No. 25-355

In the Supreme Court of the United States

JAMES DONDERO, ET AL.,

Petitioners,

v.

STACEY G. JERNIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the right to a jury trial, to due process of law, and to have laws made by the nation's elected legislators through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, executive branch officials, administrative agencies, and even some courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints against the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

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[1] In accordance with Supreme Court Rule 37.2, NCLA provided timely notice to counsel of record for the parties of its intention to file this brief. No party's counsel authored any portion of this brief, and no party, party counsel, or person other than *amicus curiae* made a monetary contribution intended to fund this brief's preparation or submission. *See* S. Ct. R. 37.6.

As a staunch defender of Americans' rights to self-government, the constitutional separation of powers, and the rule of law, NCLA has an interest in the Court's consideration of this case. Moreover, as a key advocate behind the *SEC v. Cochran*, *SEC v. Jarkesy*, and *Relentless v. Department of Commerce* cases, which involved related issues, NCLA has a unique perspective to offer the Court. As explained herein, NCLA is concerned that the challenged ruling of the Fifth Circuit, which joined a circuit split on the appropriate appellate review standard for lower court recusal decisions, overlooked a critical constitutional distinction between Article III district courts and other, non-Article III tribunals. NCLA respectfully urges the Court to consider that distinction while granting the petition for a writ of certiorari.

ARGUMENT

ARTICLE III COURTS SHOULD REVIEW THE RECUSAL DECISIONS OF NON-ARTICLE III TRIBUNALS *DE NOVO* AND WITHOUT DEFERENCE

NCLA shares Petitioners' concern that the Fifth Circuit—falling in line with most other circuits—applied a standard of review that accords too much deference to a lower tribunal's assessment of its own impartiality. NCLA further agrees with Petitioner that given the current circuit split on the appropriate standard of review, and because all circuits have now weighed in, the Court should grant review and resolve the circuit split now.

NCLA writes separately to briefly highlight an additional concern about the ruling below: It applied its highly deferential standard of judicial review to the decision of a *non-Article III bankruptcy tribunal* on a non-core question of law that requires no specialized bankruptcy expertise. Even assuming some degree of deference might be acceptable when one Article III court reviews another Article III court's refusal to recuse—a dubious proposition for the reasons explained in the petition—no similar deference is warranted when an Article III court reviews such a decision coming from a non-Article III tribunal. In the latter scenario, due process of law and the constitutional separation of powers demand that this ultimate question of law—*i.e.*, whether the bankruptcy judge's impartiality, assessed objectively, might reasonably be questioned—be decided *de novo* by the reviewing Article III court.

This Court needs no reminder about the bright-line constitutional distinction that separates presidentially appointed, Senate-confirmed, tenure-protected, and salary-guaranteed Article III judges from the thousands of other federal adjudicators who decide matters in Article I "Tribunals" and in executive departments and

agencies. Unlike Article III judges, these other adjudicators—including bankruptcy judges—lack the core *judicial* characteristics that safeguard independence, impartiality, and the due process of law.

Because of this critical distinction between Article III courts and other adjudicatory tribunals, Congress and the courts have consistently demanded that appellate review of decisions by these other tribunals on questions of law be conducted *de novo*—and especially on legal questions of general applicability requiring no specialized subject-matter expertise. *See, e.g.*, *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25 (2014); *Stern v. Marshall*, 564 U.S. 462 (2011); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); 5 U.S.C. § 706 (when reviewing agency decisions, courts decide "all relevant questions of law, interpret constitutional and statutory provisions," and "hold unlawful and set aside agency action … not in accordance with law" or "without observance of procedure required by law"); *cf. SEC v. Jarkesy*, 603 U.S. 109, 147-48 (2024) (Gorsuch, J., concurring) (distinguishing colonial era vice-admiralty judges' lack of independence from the tenure and salary protections the Constitution bestows on Article III judges); *Loper Bright Enters. v. Raimondo* and *Relentless, Inc. v. Dep't of Commerce*, 603 U.S. 369, 412-413 (2024) (courts must exercise independent judgment when deciding whether administrative agencies have acted within their statutory authority).

The court below nevertheless applied a deferential abuse-of-discretion standard in reviewing the bankruptcy judge's ruling that her own impartiality could not reasonably be questioned within the meaning

of 28 U.S.C. § 455(a). App. 8a, 28a.[2] Joining most other circuits, it reviewed that ruling only for abuse of discretion, while acknowledging that "a strong argument could be made that [the bankruptcy judge] had a duty to recuse." App. 17a. In doing so, the court accorded to the bankruptcy judge the same degree of discretion that other circuits have accorded to Article III district judges.[3] The end result? Litigants who question the impartiality of their non-Article III adjudicators—an often highly consequential legal question needing no specialized subject-matter expertise to resolve—will *never* have that legal question answered *de novo* by any Article III court.

