Case No. 24-10287

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE HIGHLAND CAPITAL MANAGEMENT, L.P.

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

Appellants

v.

JUDGE STACEY G. JERNIGAN,

Appellee

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division
No. 3:23-CV-0726-S
Hon. Karen Gren Scholer, District Judge

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

As Chief Justice Roberts recently explained, the federal judiciary is "duty-bound to strive for 100% compliance" with the federal recusal statute "because public trust is essential, not incidental" to the judiciary's function."[1] Thus, "[i]ndividually, judges must be scrupulously attentive to both the letter and spirit" of rules governing the judiciary, which means striving for "greater attention to promoting a culture of compliance."[2]

Federal law requires recusal whenever a judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). As the Dondero Parties' opening brief recounted, with extensive citation to both the record and the law, a reasonable observer familiar with all the circumstances in this case—including example after example of apparent judicial bias—would question the bankruptcy judge's impartiality. That requires recusal.

In response, Highland recounts a litany of supposed "facts"—largely without citing anything in the record—most of which are either

[1] Hon. John G. Roberts, Jr., 2021 Year-End Report on the Federal Judiciary 9 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[2] *Id.*

irrelevant to the core issues before this Court, distortions of what happened, or both. But where it counts, Highland has little to say; it either concedes or ignores the critical facts and law. For example:

- Highland fails to address any of the Dondero Parties' arguments about why the bankruptcy court erred in denying their motion to recuse, dismissing that issue as "irrelevant"—even though that is the very crux of this dispute. Highland's Br. at 26.

- Highland concedes that a judge is statutorily required to recuse herself if her "impartiality might reasonably be questioned" but makes no effort to contest the Dondero Parties' arguments about why this standard was met. *Id.* at 28.

- Highland does not contest that both extra- and intra-judicial factors are grounds for recusal.

- Highland insists that the district court "evaluate[d]" the multiple examples of the bankruptcy judge's partiality and questionable actions "in context." *Id.* at 17. But Highland does not (and cannot) identify any example of that purported context in the district court's order, let alone explain how any context would resolve a reasonable observer's concerns about the conduct at issue.

- Highland concedes that a petition for writ of mandamus is an appropriate legal vehicle to challenge the denial of a recusal motion. *Id.* at 15.

- Highland does not contest that the Dondero Parties have no other adequate means of relief and therefore satisfy the first prong of the mandamus standard. *See id.* at 45–47.

- While failing to address even one of the many examples of bias cited in the opening brief (and paying little heed to the case law supporting recusal in circumstances less egregious than

those presented here), Highland nonetheless argues that the Dondero Parties failed to meet the second prong of the mandamus standard—a clear and indisputable right to mandamus. *Id.* at 16–22. Again, the most Highland offers to counter the facts and law marshaled by the Dondero Parties is an unadorned argument that the district court got it right.

- Highland also contends that the Dondero Parties do not meet the third prong of the mandamus standard—that a writ is appropriate under the circumstances—because the district court conducted a "careful review of the record" and denied the petition for mandamus. *Id.* at 22–23. But as the Dondero Parties already explained, the district court did no analysis of this third factor (except to say it was not met), leaving Highland to speculate in a lengthy footnote about what might have been relevant to that missing analysis. *Id.* And even then, Highland fails to cite a single page of the record to support its speculation. *Id.*

Instead of well-reasoned legal argument, supported by citations to the record and legal authority, Highland largely relies on vitriol and unsupported attacks on the Dondero Parties to argue that the requested relief is unwarranted. And what little legal and factual authority Highland presents still fails to address the key issue: whether a layperson would reasonably question the impartiality of the presiding bankruptcy judge, in which case recusal is mandatory.

In the end, Highland's attacks provide no basis to affirm the district court's decision. Both the bankruptcy court and the district court erred in refusing to order recusal, and this Court should reverse and remand

to the district court with instructions to grant the Dondero Parties' mandamus petition.

RELEVANT FACTS

Highland's statement of "facts" consists mostly of irrelevant ad hominem attacks on the Dondero Parties, without any citation to supporting evidence in the appellate record.[3] And many of these supposed facts are inconsistent with the record, if not flatly false. Rather than engage in a tit for tat on issues of little importance to this appeal, the Dondero Parties correct or respond to only the most egregious accusations and misrepresentations.

