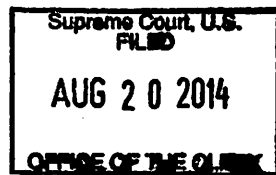


14-207
No. 14-_____



IN THE
Supreme Court of the United States

KOLON INDUSTRIES, INC.,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal recusal statute mandates that a federal judge “shall ... disqualify himself” when he or any of his former law partners have served as a lawyer in the matter in controversy. 28 U.S.C. § 455(b)(2). The statute places no obligations, substantive or procedural, on the parties, and does not require that any party move for disqualification. The statute further prohibits the parties from waiving disqualification when it is required under section 455(b). *Id.* § 455(e). The question presented is:

Under 28 U.S.C. § 455(b), is a federal judge relieved of his mandatory statutory duty of self-disqualification, simply because neither party filed a timely motion to disqualify the judge?

CORPORATE DISCLOSURE STATEMENT

In 2010, Kolon Corporation (then known as “Kolon Industries, Inc.”) adopted a holding company structure, separating its industrial manufacturing operations and assets into a newly-formed public company. The new company adopted the English name “Kolon Industries, Inc.,” while the original company, which retained the investment assets and portfolio management functions, adopted the English name “Kolon Corporation.”

Kolon Corporation has no parent corporations, and no publicly held company owns 10% of more of the stock of Kolon Corporation. Kolon Corporation owns more than 10% of shares in the new Kolon Industries, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported, but is available at 2014 WL 1317700 and reproduced in the Petition Appendix (“App.”) at 1a-14a. The opinion of the United States District Court for the Eastern District of Virginia is reported at 847 F. Supp. 2d 843 and reproduced at App. 15a-57a. The Fourth Circuit opinion in the companion case, *Kolon Industries, Inc. v. E.I. du Pont de Nemours & Co.*, is reported at 748 F.3d 160 (4th Cir. 2014) and reproduced at App. 58a-109a. A certiorari petition in the companion case is pending with this Court in *Kolon Industries, Inc. v. E.I. du Pont de Nemours & Co.*, No. 14-77 (docketed July 24, 2014).

JURISDICTION

The judgment of the Fourth Circuit was entered on April 3, 2014. App. 112a-113a. The Fourth Circuit denied rehearing and rehearing *en banc* on May 22, 2014. App. 110a-111a.

The district court had jurisdiction under 28 U.S.C. § 1332, and the court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The federal recusal statute, 28 U.S.C. § 455, is reproduced at App. 114a-117a.

STATEMENT OF THE CASE

A. Introduction

The federal recusal statute provides that a federal judge “shall ... disqualify himself” when, during the

judge's tenure in private practice, he or his law partners served as lawyers "in the matter in controversy." 28 U.S.C. § 455(b)(2). Here, the presiding district judge was a partner at a law firm that had served as trial counsel to Respondent E.I. du Pont de Nemours and Company ("DuPont") in a prior litigation that became a matter in controversy in this case. The lawyers with whom the judge had practiced represented DuPont in that proceeding, and the judge himself was involved in the case. Nevertheless, the judge refused to recuse himself on the basis that Petitioner Kolon Industries, Inc. ("Kolon") did not file a timely motion for disqualification.

A divided panel of the Fourth Circuit excused the district judge's failure to disqualify himself, both in this case and in the companion case, *Kolon Industries, Inc. v. E.I. du Pont de Nemours & Co.*, 748 F.3d 160 (4th Cir. 2014), *cert. pending*, No. 14-77 (July 24, 2014). The court of appeals held that 28 U.S.C. § 455(b) contains "a judicially implied timely-filing requirement." App. 92a-93a. This holding — which finds no support in the statutory text or history — implicates a deep and longstanding split among the circuits. In reading an implied timeliness requirement into the federal recusal statute, the Fourth Circuit acknowledged a 7-2 circuit split. App. 74a. The court of appeals aligned itself with six other circuits — the Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits. By contrast, two other courts of appeals — the Seventh and Federal Circuits — have refused to impose this judicial gloss upon the statute's mandatory disqualification duty. This entrenched circuit conflict

— which is, in fact, an 8-3 split — should be resolved by this Court.

The Fourth Circuit's statutory construction is squarely contrary to the text of the statute and to congressional intent. The court of appeals majority could identify no textual support in section 455(b) for its holding, improperly relying instead on the canon that a statute cannot be construed to have absurd results. App. 73a. Nor could the majority's decision be reconciled with the statute's prohibition on waiving disqualification when it is required. 28 U.S.C. § 455(e). Finally, the legislative history makes clear that Congress amended section 455 in 1974 to incorporate the recently adopted Code of Judicial Conduct, compliance with which is not contingent upon a party motion. Indeed, Congress disregarded a suggestion of the Department of Justice to revise the bill to include a timely filing requirement of the kind that the Fourth Circuit and likeminded courts have now imposed by judicial fiat. As Judge Shedd observed, the majority's decision "flies in the face of the plain language and thwarts the clear congressional purpose of § 455(b)(2)." App. 94a (Shedd, J., dissenting).

