No. 23-1072

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

REPLY BRIEF FOR PETITIONERS

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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?

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REPLY

The circuits are divided over when a federal judge's prior government service requires recusal under 28 U.S.C. §§455(a) and (b)(3). This Court has never offered any guidance on these routinely relevant questions of judicial administration and this case provides the perfect opportunity to do so. It comes to the Court with an undisputed record, a published opinion applying a minority circuit's settled precedent, and sharply defined disagreements over the standards the relevant statutes impose.

The government effectively concedes at least a 2-2 circuit split on whether §455(b)(3) requires recusal when a judge served as counsel for the government in a related case. BIO.12 & nn. 2–3. Supported by the Tenth and D.C. Circuits, it prefers a narrow reading of §455(b)(3) that excludes related cases. But precedents from at least seven circuits, as well as the statutory text, support Petitioner's position that §455(b)(3) disqualifies judges from presiding over any case concerning the same facts, same issues, and same parties as cases on which they served as counsel for the government.

The government also does not dispute that Judge Katsas is "closely identified with high priority, high profile litigation" concerning Petitioner's case, BIO.11, that his impartiality can be reasonably questioned as a result, and that a plain reading of §455(a) would therefore clearly compel his recusal. Instead, it argues, supported by the D.C. Circuit alone, that such circumstances cannot compel disqualification under §455(a) where they do not under §455(b)(3). Every other circuit disagrees.

Nothing demands higher standards of judicial impartiality than when a "judge must decide 'between the Government and the man whom that Government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular.'" *United States v. Hatter*, 532 U.S. 557, 568–69 (2001) (quoting James Madison, Proceedings and Debates of the Virginia State Convention, of 1829-1830, p. 616 (1830)). Congress enacted §455 to give the public certainty about the federal judiciary's impartially, even in cases involving the nation's enemies. D.C. Circuit law and the broader confusion on the questions presented thwart that purpose. This Court's review is therefore warranted.

I. The full court can decide both questions presented.

Although Justices Kavanaugh and Gorsuch previously disqualified themselves from Petitioner's case, Petitioner has waived their disqualification, Pet.1, 35-38, and the government has raised no objection to their participation. In addition to being waived, disqualification is unwarranted because of its "distorting effect upon the certiorari process." Code of Conduct for Justices of the Supreme Court, 10 (2023).

II. Judge Katsas' mandatory disqualification under §455(b)(3) is clear in any circuit other than the Tenth and D.C. Circuits.

Federal judges must disqualify themselves in any case where they "participated as counsel … concerning the proceeding" for the government. 28 U.S.C. §455(b)(3). The government all but concedes that the circuits have split over whether this statute

bars judges from presiding over related cases involving the same facts, same issues, and same parties as cases on which they served as counsel.

The government both recognizes and endorses the holdings of the Tenth and D.C. Circuits, which exclude related cases from the scope of §455(b)(3). BIO.10. And in footnotes, it concedes that the Fifth Circuit requires recusal where, as here, the judge was involved in both a "collateral-review proceeding" and a "sentence-reduction proceeding," BIO.12 n.2, and that the Sixth Circuit holds that "a judge must recuse from a case that 'is the same as or is related to' a case he oversaw as U.S. Attorney." BIO.12 n.3. That 2-2 circuit split, standing alone, would warrant certiorari on such an important and recurring question. But the circuit split over the scope of §455(b)(3) is far deeper.

"Proceeding" for §455(b)(3) purposes is a defined term. It includes not just the present case on the docket, but also "pretrial, trial, appellate review, or other stages of litigation." 28 U.S.C. §455(d). At least five other circuits interpret that open-ended language to encompass any related case involving the same facts, same issues, and same parties. Pet.20-22; *see also United States v. Smith*, 775 F.3d 879, 881 (7th Cir. 2015) (§455(b)(3) is violated where "a prosecutor who advocates against a particular defendant later sentences him to prison [as a judge], albeit for subsequent though related violations."); *Murray v. Scott*, 253 F.3d 1308, 1312 (11th Cir. 2001) (a "judge who previously served as counsel of record for a related case may be disqualified.").

The government insists that these other circuits have "not set forth a rule that would require Judge

Katsas to recuse in the circumstances here." BIO.12. But this is plainly untrue. The "proceeding" in this case is Petitioner's prosecution by the United States, which first charged him in 2004, and then recharged him in 2008. Pet.11-13. Judge Katsas appeared in 2008 as opposing counsel in a pre-trial habeas case that Petitioner filed challenging that prosecution on three grounds that would ultimately underlie the three issues Judge Katsas decided as a circuit judge.[1] Pet.14-15. If the question before Judge Katsas was whether these two cases are "related," there is no reason to think that he would not have made the commonsense decision to recuse.