First, Highland spends several pages accusing Mr. Dondero of various acts of self-dealing, breaches of fiduciary duty, and the like. *See* Highland's Br. at 8–10.[4] But Highland does not cite any record evidence

[3] Ironically, Highland accuses the Dondero Parties of similar tactics in discussing the bankruptcy court's actions and statements giving rise to the Dondero Parties' efforts to recuse. *See* Highland's Br. at 18 n.58. As with most of its accusations, Highland does not point the Court to any examples. In any event, the accusation is curious given that the issue on appeal is whether the presiding bankruptcy judge should be recused; the Dondero Parties thus had no choice but to explain the judge's statements and actions meriting recusal. That explanation can hardly be described as "ad hominem" under the circumstances.

[4] Highland even includes its favorite accusation—that Mr. Dondero allegedly threatened to "burn down the place" (the "place" being Highland)—supposedly because the Unsecured Creditors Committee refused to accept his settlement offers. Highland's Br. at 10. This accusation has found itself into numerous briefs before

to support these allegations, nor do they have anything to do with the other Dondero Parties. In any event, whether or not Mr. Dondero (or anyone else) engaged in alleged misdeeds before or during bankruptcy has nothing to do with whether the presiding bankruptcy judge's actions create a perception of bias against the Dondero Parties.

Second, Highland mischaracterizes the record in several respects. For example, without citing any record evidence, Highland accuses the Dondero Parties of flooding the courts with appeals, only to "prevail[] in none of them." Highland's Br. at 10–11. That is neither true nor relevant. To be sure, the Dondero Parties have appealed several bankruptcy court rulings, as they were entitled to do.[5] But they have prevailed in some of those appeals. Most notably, as the Dondero Parties explained in their opening brief, Mr. Dondero prevailed in a recent appeal

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various courts, notwithstanding that there is no written evidence to support it, that Mr. Dondero has vehemently denied it, and that it makes no sense. Highland's only citation for the threat is to this Court's opinion affirming in part the bankruptcy court's confirmation order, but this Court did not engage in any factfinding on this point; it merely recited a portion of the confirmation order that was not at issue on appeal. *Id.* Moreover, as even Highland acknowledges, at the time of Mr. Dondero's supposed statement, he was trying to "regain control of Highland." *Id.* It would make little sense for him to burn down (even in figurative terms) a business he founded and was hoping to salvage in bankruptcy.

[5] As this Court is no doubt aware, appeals are commonplace in bankruptcy cases, where the presiding judge is acting as a magistrate and where many decisions must be reviewed and approved by the district court.

seeking to overturn a nearly $240,000 sanctions award issued by the bankruptcy court. Opening Br. at 18–19. This Court vacated that award, concluding that the bankruptcy court abused its discretion by ordering a punitive, fee-shifting sanction beyond its civil contempt powers. *Id.* (citing *In re Highland Capital Mgmt., LP*, 98 F.4th 170, 172–75 (5th Cir. 2024)). Two of the Dondero Parties also prevailed in part in their appeal of the bankruptcy court's confirmation order, successfully arguing that the third-party exculpation provisions of Highland's plan of reorganization were impermissible. *In re Highland Capital Mgmt., LP*, 48 F.4th 419 (5th Cir. 2022). Yet other appeals have led to settlements rather than merits decisions. *The Charitable DAF Fund, L.P et. al., v. Highland Capital Management, L.P.*, Case No. 22-11036 (5th Cir.), Dkt. 141. But whether the Dondero Parties have exercised their appellate rights successfully has nothing to do with whether the bankruptcy judge has treated the Dondero Parties in a manner that reasonably appears biased, such that recusal is required.[6]

[6] Nor is it relevant that the Dondero Parties chose not to appeal certain rulings, as Highland seems to suggest. *See* Highland's Br. at 9. The question on appeal is not whether the bankruptcy court reached the right result on any particular issue, but rather whether the court's approach to the parties appears partial.

Highland also bizarrely contends (again without citing anything in the record) that this is the Dondero Parties' "third attempt to obtain a writ of mandamus to remove Judge Jernigan" while at the same time accusing the Dondero Parties of trying to "bypass the appellate process." Highland's Br. at 17, 19. The first accusation is false. The underlying petition for writ of mandamus is the Dondero Parties' first and only such petition seeking the bankruptcy judge's recusal. Moreover, the Dondero Parties promptly corrected their initial mistake in filing the petition in Judge Kinkeade's court (a court with appellate jurisdiction over bankruptcy appeals), which can hardly be described as an attempted "bypass" of the appellate process. The Dondero Parties were seeking to invoke the appellate process—as they have been trying to do for nearly two years in response to the bankruptcy court's refusal to recuse. Opening Br. at 11–12.