By permitting a judge subject to a mandatory recusal duty to continue presiding over the case, the implied timeliness rule undermines section 455's objective of "promot[ing] public confidence in the integrity of the judicial process." App. 100a (Shedd, J., dissenting) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988)). "The power and the prerogative of a court ... rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments

depends in turn upon the issuing court's absolute probity." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). This Court should grant certiorari in this case and in the companion case, No. 14-77, in order to resolve the longstanding disagreement amount circuits on the requirements of section 455, and to vindicate the congressional insistence on mandatory judicial disqualification as a safeguard of the public confidence in judicial impartiality.

B. Factual Background

DuPont is a chemical company that produces Kevlar, a high-strength synthetic para-aramid fiber used in body armor, tires, fiber optic cables, and a variety of other industrial applications. App. 3a; 60a. DuPont invented para-aramid fiber in 1965, App. 60a, and initially was the only para-aramid producer. Subsequently, other companies began to research and, eventually, produce para-aramid products. App. 4a. During the 1980s, DuPont's primary competitor was a Dutch company Akzo N.V. ("Akzo"). App. 5a-6a.¹

DuPont and Akzo engaged in protracted global patent litigation related to the manufacture and sale of para-aramid fiber. App. 5a; 19a; 64a. In one such dispute, Akzo and DuPont sued each other in the United States District Court for the Eastern District of Virginia over the infringement and invalidity of an Akzo para-aramid patent. App. 6a; 19a; 60a. One of the two law firms representing DuPont in that litigation was McGuire Woods & Battle (now

¹ Akzo was subsequently purchased by a Japanese para-aramid manufacturer Teijin Ltd. and renamed Teijin Aramid ("Teijin").

“McGuireWoods”) — DuPont’s counsel in the district court proceedings below. App. 5a; 19a; 64a. During that time, the district judge was a partner (and head of litigation) in McGuireWoods’s Richmond office. App. 19a; 64a. The *Akzo* litigation ended in 1986, *see* App. 56a, and DuPont and Akzo subsequently reached a global patent settlement in 1988. *See* Karel F. Mulder, *A Battle of Giants: The Multiplicity of Industrial R&D that Produced High-Strength Aramid Fibers*, 21 Tech. in Soc’y 37, 56, 58 (1999).

Kolon, a South Korean company, began researching para-aramid fibers in 1979, and began to market its competing Heracron para-aramid product in 2005. App. 4a; 61a. In 2006, Kolon hired five former DuPont employees to work as consultants to improve its para-aramid manufacturing technology. App. 4a.

C. Proceedings in the District Court

In 2009, DuPont brought suit against Kolon, claiming trade-secret misappropriation. App. 5a; 62a. Kolon counterclaimed, alleging that DuPont had monopolized and attempted to monopolize the United States para-aramid market. *See* App. 5a; 62a-63a.

Kolon’s critical defense to DuPont’s trade-secret claims was that many of the alleged trade secrets involved publicly available information. App. 5a. Specifically, Kolon argued that DuPont either disclosed or otherwise waived confidentiality of these trade secrets during the *Akzo* litigation. *See* App. 5a; 20a; 65a; 108a (Shedd, J., dissenting).

Kolon sought extensive discovery regarding the *Akzo* litigation. *See* App. 20a-21a. DuPont’s counsel originally indicated that no responsive documents

existed, including in the files of its co-counsel in the *Akzo* case, the Fitzpatrick Cella law firm. App. 21a-22a. Not trusting that report, Kolon subpoenaed the Fitzpatrick Cella law firm, which disclosed that it retained extensive files from the *Akzo* litigation. DuPont subsequently made an initial production of about thirty boxes of responsive Fitzpatrick Cella documents, but claimed privilege as to the vast majority of the documents. Buried within that production was a document index that indicated correspondence between the presiding judge and Fitzpatrick Cella at the outset of the case. See App. 22a; 65a-66a.

DuPont initially claimed attorney-client privilege over the document in question, an assertion that the district judge later found to be groundless. The document revealed that the district judge had a telephone conversation about the case with the lead lawyer from Fitzpatrick Cella, which served as McGuireWoods' co-counsel, and subsequently sent to the co-counsel a facsimile copy of the complaint filed in the case. App. 24a-25a; 65a-66a. The billing records of DuPont counsel in this case, produced in conjunction with a request for attorney's fees, disclosed that DuPont counsel here had earlier identified the district judge's participation in the *Akzo* case, but DuPont never disclosed that participation to either Kolon or the district judge.

DuPont sought to preclude Kolon from presenting any evidence or argument relating to the *Akzo* litigation. App. 6a; 22a. The district court agreed with DuPont and, in a summary order, granted DuPont's motion to exclude. App. 6a; see also 23a & n.3. The court opined that "Kolon ha[d] produced no

evidence that any particular trade secret, much less a trade secret that is at issue in this litigation, was disclosed in the [Akzo] litigation.” App. 6a (citation omitted) (first alteration in original).