The government defends the narrower scope the Tenth and D.C. Circuits place on §455(b)(3) by emphasizing Congress' inclusion of the definite article "the" before the word "proceeding." BIO.10. But the government does not address the open-ended statutory definition of "proceeding." And it ignores the word "concerning," which immediately precedes "the proceeding." Congress did not disqualify judges if they participated as "counsel in the proceeding." It disqualified judges who "participated as counsel … concerning the proceeding." By any commonsense standard, Judge Katsas "participated as counsel concerning" Petitioner's prosecution by appearing as opposing counsel in a habeas case *concerning* Petitioner's prosecution.

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[1] The government states that Petitioner withdrew his habeas petition after this Court's *Hamdan* decision in 2006. BIO.4-5. That is incorrect. Petitioner withdrew his habeas petition on the eve of his trial in October 2008. Pet.15.

III. Judge Katsas's disqualification under §455(a) is clear in any circuit other than the D.C. Circuit.

A reasonable person could doubt whether Judge Katsas could impartially sit in judgment of a high-profile case and decide whether Petitioner was entitled to relief on grounds that Judge Katsas had publicly advocated against in and out of government. Indeed, the government never disputes that a reasonable person could doubt Judge Katsas' impartiality, irrespective of his technical compliance with §455(b)(3). BIO.11. In nearly every circuit, those doubts would compel recusal under §455(a). Judge Katsas did not even consider that possibility, however, because the D.C. Circuit alone treats §455(b)(3) as preclusive.

The government never meaningfully grapples with how other circuits approach this issue. No other circuit would have trouble concluding that "where the earlier proceedings [are] so close to the case now before the judge … recusal under § 455(a) [is] the only permissible option"—even when disqualification is not required under §455(b). *Matter of Hatcher*, 150 F.3d 631, 638 (7th Cir. 1998); *see also* Pet.26-30. Had Judge Katsas applied that standard, there is no reason to think he would not have recused himself.

The government suggests that the D.C. Circuit's rule is not as preclusive as it seems because opinions applying it have noted the possibility of "rare and extraordinary" circumstances where a judge's prior government service might warrant disqualification under §455(a) but not under §455(b)(3). BIO.13-14. The D.C. Circuit has never articulated a standard for

applying that exception, however. And there is no decision of the D.C. Circuit applying it.

If that exception had any practical significance, one would have expected some analysis of its application in this case, given Judge Katsas' previous appearance as opposing counsel in a related case, his close personal identification with Guantanamo litigation, and his extensive public remarks not just about Guantanamo and military commissions generally, but also about Petitioner's case and its issues specifically. But there was none. If the extraordinary facts of this case do not warrant at least some consideration of the "rare and extraordinary" circumstances exception, it is hard to imagine what circumstances could ever satisfy it.

The government derides as "amorphous" a rule under which judges recuse themselves where, as here, they are "closely identified with high-profile, high-priority litigation" on which they worked in government. BIO.11. But Justice Jackson stated this precise principle in *Hirota v. MacArthur*, 335 U.S. 876, 879 (1948). Justice Souter applied it in *In re Bulger*, 710 F.3d 42, 49 (1st Cir. 2013). And, for lower court judges, who can be readily reassigned, such a rule costlessly serves the very public interest Congress enacted §455(a) to protect.

IV. This case presents an ideal vehicle to resolve exceptionally important issues.

The government makes several vehicle arguments. Most were forfeited and all lack merit.

1. The government suggests that certiorari is unwarranted because the decision below was "fact bound." BIO.9. But every disqualification question is

fact bound. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 852 (1988). Unlike most disqualification cases, however, the facts here are undisputed matters of public record and the questions presented ask what standards govern those facts.

No one disputes that Petitioner's prosecution and the habeas case challenging his prosecution were "related" cases. The disagreement is over whether the scope of §455(b)(3) reaches related cases. Likewise, no one disputes that a reasonable person could harbor doubts about Judge Katsas' impartiality. The disagreement is over whether the facts giving rise to those doubts are outside the scope of §455(a) if they are not disqualifying under §455(b)(3). Both questions are squarely before the Court. The facts underlying both are undisputed. And both warrant review.

2. The government contends that Petitioner forfeited his objections by not moving for Judge Katsas' disqualification when petitioning the D.C. Circuit for rehearing en banc four years ago. BIO.15-16. This argument was itself forfeited, as the government failed to raise it below. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999); *Granfinanciera v. Nordberg*, 492 U.S. 33, 38-40 (1989); *United States v. Johnson*, 4 F.4th 116, 120 (D.C. Cir. 2021).

This argument is also meritless. Notice of which judges have voted on petitions for rehearing en banc is ordinarily provided only after petitions are denied. Pet.34. The government offers no authority and no reason to compel litigants to defensively pair en banc petitions with preemptory challenges against judges who may not even be participating, or to protract

litigation in the circuit courts after en banc petitions have been denied.

3. The government also contends for the first time, quoting Judge Katsas' opinion, that Petitioner "failed to develop any 'distinct argument under section 455(a)' … making review in the first instance in this Court inappropriate." BIO.15. This is false and the quote is taken out of context.