Finally, Highland claims that various courts have found the Dondero Parties "to have acted in bad faith," such that the bankruptcy court had to impose a "temporary restraining order preventing these Appellants and their affiliates from impeding Highland's reorganization." Highland's Br. at 30. Yet again, Highland cites nothing

to support these allegations, and yet again, they are incorrect. The temporary restraining order Highland appears to be referring to was against Mr. Dondero, not any of the other Dondero Parties. *In re Highland Capital Mgmt., LP*, Adv. Proc. 20-3190 (Bankr. N.D. Tex.), Dkt. 1. And while the bankruptcy court has sometimes questioned the "good faith" of various parties affiliated with Mr. Dondero, it has made only one explicit finding that any of these parties acted in "bad faith," and that finding is on appeal.[7]

Highland's distortions of fact are telling. The Dondero Parties' opening brief spent nearly twenty pages detailing—with citations—the reasons the bankruptcy judge's recusal is required by law. Yet Highland opted to ignore these facts, instead spinning an irrelevant yarn about why the Dondero Parties are bad actors. Perhaps that is because Highland has no response to the Dondero Parties' statement of facts. Highland does not even attempt to defend the presiding judge's actions—

[7] As set forth in the Dondero Parties' opening brief, the bankruptcy court recently held that NexPoint Real Estate Partners, LLC acted in "bad faith" by filing and pursuing a proof of claim. Opening Br. at 23–24. That ruling is currently on appeal before the district court. *NexPoint Real Estate Partners LLC, et al v. Highland Capital Management LP*, Case No. 3:24-cv-1479 (N.D. Tex.).

after all, there is no viable explanation other than bias, or at least its reasonable appearance.

ARGUMENT

The recusal standard is a demanding and objective one: A judge must recuse herself whenever her "impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1998). The bankruptcy court's failure to comply with that mandate is clear enough to meet the mandamus standard, and the district court's contrary conclusion was an abuse of discretion.

The question for the bankruptcy judge was whether to recuse, and that question was not close. The timing of the Dondero Parties' motion, which came promptly on the heels of the judge's bias manifesting itself, was no excuse. Opening Br. at 32–34. The bankruptcy judge applied the wrong standard, focusing on subjective rather than objective considerations and ignoring § 455(a)'s reasonable observer test. Opening Br. at 34–35. The bankruptcy judge began this case with negative views of the Dondero Parties and proceeded to act on those views, treating the Dondero Parties as the villains she imagined them to be at every turn. *Id.* at 6–26.

The mandamus standard shields none of that. In denying mandamus, the district court failed to grapple with the record and misunderstood the law. *See id.* at 44–57. The resulting decision was an abuse of discretion. *Marlin v. Moody Nat'l Bank, N.A.*, 533 F.3d 374, 377 (5th Cir. 2008) ("ruling based on legal error" is an abuse of discretion)

A. It Is Undisputed that the Dondero Parties Have No Other Adequate Means of Relief Besides Mandamus

The first prong of the three-prong test asks whether the party requesting the writ has any other adequate means of relief. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004); Opening Br. at 44–45. It is well established that mandamus relief is particularly appropriate in the context of an order denying recusal. Opening Br. at 45–47 (citing, among other authority, *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997); *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988); *In re Mohammad*, 866 F.3d 473, 475 (D.C. Cir. 2017); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3553 (3d ed.)).

Highland does not contest that the Dondero Parties meet the first prong. Though Highland asserts in its summary that the Dondero Parties "have not met their heavy burden of proving" that "they have no other adequate means to obtain the relief they seek," Highland's Br. at

13, Highland never supports its say-so with argument. Its only discussion of the first prong is buried in a footnote, in which Highland quotes the district court as stating, "Judge Jernigan's ruling could arguably constitute grounds for appeal, not for recusal." *Id.* at 16–17 n.53. But Highland concedes that "[t]he question of disqualification is reviewable on a petition for writ of mandamus." *Id.* at 15 (quoting *In re Houston*, 745 F.2d 925, 927 (5th Cir. 1984)). Highland does not account for the district court's error, nor does it provide any authority to argue that other adequate means of relief are available.

B. The Dondero Parties Have a Clear and Indisputable Right to Mandamus

The second prong of the three-prong mandamus standard asks whether the party requesting the writ has a "clear and indisputable" right to mandamus. *Cheney*, 542 U.S. at 381 (attribution omitted). That is, so long as the bankruptcy judge clearly abused her discretion by refusing to recuse, this prong is satisfied. *See, e.g.*, *In re TikTok, Inc.*, 85 F.4th 352, 358 (5th Cir. 2023) (where the underlying decision is ordinarily reviewable for abuse of discretion, the second prong asks whether the court "clearly abuse[d] its discretion" (attribution omitted)).