Prior to trial, on July 20, 2011, Kolon raised the question of the district judge’s recusal. Kolon did so in a brief opposing DuPont’s proposed adverse-inference instruction premised on the invocation of the Fifth Amendment by a former Kolon consultant who was DuPont’s expert witness during the *Akzo* litigation. See App. 23a; 66a. Kolon explained that adjudication of the proposed jury instruction would require the district judge to consider the disclosure of DuPont’s trade secrets during the *Akzo* litigation by DuPont’s counsel (including the judge’s former law partners) and DuPont’s claim of privilege, to which the judge and his former partners were a party, and cited the governing Fourth Circuit precedent under 28 U.S.C. § 455(b)(2). The district judge stated that, despite having reviewed the relevant documents, he had no recollection about his involvement in the *Akzo* litigation. App. 25a-26a; 66a-67a. The district judge did not otherwise address the question of whether he had a duty to recuse under 28 U.S.C. § 455(b)(2).

DuPont’s trade-secrets claim proceeded to trial, and the jury entered a \$919.25 million verdict against Kolon. App. 6a. Following the verdict, Kolon filed post-trial motions, seeking judgment as a matter of law and a new trial. *Id.*

After the verdict, on September 21, 2011, the district court severed Kolon’s antitrust counterclaim from the trade-secrets claim. App. 27a n.6. During discovery on its antitrust counterclaim, Kolon sought (and DuPont opposed) discovery of the *Akzo* litigation

documents. *See* App. 65a. Thereafter, on November 30, 2011, prior to the deadline for summary judgment briefing in the antitrust case, Kolon filed a formal motion seeking the district judge's recusal. *See* App. 26a-27a; 67a. Kolon argued that, because the *Akzo* litigation was a "matter in controversy," the district judge had to recuse himself under 28 U.S.C. § 455(b)(2) based on his former law partners' and his own involvement in that litigation. *See* App. 68a.² In its motion, Kolon also urged the district judge to reconsider his refusal to recuse himself in the trade-secrets case. App. 27a; 67a-68a n.2.

Kolon then repeatedly urged the district judge to consider his mandatory recusal duty under 28 U.S.C. § 455(b) in the trade-secrets case. Kolon did so on December 9, 2011, in a briefing requesting judgment as a matter of law, and again on December 23, 2011 and January 11, 2012, during the briefing on DuPont's request for an injunction against Kolon's para-aramid production. *See* App. 27a-28a; 67a-68a n.2. Kolon again requested recusal during the argument on its post-trial motions on January 24, 2012. App. 27a-28a; 67a-68a n.2. The district judge refused to consider recusal absent a formal motion. Kolon then filed a formal recusal motion in the trade-secrets case three days later, on January 27, 2012, arguing, as it did in the antitrust case, that recusal was required by 28 U.S.C. § 455(b)(2) due to the district judge's and his former law partners'

² Kolon also argued that recusal was appropriate under Canon 3(C)(1)(b) of the Code of Conduct for United States Judges, which imposes the same disqualification duty as 28 U.S.C. § 455(b), and under 28 U.S.C. § 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality may reasonably be questioned."

involvement in the *Akzo* litigation. See App. 28a; 67a-68a n.2.³

The district court denied both recusal motions. The district court first read into 28 U.S.C. § 455(b)(2) an implicit timeliness requirement. See App. 32a-33a; 68a-69a. The court then concluded that neither of Kolon's motions was timely. See App. 36a-42a; 69a.⁴

The district court then denied Kolon's post-trial motions and imposed a twenty-year worldwide injunction on Kolon's para-aramid production (which the Fourth Circuit stayed pending appeal). App. 6a-7a.⁵ Kolon appealed the district court's final judgment, including all prior interlocutory rulings, to the Fourth Circuit.

D. Proceedings in the Court of Appeals

In a divided opinion, the Fourth Circuit affirmed the district judge's refusal to disqualify himself under 28 U.S.C. § 455(b)(2) in both the trade-secrets and the

³ As it did in the recusal motion filed in the antitrust case, Kolon argued that recusal was also required under 28 U.S.C. § 455(a). See App. 28a-29a; 50a-57a; *see also supra* at 8 n.2.

⁴ The district court reasoned that, in the alternative, recusal was not required under section 455(b)(2) because the *Akzo* litigation was not sufficiently related to the action below to constitute the same matter in controversy either in the trade-secrets or the antitrust case. App. 42a-50a; 68a-69a. The district court also concluded that recusal was not required under Canon 3(C)(1)(b) of the Code of Conduct for United States Judges or under 28 U.S.C. § 455(a). See App. 50a-57a; 69a n.4.

⁵ In the antitrust case, the district judge issued several discovery rulings adverse to Kolon, and then granted summary judgment to DuPont on both of Kolon's antitrust claims. App. 63a.

antitrust cases.⁶ The majority held that section 455(b)(2) "include[s] a judicially implied timely-filing requirement." App. 92a-93a. The panel majority noted that federal circuit courts are split on the question: Six other circuits had "found a timely filing requirement to be implied [in section 455(b)] despite the text's silence," while two other circuits "have refused to read in a timeliness requirement." App. 74a (citing cases). The Fourth Circuit then adopted the majority approach.

The majority acknowledged that "the textual support" for such a requirement was "lacking," but asserted that a failure to read the timeliness requirement into section 455(b)(2) would "produce a result demonstrably at odds with the intentions of its drafters." App. 73a (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)). The majority similarly dismissed the fact that the recusal statute prohibits the parties from waiving disqualification under section 455(b)(2), see 28 U.S.C. § 455(e), on the grounds that the timeliness requirement was "distinct" from waiver. App. 72a; see also App. 75a-76a.

