of an organization that had appeared below. After finding recusal not required under §455(b)(5), he ruled that recusal was also not warranted under §455(a), because §455(a) should not be construed to prohibit "what is permissible under §455(b)(5)." *Id*. at 914–15. Petitioner takes no position on whether Judge Reinhardt's recusal under §455(a) was warranted. But his reasoning is squarely contradicted by *Microsoft v. United States*, 530 U.S. 1301, 1302 (2000) (Rehnquist, J.) (treating §455(a) and §455(b)(5) as independent bases for disqualification); *see also* Code of Judicial Conduct, Canon 3C(1)(d)(ii), cmt.

Such a rule also frustrates §455's purposes. As this Court held in *Liljeberg*, "Congress amended the Judicial Code 'to *broaden* and clarify the grounds for judicial disqualification.'" 486 U.S. at 849 (quoting 88 Stat. 1609) (emphasis added). If anything, scrutiny under §455(a) becomes far more important, where a judge was deeply involved in a related matter that, for purely technical reasons, falls outside of §455(b)(3)'s scope. And that scrutiny should be especially exacting if §455(b)(3) is given the "restrictive" interpretation adopted by the Tenth Circuit and below. As the Tenth Circuit itself recognized, its "restrictive" interpretation of §455(b)(3) significantly *narrowed* the circumstances under which recusal had been mandatory before 1974. *Gipson*, 835 F.2d at 1326. But this perverse result was mitigated by the fact that the Tenth Circuit also held, "a judge who has had an affiliation with a prior case involving a defendant might find recusal mandated by § 455(a)." *Ibid*.

2. *Liteky*'s reasoning, which asks what precedents formed the background principles against which Congress amended §455, also fails to support a general rule that exempts previous government service from scrutiny under §455(a). The most analogous precedents to the circumstances presented here arose out of Justice Robert Jackson's service as the prosecutor before the International Military Tribunal at Nuremberg ("IMT"). Justice Jackson recused himself from legal actions involving not just the IMT, but also the related German war crimes prosecutions brought under Control Council Order No. 10; prosecutions conducted against different German war crimes defendants in the years after he returned to the

bench. *See*, *e.g.*, *Flick v. Johnson*, 338 U.S. 879 (1949); *Pohl v. Acheson*, 341 U.S. 916 (1951).

Justice Jackson also recused himself from legal challenges brought by Japanese war crime defendants against the International Military Tribunal for the Far East. As he explained when making a necessity-based exception to his recusal policy, "I do not regard myself as under a legal disqualification in these Japanese cases under the usages as to disqualification which prevail in this Court. … Nevertheless, I have been so identified with the subject of war crimes that, if it involved my personal preferences alone, I should not sit in this case." *Hirota v. MacArthur*, 335 U.S. 876, 879 (1948).

Justice Jackson's recusals predate §455(a). But his stated rationale illustrates the role that Congress would have expected §455(a) to play in a case such as *Bulger* or here: compelling recusal where a judge's previous government service led them to become closely identified with high-profile, high-priority litigation involving the same parties, same facts, and same legal issues as a case to come before them.

3. Justice Jackson's rule makes particular sense here. The duration and high-level attention given to Petitioner's case has resulted in sua sponte recusals from a judge on the CMCR, App. 44a, the Chief Judge of the D.C. Circuit, App. 13a, and two justices of this Court, due to their prior involvement in the case, as well as a Convening Authority. Christian Reismeier, Supplement to Memorandum for File, July 18, 2019.[22] None of these individuals ever appeared, as Judge

[22] https://perma.cc/89JJ-G32U

Katsas did, as opposing counsel against Petitioner. None publicly stated their opinion, as Judge Katsas did, that Petitioner's prosecution "worked well; life sentence." And none are as like Justice Jackson as Judge Katsas is, in being so identified with a category of high-profile, high-priority litigation as to be celebrated by the former Attorney General as the "captain of the [Guantanamo] javelin-catching team."

A reasonable person could question whether Judge Katsas should sit in judgment of a high-profile case, in which the questions presented were whether Petitioner was entitled to relief on the very grounds that Judge Katsas had advocated against before ascending to the bench. But because Judge Katsas concluded that he was not disqualified under §455(b)(3), D.C. Circuit precedent led him to stop his inquiry there. The D.C. Circuit's rule is wrong and warrants this Court's review.

III. This case presents a uniquely strong vehicle to resolve both of the important questions presented.

1. Studies indicate that a supermajority of federal judges come to the bench with significant experience as government counsel. Clark Neily, "Are a Disproportionate Number of Federal Judges Former Government Advocates?" CATO Institute Study (May 27, 2021); *see also Baker Hostetler*, 471 F.3d at 1358. That makes disqualification under §455(b)(3) a routine question. Yet, §455(b)(3) is only rarely subject to judicial scrutiny because, in the courts of appeal, panels are ministerially assigned often using software that screens disqualified judges off cases without notice. *See*, *e.g.*, Handbook of Practice and Internal

Procedures of the United States Court of Appeals for the District of Columbia Circuit, 48 (rev. 2021).

Reasoned opinions applying §455(b)(3) are rare and approximately 86.5% of circuit court opinions in which §455(b)(3) is raised are dedicated to affirming a decision not to recuse.[23] To be sure, many disqualification motions are frivolous. But the caselaw interpreting a routine basis for disqualification is dedicated near wholly to the circumstances where §455(b)(3) does not apply, leaving responsible judges and litigants scant guidance on when it does.

It is often only in the context of en banc proceedings that disqualified judges are identified. Yet, the reasons for disqualification are rarely, if ever, noted.[24] Indeed, Judge Katsas could only speculate as to why Justice Gorsuch and Chief Judge Srinivasan recused themselves from Petitioner's case, since neither had appeared in any case involving Petitioner. App. 6a.