Petitioner's claim below, as it is here, was that Judge Katsas' close identification with Guantanamo litigation generally, and his appearance as opposing counsel in Petitioner's habeas case specifically, compelled disqualification under both §455(a) and §455(b)(3). As Judge Katsas recognized, Petitioner cited "these provisions, and a handful of cases applying them, for the general proposition that a judge may not hear a case in which he previously played any role." App. 2a (cleaned up).

When Judge Katsas later stated that Petitioner made no "distinct" argument under §455(a), he was addressing whether §455(b)(3) occupies the field respecting when "a judge must recuse based on past government service." App. 6a. Judge Katsas never suggested that Petitioner forfeited his argument that §455(a) also required disqualification on that ground, and the government forfeited any objections it might have made based upon distinctions between to the two subsections below.

4. The government further contends that, even if Judge Katsas should have recused himself, his failure to do so was harmless. This argument is wrong on the law and the facts.

As an initial matter, the harmless error rule is relevant to remedy, not to whether disqualification was warranted. *Liljeberg*, 486 U.S. at 862. And regardless, the harmless error rule does not apply to the grounds for disqualification presented here.[2] The government acknowledges that a judge's failure to recuse is structural error whenever the need for disqualification is "of constitutional dimension." BIO.16. This Court has already held that a judge who improperly presides over a case they previously litigated is of "constitutional dimension" and further, "is a defect not amenable to harmless-error review, regardless of whether the judge's vote was dispositive." *Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016) (cleaned up).

Judge Katsas' service on Petitioner's case was also not harmless. For a violation of §455 to be harmless, there must be no risk of "injustice to the parties," "injustice in other cases," or "undermining the public's

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[2] The government asserts that *Liljeberg*, "[held] that failures to recuse under Section 455 are subject to harmless-error review." BIO.16. This overstates the Court's conclusion. *Liljeberg* held that the harmless error rule applied to §455(a) violations and reserved judgment on the remedies for §455(b) violations. In practice, circuit courts vacate and remand when confronted with a §455(b)(3) violation as a matter of course. *See*, *e.g.*, *United States v. Lindsey*, 556 F.3d 238, 247 (4th Cir. 2009). A handful of circuits have considered *Liljeberg*'s harmless error rule and extended it to §455(b) generally, though have reached differing conclusions on when and how it should apply. *See*, *e.g.*, *Akers v. Weinshienk*, 350 F. App'x 292, 294 (10th Cir. 2009) (holding that structural error applies where the challenged decisions involve significant discretion). None have revisited the question following *Williams*' holding that an "unacceptable risk of actual bias" constitutes structural error. 579 U.S. at 14.

confidence in the judicial process." *Liljeberg*, 486 U.S. at 864. As the amicus briefs in support of certiorari make plain, all of those risks are present here.

Against this, the government emphasizes the unanimity of the panel decision. BIO.16. But that was also true of *Pennsylvania v. Williams*, 629 Pa. 533 (2014). And even if Judge Katsas's vote was not dispositive to the panel's decision, it was dispositive to denying Petitioner's application for panel rehearing, due to the intervening retirement of another panel member. App. 10a-11a.

Judge Katsas participation was also not harmless because he played a central role in the panel's deliberations on matters of judicial discretion. *Williams*, 579 U.S. at 15. He presided over oral argument and asked most of the questions put to counsel. And the panel's resolution of every issue before it rested on discretionary judgments about the application of law of the case principles, the timeliness of objections, and the harmless error standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), which turns on "the quality of the judgment with which it is applied." *Brecht v. Abrahamson*, 507 U.S. 619, 643 (1993) (Stevens, J., concurring).

5. The government finally contends that this Court's review is unwarranted, even if the decision below is wrong and deepens several circuit splits, because it was the opinion of "a single judge and lacks precedential effect." BIO.15. This is incorrect on the law. The resolution of a motion by a single judge is the "action of the court itself and not of the individual judge." *Hohn v. United States*, 524 U.S. 236, 243-244 (1998). Like Justice Kavanaugh's opinion in *Baker*

Hostetler v. Commerce, 471 F.3d 1355 (D.C. Cir 2006), the decision below was issued "for the court," App. 8a-9a, and published in the federal reporter. *Baker Hostetler*, for its part, has been relied upon to resolve more than two dozen federal cases. *See*, *e.g.*, *In re Hawsawi*, 955 F.3d 152, 160 (D.C. Cir. 2020).

The need for certiorari here also does not rest on the decision below breaking new ground. To the contrary, Judge Katsas faithfully applied settled D.C. Circuit law. If anything, that makes this case an opportune vehicle to resolve deep circuit splits over the ethical standards that govern the federal judiciary. Judge Katsas' decision offers a stark example of the extreme and inevitable results that follow from the combined effect of the D.C. Circuit's minority positions on the questions presented. The D.C. Circuit shares the Tenth Circuit's narrow reading of when §455(b)(3) compels disqualification. That narrow reading is wrong. But whatever its merits, when combined with the preclusive effect the D.C. Circuit uniquely places on §455(b)(3), federal judges in the nation's capital are encouraged to sit in circumstances that, in any other circuit, would have compelled their disqualification under either §455(a) or §455(b)(3).

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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