Turning to the legislative history, the majority conceded that, in enacting section 455(b), Congress declined to enact the Department of Justice's recommendation to "add[] an explicit timeliness requirement" to the statute. App. 73a-74a n.7. The majority nonetheless declared the legislative history

⁶ The Fourth Circuit panel explained its reasoning in the published opinion issued in the companion antitrust case, see App. 69a-79a; 94a-109a (Shedd, J., dissenting), and noted that this reasoning applied to this case as well. App. 7a n.*; 13a-14a; 14a (Shedd, J., concurring in the judgment).

“murky” because the federal courts had “generally held” that a timely objection was required under the predecessor statute, and Congress may have “belie[ved] that the judicial gloss on old section 455 would survive.” App. 73a-74a n.7 (quoting *Delesdernier v. Porterie*, 666 F.2d 116, 121 (5th Cir. 1982)). The majority also acknowledged that the timeliness requirement was contrary to the statutory “interest in removing any judge who bears even the slightest appearance of partiality.” App. 75a. Nevertheless, the majority concluded that the requirement comported with the legislative intent because it prevented potential gamesmanship by the parties. *Id.* In the majority’s view, such gamesmanship is as “equally detrimental to public impressions of the judicial system as is a potentially biased judge.” *Id.* (internal quotation marks and citation omitted).⁷

Having held that section 455(b)(2) includes a timeliness requirement, the Fourth Circuit majority concluded that Kolon did not raise recusal in a timely fashion, and refused to excuse the delay on the basis of DuPont’s delayed disclosure of the full extent of the district judge’s involvement. App. 77a-78a.⁸ The majority then rejected Kolon’s challenge to the district court’s discovery rulings as being within the

⁷ The Fourth Circuit also relied on its prior precedent of *United States v. Owens*, 902 F.2d 1154, 1155 (4th Cir. 1990), which spoke generally about 28 U.S.C. § 455’s requirements, and extended that precedent, which imposed a timeliness requirement, to section 455(b) as well as section 455(a). See App. 71a-73a.

⁸ Having resolved the question on the timeliness grounds, the majority did not address the district court’s alternative ruling that recusal was not required on the merits. App. 79a n.10.

scope of the district court's "considerable discretion in overseeing discovery," and affirmed the grant of summary judgment. *See* App. 79a-93a.

Judge Shedd disagreed with "the majority's unwarranted imposition of a timeliness requirement." App. 94a (Shedd, J., dissenting); *see also* App. 14a (Shedd, J., concurring in the judgment) (adopting his dissent in the antitrust case). Judge Shedd noted that the majority's statutory construction "constitutes the addition of words to the statute." App. 97a. "The statutory language of § 455(b) could not be plainer; it sets forth no procedural requirements. Congress' omission of any reference to a timely-filed motion as a prerequisite to § 455(b) recusal should end our inquiry." App. 98a (Shedd, J., dissenting) (internal quotations marks and citations omitted). Judge Shedd rejected the majority's reliance on the absurdity canon. *See* App. 97a-98a n.2 (Shedd, J., dissenting). Given the statutory objective of "promot[ing] public confidence in the integrity of the judicial process," it was "entirely plausible that Congress did not intend to impose a timely-filing requirement." App. 97a-100a & n.2 (quoting *Liljeberg*, 486 U.S. at 858 n.7) (Shedd, J., dissenting).

The dissenting judge saw additional support for his construction of section 455(b)(2) in the statutory context. First, "§ 455(e) provides that mandatory recusals may not be waived by the parties," and "the non-waiver of § 455(b) recusals reinforces the mandatory nature of the section." App. 99a-100a (Shedd, J., dissenting). Second, Congress "respon[ded] to judicial economy concerns" by permitting a judge who must otherwise recuse himself due to "a financial conflict of interest under

section 455 (b)(4)” to remain in the case by “divest[ing] himself ... of the interest.” App. 100a (quoting 28 U.S.C. § 455(f)). The fact that “Congress spoke specifically to this one area” suggests that Congress did not intend to imply similar exceptions with respect to the other provisions of section 455(b). App. 100a.

Judge Shedd also observed that “a timely-filing requirement subverts the statute’s intent.” App. 100a. The recusal statute “is based upon the notion that, when the judge has information that triggers one of the subsections of § 455(b), that judge will recuse himself or herself regardless of any urging by a party.” App. 101a. The timeliness requirement, by contrast, “pivots responsibility from the judges to the litigants,” undermining the statutory goal of ensuring public confidence in the judiciary’s integrity. App. 102a.⁹

Judge Shedd would have held that recusal was required because the *Akzo* litigation was a matter in controversy both in the trade-secrets and antitrust cases. App. 108a-109a (Shedd, J., dissenting);

⁹ To the extent timeliness should play a role in recusal, Judge Shedd agreed with the Federal Circuit that it is a potential equitable factor that may limit relief “where a party learns of information that the judge does not (or may not) possess but then sits on that information as a litigation strategy.” App. 103a (Shedd, J., dissenting) (discussing *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1419 (Fed. Cir. 1989)). Under such a rule, Judge Shedd would have concluded that Kolon acted timely because “DuPont impeded the discovery of *Akzo* documents” and “did not highlight the district judge’s role in the prior litigation,” and “at all times the district court was aware that Kolon was pursuing discovery of the *Akzo* litigation.” App. 103a (Shedd, J., dissenting).