Regardless of the outcome of this case, clarifying when §455(b)(3) applies and whether and when disqualification under §455(a) is warranted, even if disqualification under §455(b)(3) is not, will provide the lower courts much needed guidance on recurring questions for which there is no authoritative precedent. This case is an ideal vehicle for providing

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[23] A Westlaw search of circuit cases citing "455(b)(3)" returns seventy-six published and unpublished opinions. Of these, four arise out of the same two matters. Ten out of seventy-four remaining cases resulted in a finding that recusal was warranted, though not necessarily on §455(b)(3) grounds.

[24] In this Court, too, only Justice Kagan appears to regularly indicate the bases for her recusals. *See*, *e.g.*, *Salley v. United States*, 144 S. Ct. 412 (2023).

that guidance, insofar as it comes to the Court from one of the few published opinions to consider both questions and where the grounds for disqualification under both §455(a) and §455(b)(3) rest on an uncontested factual record comprised of public records subject to judicial notice. Granting certiorari here, therefore, affords this Court a rare opportunity to provide certainty on an open question that frequently recurs but ordinarily evades review.

2. The only vehicle problem this case may present is that Justices Gorsuch and Kavanaugh both recused themselves from the consideration of a previous petition filed in this case. *Bahlul v. United States*, 142 S. Ct. 621 (2021). Petitioner has studied the matter closely and waives their disqualification to the extent permitted by law.

With respect to Justice Kavanaugh, Petitioner assumes that the basis for his recusal was his participation in the en banc D.C. Circuit's rehearings of this case. Canon 3(B)(2)(e) of this Court's Code of Conduct disqualifies any Justice who "served in government employment and in that capacity participated as a judge (in a previous judicial position) ... concerning the proceeding." Unlike the Code of Conduct for United States Judges, however, neither this ground, nor any other, is non-waivable. *Compare* Code of Conduct for United States Judges, Canon 3(D). And the statutory prohibitions of 28 U.S.C. §47 do not apply to the justices of this Court.

While §455(b)(3) makes prior government service as "counsel, adviser or material witness concerning the proceeding" a non-waivable ground for disqualification, it conspicuously does not include

prior judicial service. Given that the questions presented here were not previously before Justice Kavanaugh, Petitioner waives his prior judicial service as a basis for disqualification.

With respect to Justice Gorsuch, Petitioner assumes, as Judge Katsas did below, that the basis for his recusal arose from his role as Judge Katsas' predecessor as the Principal Deputy Associate Attorney General. App. 6a. The records made public during Justice Gorsuch's confirmation to this Court indicate that his most substantial involvement in litigation in which Petitioner had a material interest was his participation in the *Hamdan* and *Boumediene* cases. Ryan Newman to Dianne Feinstein, March 8, 2017.[25] Though he never appeared as counsel, Justice Gorsuch did discuss litigation strategy, participate in moots, and review pleadings, which, as noted above, highlighted Petitioner's ongoing military commission proceedings. *Ibid*.

The most direct involvement Justice Gorsuch appears to have had with Petitioner's case was his receipt of a spreadsheet the Department of Defense sent to "provide regular updates on military commission issues" across federal components. Department of Justice, Nomination Documents Relating to Neil M. Gorsuch, March 10, 2017 ("Gorsuch Documents), at DOJ_NMG_0013362.[26] The sender of this email stated that it "should not be distributed further unless absolutely necessary" and forwarded it to Justice Gorsuch, "[f]or further distribution within your respective organizations on a

[25] https://perma.cc/9E6T-4CYE
[26] https://perma.cc/54KY-9CS6

need-to-know basis." *Ibid*. This spreadsheet included a field indicating the "latest developments" in Petitioner's military commission proceedings and Justice Gorsuch, in turn, forwarded the spreadsheet to nine other Justice Department officials. *Ibid*.

Justice Gorsuch also received write-ups on the pre-trial proceedings in Petitioner's case, which were featured in the Attorney General's "News Briefing," an internal roundup of legal news circulated to "the Attorney General and Senior Staff." Gorsuch Documents, at DOJ_NMG_0008362,[27] DOJ_NMG_0009076.[28] He was copied on an update about the scheduling of pre-trial proceedings in Petitioner's military commission. *Id*. at DOJ_NMG_0008311.[29] And he received status updates about Petitioner's case that were included in the Justice Department's internal Terrorism Litigation Report. *Id*. at DOJ_NMG_0042684.[30]

Justice Gorsuch did not indicate whether the basis of his recusal was under §455(a) or §455(b)(3). If the former, Petitioner waives the need for disqualification because the very question presented is whether this degree of involvement is disqualifying. Judge Katsas shared nearly all the known contacts Justice Gorsuch had with Petitioner's case while in government.[31] Judge Katsas was counsel in both *Hamdan* and

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[27] https://perma.cc/TS5M-VZN3
[28] https://perma.cc/EL8R-DU66
[29] https://perma.cc/47U8-2SYX
[30] https://perma.cc/5ASQ-3V44
[31] Justice Gorsuch and Judge Katsas also worked on detainee treatment policy, Gorsuch Documents, at DOJ_NMG_0040196 (https://perma.cc/ZGL5-UT9H), and the drafting of the MCA. *Id*. at DOJ_NMG_0040177 (https://perma.cc/VP4T-RM66).

Boumediene. He was included on the distribution lists for the Terrorism Litigation Report. And he was one of the nine Justice Department officials whom Justice Gorsuch determined had a need-to-know the Defense Department's military commission updates. If the latter, Petitioner recognizes that Justice Gorsuch's disqualification is mandatory.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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