1. The Court Can and Should Decide Whether the Bankruptcy Court Erred in Refusing to Recuse

Highland initially insists that the foundational issue in this appeal—whether the bankruptcy judge erred by refusing to recuse herself—is "irrelevant." Highland's Br. at 26. As a result, Highland gives this key question scant discussion.

Highland's dismissal of this core issue as "irrelevant" is perplexing because, at the very least, the bankruptcy judge's error is directly relevant to whether the Dondero Parties have a clear and indisputable right to mandamus. Indeed, it could hardly be more relevant. It would make no sense to decide whether the district court erred in a vacuum. Instead, the Court must consider the question before the district court: Did the bankruptcy court's refusal to recuse comport with applicable law? As the Dondero Parties explained in their opening brief, it did not.

2. Highland Ignores the Bankruptcy Judge's Appearance of Partiality, Which Requires Recusal

The recusal statute begins not by prohibiting actual bias or financially interested decision-making, but rather with a far broader rule: A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a);

Liljeberg, 486 U.S. at 850. It is no accident that the statute focuses on appearances first. The point is "to promote public confidence in the integrity of the judicial process," and for that, appearances matter. *Id.* at 859–60. Case after case recognizes this point.[8]

Where, as here, the judge is the trier of fact, it is especially important to maintain the appearance of impartiality. *IFG Port Holdings v. Lake Charles Harbor & Terminal Dist.*, 82 F.4th 402, 418 (5th Cir. 2023) ("When the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced." (quoting *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 166 (3d Cir. 1993)). Federal judges, after all, "are duty-bound to strive for 100% compliance [with 28 U.S.C. § 455] because public trust is essential, not incidental, to [their] function." *Litovich*, 106 F.4th at 227 (quoting

[8] *See, e.g.*, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) ("[J]ustice must satisfy the *appearance* of justice."); *United States v. Jordan*, 49 F.3d 152, 154 (5th Cir. 1995) ("Put simply, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself."); *Litovich v. Bank of Am. Corp.*, 106 F.4th 218, 227 (2d Cir. 2024) ("[T]he focus of § 455(a) is on avoiding the appearance of partiality, even absent an explicit showing of it."); *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, __ F.4th __, 2024 WL 3642432, at *21 (4th Cir. Aug. 5, 2024) ("even the appearance of partiality requires recusal"); *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir. 1982) ("Impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system."); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir. 1993) ("[T]he public's confidence in the judiciary . . . may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted.") (attribution omitted).

Roberts, *supra* note 1, at 9); *see also Jordan*, 49 F.3d at 157 (ordering recusal to maintain "[p]ublic respect for the judiciary").

Despite the appearance of partiality and a statutory mandate to recuse, the bankruptcy judge failed to recuse, resulting in a litany of prejudicial rulings, such as the sanctions award this Court recently vacated. *Highland Capital*, 98 F.4th at 172–76. The many extra- and intra-judicial examples of the bankruptcy judge's bias (*e.g.*, the disparaging comments, the punitive sanctions, the call for investigation into government loans, the novels), *see* Opening Br. at 4–28, raise reasonable questions concerning the bankruptcy judge's impartiality, which is all that was required.

Highland ignores all that. Instead of confronting the appearance of bias and resulting threat to public trust in the judiciary, Highland claims that two district court judges' decision not to remove the bankruptcy judge necessarily extinguishes any possibility that a reasonable person could question her impartiality. Highland's Br. at 28. That is not how § 455(a) works. The statute's reasonable observer is not a fellow jurist, but a member of the public. The standard is "whether a reasonable and objective person, knowing all of the facts, would harbor doubts concerning

the judge's impartiality." *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483–84 (5th Cir. 2003) (emphasis and attribution omitted).[9] And that person is a layperson. *See Liljeberg*, 486 U.S. at 860 (question is what "the public might reasonably believe"); *id.* at 864–65 ("[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges"); *Faulkner*, 856 F.2d at 721 (same). After all, § 455(a)'s purpose is to maintain the *public's* confidence in the judicial system. *In re Cont'l Airlines*, 981 F.2d 1450, 1463 (5th Cir. 1993) ("[W]e are concerned with . . . maintaining the public's confidence and trust that should a violation of § 455(a) occur, the welfare of the parties will take priority over convenience or ease of disposing of the parties' claims."); *Litovich*, 106 F.4th at 224 ("[T]he purpose of § 455(a) is 'to promote public confidence in the integrity of the judicial process'" (quoting *Liljeberg*, 486 U.S. at 860)).