App. 14a (Shedd, J., concurring in the judgment). In his view, the district judge had to recuse himself no later than July 2011, prior to the trade-secrets trial. App. 14a; 108a-109a.

Although the Fourth Circuit majority ruled that the district judge did not have a duty to disqualify himself under section 455(b)(2), the Fourth Circuit nonetheless vacated the jury verdict because it found that the district judge's "*blanket exclusion*" of the evidence from the *Akzo* litigation "seriously prejudiced Kolon's ability to present its case to the jury." App. 9a-13a. The Fourth Circuit therefore granted Kolon's motion for a new trial. *Id.* Despite having found recusal barred by the absence of a timely motion by Kolon, the Fourth Circuit deemed "it prudent to direct, pursuant to our supervisory powers under 28 U.S.C. § 2106, that all further proceedings on remand be conducted before a different district judge." App. 13a. Judge Shedd concurred in the judgment vacating the jury verdict and reassigning the case to another judge. App. 14a (Shedd, J., concurring in the judgment).

Because it rejected the recusal argument, the Fourth Circuit did not order vacatur of the district court's other rulings that Kolon had challenged on appeal. *See* App. 7a. These rulings, therefore, remain part of the law of the case and, unless reconsidered, are binding upon the new district judge on remand. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988).

REASONS FOR GRANTING THE PETITION

A divided United States Court of Appeals for the Fourth Circuit held below, over a strong dissent, that a timely party motion is a condition precedent to a federal judge's performance of his statutory duty to disqualify himself when he or any of his former law partners have served as a lawyer in the matter in controversy. This Court should resolve the circuit conflict on this important question of law, which the Fourth Circuit acknowledged as a 7-2 split, and is in fact 8-3. Moreover, the Fourth Circuit acknowledged that its ruling had no foundation in the statutory text, and had to resort to the absurdity canon as justification for rewriting the statute, App. 73a (citing *United States v. Ron Pair Enters.*, 489 U.S. at 242) — even though the contrary interpretation of the dissent and the Federal Circuit fully addresses the equitable concerns raised by the majority opinion. This Court should vindicate the text and important statutory policies of 28 U.S.C. § 455 by reversing the judgment below.

I. This Court Should Resolve a Deep Circuit Split over Whether a Timely Party Motion Is a Condition Precedent for Disqualification of a Judge.

Section 455 of Title 28 defines rules for the mandatory disqualification of federal judges. Subsection 455(a) provides that “[a]ny justice, judge, or magistrate of the United States *shall disqualify* himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a) (emphasis added). Subsection 455(b) sets forth five actual conflicts of interest in which Congress has deemed the judge's relationship to, or interest in, the

matter or the parties or their counsel to mandate disqualification, without need for a specific determination of whether the judge's impartiality might be questioned. *Id.* § 455(b)(1)-(5). Relevant here is subparagraph 455(b)(2), which provides in mandatory and unqualified language that the judge

shall also disqualify himself ... [w]here in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it

Id. § 455(b)(2) (emphasis added).

No part of section 455 places any obligation, substantive or procedural, upon the parties to an action over which the judge presides. Instead, Congress "placed the obligation to identify the existence of [disqualification] grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit." *Liteky v. United States*, 510 U.S. 540, 548 (1994).

The subsections of section 455 reflect the judge's independent duty of self-disqualification. Subsection (c) provides that "[a] judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." 28 U.S.C. § 455(c). Subsection (e) authorizes the parties to waive disqualification arising only from subsection (a), but provides that "[n]o justice, judge, or magistrate judge shall accept from the parties to the

proceeding a waiver of any ground for disqualification enumerated in subsection (b).” *Id.* § 455(e). By providing that subsection (b) disqualification cannot be waived, subsection (e) “creates what is tantamount to a ‘jurisdictional’ limitation on the authority of a judge to participate in a given case.” *United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir. 1988). Finally, subsection (f) addresses the lone circumstance in which disqualification may not be required “after substantial judicial time has been devoted to the matter”: namely, when the judge discovers a disqualifying financial interest after the matter has been assigned to him or her, and the judge “divests himself or herself of the interest that provides the grounds for the disqualification.” 28 U.S.C. § 455(f).