It bears emphasizing, moreover, that the question of recusal is not just a mine-run legal question. It can have constitutional significance, because refusals to recuse can deprive litigants of their due process right to an impartial adjudicator. *See, e.g.*, *Williams v. Pennsylvania*, 579 U.S. 1, 4, 16 (2016); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884-86 (2009); *cf. In re Murchison*, 349 U.S. 133, 139 (1955) (state court contempt proceeding conducted by judge as "one-man grand jury" violated due process). With this important constitutional right potentially hanging in the balance, *de novo* review by an Article III court is especially warranted. *U.S. Bank Nat'l Ass'n ex rel. CWCapital*

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[2] Although § 455(a) does not expressly cover the recusal decisions of bankruptcy judges, the statute is made applicable to bankruptcy judges through Rule 5004(a) of the Federal Rules of Bankruptcy Procedure.

[3] The Fifth Circuit is not alone in this regard. Other circuits have likewise reviewed bankruptcy court recusal decisions solely for abuse of discretion, typically extending their precedent for district court recusals without discussing the key constitutional differences between Article III courts and bankruptcy courts. *See, e.g.*, *In re Marshall*, 721 F.3d 1032, 1039 (9th Cir. 2013); *In re Triple S Restaurants, Inc.*, 422 F.3d 405, 417 (6th Cir. 2005); *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1500 (10th Cir. 1994).

Asset Mgmt. LLC v. Village at Lakeridge, LLC, 583 U.S. 387, 396 n.4 (2018) (even when reviewing a mixed question of law and fact involving credibility judgments and other case-specific factual issues, when the question is "[i]n the constitutional realm … the calculus changes"); *cf. Axon Enter., Inc. v. FTC* and *SEC v. Cochran*, 598 U.S. 175, 194-95 (2023) (non-Article III agencies lack "expertise" or "competence" to decide constitutional questions (quoting *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 (2010))); *Carr v. Saul*, 593 U.S. 83, 92 (2021) (non-Article III agency adjudicators are "ill suited to address structural constitutional challenges").

This Court's decision in *U.S. Bank*—which was not cited or addressed by the parties or the courts below—does not support the abuse-of-discretion standard adopted here, and it implicitly counsels against it. In that case, the Court addressed the relatively narrow question of whether a bankruptcy court's decision on a mixed question of fact and bankruptcy law—specifically, was a specific individual a "non-statutory insider" of the debtor?—should be reviewed *de novo* or only for clear error. 583 U.S. at 393-98. After noting all parties' agreement that appellate courts generally review bankruptcy court legal conclusions *de novo* and "without the slightest deference," *id.* at 393, the Court held that clear error was nevertheless the proper standard in that case, but for reasons inapplicable here.

One obvious distinction is that the bankruptcy judge's decision in *U.S. Bank* involved a provision of the Bankruptcy Code that was integral to the success or failure of a debtor's proposed "cramdown" plan of reorganization, whereas the decision in the instant case was on an entirely collateral matter having nothing to do with bankruptcy law or any proposed reorganization plan. Another distinction is that the bankruptcy judge's decision in *U.S. Bank* had nothing to do with the bankruptcy judge himself, nor with his own impartiality,

whereas the decision in the instant case is almost entirely about the bankruptcy judge and reasonable perceptions about her impartiality.

A third crucial distinction is that existing circuit precedent in *U.S. Bank* had already dictated the legal result once the bankruptcy court resolved the purely factual question of whether a particular transaction was conducted at arm's length. *See* 583 U.S. at 396-98. With the applicable legal test already firmly established by circuit precedent, neither the bankruptcy court nor the reviewing courts had much legal work left to do once the bankruptcy court made the purely factual finding that the relevant transaction was conducted at arm's length. In the instant case, by contrast, no comparable circuit precedent plainly dictates the legal result that follows from a finding that a presiding judge wrote books featuring a fictional heroine and villain who bear close resemblance to the judge and to a party involved in adversarial litigation pending before her, respectively.

Here, there was plenty of legal work to be done by the reviewing courts in a case with unusual facts and one of apparent first impression. As previously noted, that legal work also potentially implicated the litigants' due process right to an impartial adjudicator, which should have changed the calculus on the proper standard of review. *Id.* at 396 n.4. Moreover, unlike in *U.S. Bank*, the Article III appellate courts here were in a much better position to dispassionately decide whether, applying § 455(a)'s objective and mandatory statutory standard for recusal, the bankruptcy judge's impartiality might reasonably be questioned. *See id.* at 395 (courts must consider "the nature of the mixed question [at issue] and which kind of court (bankruptcy or appellate) is better suited to resolve it").

Regardless of whether an Article III appeals court should defer to an Article III district court's decision not

to recuse, Article III courts should review the recusal decisions of non-Article III adjudicators *de novo* and without deference.

CONCLUSION

For the foregoing reasons, *amicus curiae* NCLA respectfully urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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