Nothing about this point "mischaracteriz[es]" *Liljeberg*, "nakedly" or otherwise. *Contra* Highland's Br. at 26. *Liljeberg* is important not

[9] Highland asserts that "*Patterson* is of no use to" the Dondero Parties' arguments. Highland's Br. at 28 n.83. But as Highland concedes, this Court concluded in *Patterson* that the trial court judge "should have recused himself.'" *Id.* (quoting *Patterson*, 335 F.3d at 485–86). Highland's suggestions about the appropriate remedy for rulings infected by the failure to recuse are beside the point; that issue has not been addressed below and is not presented here.

because it has exactly the same facts, but because the Supreme Court's holding is precisely on point: the Court held that "a violation of § 455(a) is established when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality, *notwithstanding a finding that the judge was not actually conscious of those circumstances*." *Liljeberg*, 486 U.S. at 850 (emphasis added). The judge's subjective belief of her impartiality is irrelevant, and proof of actual bias is unnecessary. *Id.*

3. Highland's Undeveloped Implication that the Recusal Motions Were Untimely Is Meritless

Highland implies that the Dondero Parties should have moved for recusal sooner. *See, e.g.*, Highland's Br. at 7–8. But Highland neither develops any argument nor cites any legal authority for this suggestion. *See, e.g.*, *Escalante v. Lidge*, 34 F.4th 486, 496 n.10 (5th Cir. 2022) (undeveloped assertions are forfeited); *see also Murthy v. Missouri*, 144 S. Ct. 1972, 1991 n.7 (2024) ("As the Seventh Circuit has memorably put it, judges are not like pigs, hunting for truffles buried in [briefs]." (cleaned up)).

In any event, the Dondero Parties demonstrated that they timely sought recusal. Opening Br. at 32–34 (citing, among other cases, *IFG*

Port Holdings, 82 F.4th at 419; *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983)). The timeliness of a recusal motion is determined not from the progress of the underlying case, *contra* Highland's Br. at 7, but from the point when a judge's partiality (or appearance of partiality) becomes clear (*i.e.*, when the grounds for recusal, beyond speculation, are actually known). *Hall*, 695 F.2d at 179 (motion for recusal was timely even though filed after trial).

The Dondero Parties sought recusal once an evolving pattern of apparent bias and actual animus became clear, which did not occur until late 2020 and early 2021. Opening Br. at 32–34; *see also id.* at 11 (citing ROA.80–117). For example, it was not until December 2020 that the bankruptcy judge speculated Mr. Dondero was behind a third-party motion and concluded (without any evidence) that the motion was brought for an improper purpose. ROA.2975 at 63:14–25. And it was not until January 2021 that the bankruptcy judge concluded (without evidence) that Mr. Dondero had caused outside counsel for the retail funds to tortiously interfere with certain agreements and threatened to shift the "whole bundle of attorney's fees" to Mr. Dondero for his supposed "contempt." ROA.2990–991 at 251:24–252:5.

Because a recusal motion is timely if filed within a reasonable time after the grounds for recusal become clear, the Dondero Parties' recusal efforts were timely. *See IFG Port Holdings*, 82 F.4th at 419 (recusal effort timely where the movant initiated it shortly after learning of friendship between judge and counsel); *Hall*, 695 F.2d at 179 (though initiated after trial, recusal effort timely where movant did not learn of law clerk's employment offer from plaintiff's counsel until after trial).

4. The Bankruptcy Judge Clearly Abused Her Discretion in Denying Recusal

The Dondero Parties' opening brief cited ample legal authority to demonstrate a clear and indisputable right to mandamus. Opening Br. at 48–54 (citing *Liljeberg*, 486 U.S. at 850; Am. Bar Assn. Model Code of Judicial Conduct, Rules 2.10, 3.5; and Guide to Judiciary Policy, Vol. 2, Part B, § 220, Nos. 55, 112, 114, among other sources). Highland's response, in contrast, is devoid of legal authority. Highland's Br. at 16–22.

So too for the facts. The Dondero Parties demonstrated a clear right to mandamus by providing multiple examples of the bankruptcy judge's apparent partiality and her abuse of discretion in denying recusal. Opening Br. at 32–44. Highland either ignores those examples or fails to

explain how they do not at least raise a reasonable appearance of partiality.