Notwithstanding the plain and mandatory language of subsection 455(b), the statutory bar on party waiver in subsection (e), and the limited circumstance in which the time the judge devoted to a matter is relevant to disqualification in subsection (f), a deep circuit split has emerged on the question of whether a judicially implied requirement of a timely party motion should be imposed as a condition precedent to mandatory statutory disqualification. As the Fourth Circuit acknowledged below, six of its “sister circuits have ... found a timely filing requirement to be implied despite the text’s silence.” App. 74a (citing *Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 789-91 (8th Cir. 2009) (§ 455(a) and (b)); *Omega Eng’g, Inc. v. Omega, S.A.*, 432 F.3d 437, 447-48 (2d Cir. 2005) (§ 455(b)); *Stone Hedge Props. v. Phoenix Capital Corp.*, 71 Fed. App’x 138, 141 (3d Cir. 2003) (unpublished) (§ 455(b)); *United States v. Rogers*, 119 F.3d 1377, 1380-83 (9th Cir. 1997) (§ 455(a) and (b)); *Summers v. Singletary*, 119 F.3d

917, 920-21 (11th Cir. 1997) (§ 455(b)); *United States v. York*, 888 F.2d 1050, 1053-55 (5th Cir. 1989) (§ 455(a) and (b))). In addition, the Tenth Circuit has recognized a timely requirement under subsections 455(a) and (b). *Willner v. Univ. of Kan.*, 848 F.2d 1020, 1022-23 (10th Cir. 1988).

By contrast, the Fourth Circuit acknowledged, "two circuits have refused to read in a timeliness requirement." App. 74a. In *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977), the Seventh Circuit unequivocally held that "there is no basis in law" for finding that disqualification can be denied because a party did not timely move for it. *Id.* at 117. Noting the interplay of subsection 455(b) and (e), the Court observed:

The provisions are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed "that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver." They impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought. Moreover, although the Department of Justice recommended that the new section 455 should include some limitation of time "to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before," (H.R. Rep.

No. 1453, 93d Cong., 2d Sess. 9 (1974) U.S. Code Cong. & Admin. News, 1974, p. 6358), Congress did not incorporate this recommendation in the statute. Because it is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, these defenses to the petition are without merit.

Id. (footnote omitted). Although as the majority below pointed out, one Seventh Circuit judge has criticized SCA and a panel of that Circuit noted that its precedent is contrary to the majority rule, *see* App. 74a, SCA states the law in the Seventh Circuit and has stood for 37 years.

Similarly, the Federal Circuit has rejected an implication of a timing requirement in section 455(b). *See Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1418 (Fed. Cir. 1989). The Federal Circuit held:

Application of a "timeliness" requirement requires a fixed point or bench mark from which the timeliness or untimeliness of an action can be measured (*e.g.*, 10 days after event X; before event Y). There is no such provision anywhere in section 455. Nor could there be. The statute deals only with action of a judge. It has nothing to do with actions of counsel.

Id. The Federal Circuit acknowledged the policy against gamesmanship that the courts of appeals have sought to vindicate with implied timeliness requirements, but characterized timeliness as one factor in determining what equitable relief should be

rendered in vacating the orders of a disqualified judge. *Id.* at 1418-19. The majority opinion below mischaracterizes *Polaroid* as establishing “a de facto filing obligation under principles of equity.” App. 74a-75a. The Federal Circuit explicitly rejected the validity of any concept of timely filing, and expressly held that “[t]he passage of time is merely one factor and events preceding the motion require equal if not greater consideration. Thus the concept of ‘timeliness’ merges into and is subsumed in the concepts of ‘equity,’ ‘fairness,’ and ‘justice.’” *Polaroid*, 867 F.2d at 1418-19.¹⁰

Finally, the Sixth Circuit has adopted the minority rule. In *Roberts v. Bailer*, 625 F.2d 125 (6th Cir. 1980), the Sixth Circuit held that recusal was not required under a separate statute, 28 U.S.C. § 144, because the plaintiff had failed to submit the required timely affidavit from a party alleging personal bias of the judge. But the Sixth Circuit held that this procedural defect was not fatal under section 455(a):

The District Judge had an independent duty to recuse himself, however, under 28 U.S.C. § 455(a). Section 455(a) is a self-executing provision for the disqualification of federal judges. There

¹⁰ *Polaroid* was a patent case arising from a district court in the First Circuit, in which the Federal Circuit attempted to “follow the guidance” of First Circuit law on the non-patent law of disqualification. 867 F.2d at 1419 n.11. The Federal Circuit later recognized *Polaroid* as circuit precedent in a matter within its exclusive jurisdiction (involving an appeal from the U.S. Court of Federal Claims). *Shell Oil Co. v. United States*, 672 F.3d 1283, 1293 (Fed. Cir. 2012) (“In light of our decision in *Polaroid*, violations of § 455(b) can constitute harmless error.”).

is no particular procedure that a party must follow to obtain judicial disqualification under § 455(a). Instead, the section sets forth a mandatory guideline that federal judges must observe *sua sponte*.

Roberts, 625 F.2d at 128 (internal footnotes omitted). The Sixth Circuit observed that nothing in the text or history of section 455 suggested adoption of the procedures of section 144; expressly approving the analysis of the Seventh Circuit in *SCA*, the court declared that “Congress disregarded suggestions that requirements such as timeliness apply to disqualification under § 455.” *Id.* at 128 n.8.

In a subsequent case involving allegations of appearance of impropriety under section 455(a) and personal bias under section 455(b), the Sixth Circuit declared that timeliness is implicitly required, not as a condition precedent to disqualification, but rather as “a factor that obviously merits consideration by a court that is trying to determine whether a judge is truly biased or a litigant is merely trying to avoid an impending adverse decision.” *In re City of Detroit*, 828 F.2d 1160, 1167-68 (6th Cir. 1987). Since the *ratio decidendi* of *Roberts* rejects any claim of party procedural obligations under section 455, including timeliness, the circuit split is more appropriately regarded as 8-3.

Recently, a respected jurist, Judge Stephen Williams of the D.C. Circuit, has criticized the judicial implication of a timeliness requirement in section 455. In *United States v. Brice*, 748 F.3d 1288 (D.C. Cir. 2014), the majority had refused to consider a claim that the district judge should have recused

himself under section 455, in part based on circuit precedent that "if the motion is not filed in a reasonable time, the objection is deemed waived and may not be considered on appeal." *Id.* at 1289. Although bound by precedent, Judge Williams found the timeliness rule antithetical to the plain language; "the language of § 455(e) on its face made the values protected by § 455(b) trumps over judicial economy," and the rule creates an "apparent anomaly: while recognizing that *deliberate* waiver of § 455(b) values is impossible, it allows an easy loss of those values through mere neglect." *Id.* at 1292-93 (Williams, J., concurring in the judgment). Judge Williams also found the timeliness bar nonsensical because it prevented consideration of a forfeited issue that could ordinarily be reviewed for plain error. *Id.* at 1294-95.

For the foregoing reasons, this Court should grant the petition to resolve the significant conflict of authority among the courts of appeals on an important federal statute.

II. This Court Should Reverse the Fourth Circuit's Rewriting of an Important Federal Statute.

Even apart from the circuit conflict identified above, a lower court's attempt to rewrite a federal statute presents "an important question of federal law that has not been, but should be, settled by this Court," and thus warrants certiorari. Sup. Ct. R. 10(c). That is especially so when the statute at issue is designed to "promote public confidence in the integrity of the judicial process," *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988), and when the decision below is manifestly wrong. Contrary to the majority opinion, there is no

absurdity whatsoever in giving section 455 its plain meaning by enforcing the independent duty of the judge to disqualify himself regardless of whether a party brings a disqualification motion. All of the policy concerns that moved the Fourth Circuit — namely, concerns about not rewarding strategic conduct by dilatory parties — may be addressed by implementing section 455 according to its mandatory terms, and then applying equitable principles in deciding what orders rendered by the disqualified judge should be vacated. *Polaroid*, 867 F.2d at 1418-19; *Liljeberg*, 486 U.S. at 862 (noting that federal judges shall fashion the appropriate remedies for violations of section 455).

A. The Plain Language of the Statute Makes Disqualification Mandatory Without Regard to a Party Motion.

“[W]hen the statute’s language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms.” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted).

As Judge Shedd observed in dissent, “[t]he statutory language of § 455(b) could not be plainer; it sets forth no procedural requirements. Congress’ omission of any reference to a timely-filed motion as a prerequisite to § 455(b) recusal should end our inquiry.” App. 98a (internal quotations marks and citations omitted). The statutory provisions “impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought.” *SCA*, 557 F.2d at

117; *Roberts*, 625 F.2d at 128 & n.8. Moreover, as the Federal Circuit has observed, it is impossible to derive a timeliness requirement in the absence of any benchmarks for required action. *Polaroid*, 867 F.2d at 1418. Congress's decision not to impose procedural duties upon parties is unsurprising: "The statute deals only with action of a judge. It has nothing to do with actions of counsel." *Id.*

The surrounding provisions of the statute confirm that the judge's duty of self-disqualification is not contingent upon a timely party motion. First, "§ 455(e) provides that mandatory recusals may not be waived by the parties," and "the non-waiver of § 455(b) recusals reinforces the mandatory nature of the section." App. 99a-100a (Shedd, J., dissenting). Second, the grounds for recusal under subsection (b) — such as financial interests or participation in the matter in controversy as a lawyer — are items within the independent knowledge of the district judge, who does not need a party motion to be informed of the relevant facts. Indeed, the statute enjoins the district judge to "inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." 28 U.S.C. 455(c). Third, Congress has addressed concerns of timeliness in a much more limited fashion in subsection 455(f). Congress there "respon[ded] to judicial economy concerns" by permitting a judge who must otherwise recuse himself due to "a financial conflict of interest under section 455 (b)(4)," but who has devoted substantial judicial time to the matter, to remain in the case by "divest[ing] himself ... of the interest." App. 100a (Shedd, J., dissenting) (quoting 28 U.S.C. § 455(f)).

The fact that “Congress spoke specifically to this one area” suggests that Congress did not intend to imply similar exceptions with respect to the other provisions of section 455(b). App. 100a (Shedd, J., dissenting). “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

The Fourth Circuit made no pretense that it derived its rule from *interpretation* of the text of section 455; it effectively rewrote the statute to require a timely party motion because it deemed section 455 one of “the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.” App. 73a (quoting *Ron Pair Enters.*, 489 U.S. at 242).

Judicial rewriting of a federal statute is strongly disfavored. *See, e.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 403 (2010) (“The manner in which the law could have been written has no bearing; what matters is the law the Legislature did enact. We cannot rewrite that to reflect our perception of legislative purpose.”) (citations omitted); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (“We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.”); *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010).