Early Commentary and Targeting. For example, at the bankruptcy judge's very first hearing in January 2020, the judge stated that Mr. Dondero acted in a "bad way" in prior litigation and said, "I can't extract what I learned during the [prior litigation], it's in my brain." ROA.2891–892 at 78:23–79:16. The bankruptcy judge then insisted *sua sponte* on including language in an order to allow the court to hold Mr. Dondero (but no other party) in contempt. ROA.2892–893 at 79:14–80:6. At the time, Mr. Dondero had not filed a single motion or objection to any motion, and nothing in the record justified the bankruptcy judge's comments. ROA.2851. Highland fails to address the hearing, much less explain how the bankruptcy judge's actions would not raise reasonable questions about her impartiality.

In addition, in a bankruptcy-related adversary proceeding, the bankruptcy judge ordered Mr. Dondero to appear at all hearings, suggesting that Mr. Dondero could not be "trust[ed]" to "keep[s] his word." *See* ROA.2902–903 at 174:11–175:13. When Mr. Dondero later failed to personally appear at a routine discovery hearing, the

bankruptcy judge scolded him and broadened the scope of her prior order, even though Mr. Dondero's counsel took responsibility for the misunderstanding. *See* ROA.11804 at 17:20–23; ROA.11806–807 at 19:18–20:2; ROA.11807–808 at 20:19–21:14. Additionally, the bankruptcy judge expressly ordered Mr. Dondero's sister to "appear in all future hearings" in the Highland bankruptcy and in "all Adversary proceedings where either the Trusts are a party or take a position, unless otherwise ordered by the court." ROA.14260. Again, Highland fails to address the orders and comments and makes no effort to argue against an appearance of partiality.

The Novels. What's more, the bankruptcy judge's novels—*He Watches All My Paths* and *Hedging Death*—create, at minimum, an appearance of bias and raise reasonable questions concerning the bankruptcy judge's impartiality. Opening Br. at 20–23, 37–40.

Both novels were published while the bankruptcy judge presided over bankruptcies in which some or all of the Dondero Parties were involved. Opening Br. at 21. The novels described the Dondero Parties' industry as "creepy" and portrayed those involved in it as villains. *Id.* at 21–22. And both books feature antagonists with eyebrow-raising

similarities to the Dondero Parties, *id.* at 21–22, and a hero directly based on the bankruptcy judge herself, *id.* at 21.

The similarities are striking enough to catch the eye of the media. As a recent American Lawyer article observed in response to this issue, "a judge shouldn't write thinly fictionalized versions of individuals in pending cases, if only because of the possible appearance of bias." *Federal Bankruptcy Judge's 'Vilifying' Novels Raise Questions Over Impartiality*, Am. Lawyer (July 23, 2024), https://www.law.com/americanlawyer/2024/07/23/federal-bankruptcy-judges-vilifying-novels-raise-questions-over-impartiality (quoting Prof. Adam Levitin).[10] The bankruptcy judge's refusal to recuse herself after publishing the novels has even made its way to TikTok. A recent video posted by LawyerLori—a South Carolina lawyer with more than 600,000 followers—suggested in strong terms that the novels alone warranted the judge's recusal and sought audience feedback about the issue.[11] Though recusal is not "defined by what

[10] The cited article, which was published after the Dondero Parties filed their opening brief, is appropriate for judicial notice because its existence is a matter of public record not subject to reasonable dispute. *See* Fed. R. Evid. 201(b)(2). This brief cites the article not for the truth of its contents, but for its existence, which demonstrates that the parallels between the bankruptcy judge's novels and real life are a subject of public and media interest.

[11] *See* https://www.tiktok.com/@lawyerlori/video/7368614604773084462.

appears in the press," courts recognize "that recurrent controversies legitimately risk undermining public confidence in the federal judiciary and its function: the fair adjudication of the law." *See Litovich*, 106 F.4th at 228. Because the purpose of the recusal statute is to maintain public confidence in the judiciary, even the appearance of bias warrants recusal. *See Marshall*, 446 U.S. at 242; *Faulkner*, 856 F.2d at 721; *Cont'l Airlines*, 981 F.2d at 1463. Thus, the bankruptcy judge's novels warrant recusal.

Highland has no counterargument; its brief fails to explain how the similarities between the novels and real-life people and events do not raise reasonable questions about the bankruptcy judge's impartiality. Highland's Br. at 19–20. Instead, Highland insists that the novels must be okay because the bankruptcy judge "spent more than four pages of her opinion discussing her novels," including "explaining her motivations and inspirations for writing them." *Id.* at 19. But the question is not whether the judge's order denying recusal contained an explanation of the novels' content; it is whether an ordinary observer would have reasonable questions about the bankruptcy judge's impartiality in light of those novels. *See supra* pp. 12–14. Highland does not even acknowledge this question, let alone give any meaningful answer. *See* Highland's Br. at

19–20. As the Dondero Parties have demonstrated, the bankruptcy judge selectively addressed only a few of the identified bases for recusal, misapplied the law, and avoided discussing the important similarities between the novels and real-life events. Opening Br. at 35, 37–38.

Highland's only other defense of the novels is to argue that the district court "addressed the issue of Judge Jernigan's novels directly and bluntly" and was "not persuaded." Highland's Br. at 19. At the same time, Highland concedes that the district court's "uncomfortably terse" (Highland's words) order does not explain how a reasonable person would be convinced of the bankruptcy judge's impartiality despite the similarities between the novels and real-life people and events. *Id.* at 19–20 & n.61 (acknowledging that the district court "chose[] [not] to elaborate on its rejection of the 'parallels'" between the Dondero Parties and the novels' characters and events).

At the end of the day, a layperson confronted both with Judge Jernigan's attempt to explain away the novels and the reality of the novels' content—including the close parallels between their characters and the parties before her in this case—would reasonably question whether the judge harbors any bias against hedge-fund managers and

the investment industry in which the Dondero Parties operate. Opening Br. at 20-23, 37–40. Significantly, the novels are a problem entirely of the bankruptcy judge's own creation: no one forced the judge to write them, and no one moved the court for a fictionalized account of hedge fund managers and bankruptcy judges. The decision to write the novels raises legitimate questions about the bankruptcy judge's judgment and impartiality. Therefore, the novels warrant recusal, particularly in the context of the bankruptcy judge's conduct in this case.

Extrajudicial Bias. Next, the bankruptcy judge's call for investigation into Paycheck Protection Program ("PPP") loans reveals an extrajudicial source of bias. Opening Br. 40–41. As the opening brief explains, an extrajudicial source of bias is relevant but not required for recusal. Opening Br. at 49. Highland does not contest this point and in fact concedes that the newspaper article the bankruptcy judge read about PPP loans is an extrajudicial source. Highland's Br. at 20 n.62.[12]

[12] Highland's claim that the PPP loan article is "the only extra judicial fact" the Dondero Parties cite, Highland's Br. 20 n.62, ignores the novels, which are of course extrajudicial. Highland further argues that the bankruptcy judge "openly disclosed" the PPP loan article, *id.*, which stands in contrast to the novels that the bankruptcy judge failed to disclose to the parties, Opening Br. 20–21.

The fact remains that the bankruptcy judge read an extrajudicial article regarding the Dondero Parties, implied that the Dondero Parties may have engaged in improper activity, and based on the article, *sua sponte* directed Highland's counsel to conduct an investigation into the loans. ROA.2932, at 43:13–25. Highland's characterization of these actions as "an isolated episode," Highland's Br. at 20, ignores the reality that they are just one part of a long-running pattern of conduct calling the bankruptcy judge's impartiality into question, *see* Opening Br. at 4–26. In any event, even one egregious display of bias can suffice to support recusal. *See, e.g.*, *In re United States*, 572 F.3d 301, 312 (7th Cir. 2009) (ordering recusal based on comments made by the presiding judge during one off-the-record meeting with the parties). And as Highland acknowledges, "the district court did not address" the bankruptcy judge's actions regarding the PPP loans at all, Highland's Br. at 21, and thus did not analyze whether those actions create or contribute to an appearance of partiality, ROA.18885–890.

At minimum, the bankruptcy judge's comments and unsolicited call for an investigation create an appearance of bias and raise reasonable questions concerning the bankruptcy judge's impartiality.

Name-calling. Finally, Highland concedes that the bankruptcy judge repeatedly called the Dondero Parties "litigious" and "vexatious." Highland's Br. at 5. The opening brief cites multiple examples of the bankruptcy judge expressing these views on the record. Opening Br. at 42. When considered in context of the long-running pattern of actions creating an appearance of partiality, the judge's commentary only exacerbates that appearance and raises additional questions.

Highland's only response is to claim that the bankruptcy court "rightly" made these statements. Highland's Br. at 21–22. In support, Highland claims (again without citation) that this Court affirmed "every single finding of bad faith." *Id*. at 22. That is incorrect. In reversing in part and remanding the bankruptcy judge's confirmation order, the Court did recite language from the confirmation order expressing the bankruptcy judge's views about the Dondero Parties' "bad faith," but the bankruptcy court's commentary was not at issue on appeal and so there was no "finding" of bad faith to affirm. *See In re Highland Capital Mgmt., LP*, 48 F.4th 419 (5th Cir. 2022).

* * *

In the end, Highland's argument is irreconcilable with the many cases in which courts found recusal appropriate under circumstances similar to those here. *See, e.g.*, *Johnson v. Sawyer*, 120 F.3d 1307, 1333–37 (5th Cir. 1997) (recusal appropriate where "immediate, continuing, and ever-increasing tension" between judge and counsel, judge questioned in open court counsel's conduct and party's "good faith"); *Sentis Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 904–05 (8th Cir. 2009) (judge's antagonistic statements to plaintiffs showed "apparent distrust" of plaintiffs "early in the litigation"); *United States v. Kennedy*, 682 F.3d 244, 258–60 (3d Cir. 2012) (judge openly questioned counsel's integrity, suggested counsel was acting in "bad faith," and derided counsel's decisions as "suspicious"); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 164–66 (3d Cir. 1993) (judge accused plaintiffs and their counsel of "excessive contentiousness" and "bad faith").[13]

[13] *See also* ROA.2891–892 at 78:23–79:16; ROA.2902–903 at 174:11–175:1; ROA.14291–292; ROA.3921–933; ROA.21, 27, 79; ROA.2975 at 63:14–25; ROA.2920 at 82:3–11; ROA.2923 at 85:4–22; ROA.2981–984, at 119:6–122:25; ROA.2990–991 at 251:24–252:5.

C. Mandamus Relief Is Appropriate Under the Circumstances, and Highland's Speculation Cannot Rescue the District Court's Unsupported Contrary Conclusion

The third and final prong of the mandamus standard asks whether a writ of mandamus is appropriate under the circumstances—that is, assuming that "the first two prerequisites have been met," are there discretionary reasons for or against mandamus? *Cheney*, 542 U.S. at 381. Generally, a party satisfies the third prong by showing that the issues implicated by the writ have importance outside the immediate case. *In re A&D Ints., Inc.*, 33 F.4th 254, 256 (5th Cir. 2022). That standard is readily met here; recusal necessarily involves public confidence in the judiciary. Opening Br. at 55–56; *see also* Roberts, *supra* note 1, at 9.

The District court did not provide any basis for finding mandamus inappropriate, other than to say that a reasonable observer would not harbor doubts about the bankruptcy judge's impartiality. ROA.18889. That is just a restatement of the second-prong question, not a discretionary reason to deny mandamus "even if the first two prerequisites have been met," *Cheney*, 542 U.S. at 381. The District court's brief discussion did not analyze recusal law and did not consider the broader issues implicated by the bankruptcy judge's refusal to recuse.

ROA.18885–890. That failure to apply the relevant legal standard is by definition an abuse of discretion. *See, e.g.*, *Highland Capital*, 98 F.4th at 174 ("[A] court abuses its discretion when it bases its decision on an erroneous legal conclusion." (attribution omitted)).

Highland repeats the district court's mistake; its arguments go to the second (merits) prong, not the third (discretionary) prong—and are wrong regardless. Highland's Br. at 22–26. Highland insists that the district court conducted "a careful review of the record." *Id.* at 22. But the district court neither identified any part of the record it reviewed nor provided any analysis. ROA.18885–890. So Highland is left to speculate as to what the district court considered. Highland's Br. at 23–24 (bullet points with no citations to the record). That speculation cannot overcome what the district court's opinion actually says (and fails to say). ROA.18889.

Assuming, as the law requires, that the Dondero Parties prevail on the first two prongs—that mandamus relief is appropriate and that the bankruptcy judge clearly abused her discretion in refusing to recuse because her actions and comments would lead a reasonable observer to question her impartiality—the third prong falls into place. A judge's

partiality necessarily implicates public confidence in the judiciary, which warrants extraordinary relief. And neither Highland nor the district court identified any countervailing interests.

CONCLUSION

The Court should reverse the denial of mandamus relief and remand with instructions to issue the writ.

Respectfully Submitted,

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Dated August 16, 2024

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CERTIFICATE OF SERVICE

This is to certify that this brief was served this day on all parties who receive notification through the Court's electronic filing systems.

Dated August 16, 2024

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