This is not a case where Congress’s intent to make disqualification contingent upon a timely party motion was abundantly clear from the legislative history, and a federal court is merely correcting an

overt error or omission in the drafting; indeed, as shown below, the legislative history supports Petitioner. Nor did the Fourth Circuit have cause to invoke the doctrine against interpreting a statute to avoid absurd results. As Judge Shedd noted in dissent, “[t]he hurdle for invoking the [absurdity] canon is ... ‘a very high one’” because it presents the danger of “‘judicial revision of public and private texts to make them (in the judges’ view) more reasonable.’” App. 98a n.2 (Shedd, J., dissenting) (quoting Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 237 (2012)).

That hurdle is not cleared here. The Fourth Circuit’s imposition of a judicially crafted timely-filing requirement subverts rather than furthers congressional intent. App. 100a (Shedd, J., dissenting). Section 455 serves to “promote public confidence in the integrity of the judicial process.” *Liljeberg*, 486 U.S. at 858 n.7. It defeats public confidence in the judiciary for a judge whose disqualification is mandatory to continue to serve simply because a party does not raise the issue soon enough: “The timely filing requirement, as implemented by the majority, pivots responsibility from the judges to the litigants when that duty and responsibility should lie with us.” App. 101a-102a (Shedd, J., dissenting).

The Fourth Circuit, like the other courts in its camp, has arrogated to itself the right to make legislative policy judgments on proper disqualification procedure. It has not only determined that a timely party motion is a condition precedent to disqualification, even where Congress

has declared disqualification to be mandatory. It has also declared, without any guidance from Congress, what shall constitute timeliness, adopting the stringent rule that a party must raise disqualification “at the earliest moment after [its] knowledge of the facts.” App. 76a-77a (alteration in original) (internal quotation marks omitted); *see also* App. 105a-106a (Shedd, J., dissenting) (criticizing the majority’s approach). And it has determined that a party must not only raise the issue to the judge, but must file a formal motion to disqualify. App. 77a; *see also* App. 98a-99a n.3 (Shedd, J., dissenting) (criticizing the majority’s requirement of a formal motion). It is not the role of the judiciary to fashion procedural requirements according to its conceptions of proper policy, when Congress has not done so.

The Fourth Circuit’s concerns about a party’s “knowing concealment of an ethical issue for strategic purposes,” App. 72a (internal quotation marks omitted), do not justify a judicial rewriting of the statute. As an initial matter, as Judge Shedd pointed out, those concerns only arise when “where a party learns of information that the judge does not (or may not) possess but then sits on that information as a litigation strategy.” App. 103a (Shedd, J., dissenting). No such circumstance is present here. Kolon did not have superior or earlier knowledge of the relevant facts vis-à-vis DuPont or the district judge, and it was DuPont that acted inequitably in first impeding discovery of the *Akzo* documents and then concealing the district judge’s personal involvement in that litigation. App. 94a-95a; 103a (Shedd, J., dissenting). As Judge Shedd observed, “DuPont impeded the discovery of *Akzo* documents” and not only “did not highlight the district judge’s

rule in the prior litigation,” either to Kolon or to the district court, but attempted to bury that involvement in “voluminous discovery” and to shield it by a groundless claim of privilege. App. 103a (Shedd, J., dissenting); *see also* App. 65a-66a; *supra* at 5-6.

Nor is there any basis for an inference that Kolon lay in wait in the hope of receiving favorable rulings. The district judge had consistently ruled against Kolon on every significant motion in the case from its inception. For example, the court granted DuPont broad discovery beyond the allegations in its trade-secrets complaint. It denied Kolon’s motion to dismiss DuPont’s complaint, and granted a motion by third-party defendants to dismiss Kolon’s complaint against them. It repeatedly denied Kolon’s motions requesting DuPont to specify its trade secrets. It granted DuPont’s spoliation sanction motion, and denied Kolon’s, even though the latter was far more justified. The district court granted all of DuPont’s motions in limine, while denying all of Kolon’s motions in limine.

More importantly, any concerns about “tactical sandbagging” by parties, App. 76a, can be fully accommodated without departing from the plain language of the statute and relieving the district judge of his or her mandatory duty of self-disqualification. As this Court has stated, “[a]lthough § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.” *Liljeberg*, 486 U.S. at 862. Courts can consider

timeliness as an equitable factor in determining whether to grant relief. *Polaroid*, 867 F.2d at 1418-19. A party cannot profit from sandbagging (*i.e.*, from withholding facts giving rise to disqualification to see if it prevails, and then seeking to undo any unfavorable rulings by later claiming disqualification) if a court refuses on equitable grounds to vacate any order that was issued prior to a party's notice to the district court of the grounds of disqualification. Given that a court can always punish inequitable party conduct in fashioning relief, where circumstances warrant, the Fourth Circuit had no cause to rewrite the statute that mandates disqualification of the judge without exception. A judge should never continue to preside over a case where Congress has mandated his recusal.

**B. Section 455 Stands in Contrast to
Disqualification Statutes that Place
Procedural Burdens upon Parties.**

Congress's choice to impose a mandatory duty of disqualification upon federal judges, independent of any motion by the party, must be regarded as a conscious one. Other disqualification statutes, past and present, have placed procedural burdens on parties. For example, an early version of the federal disqualification statute, in effect for more than a century, provided for disqualification on "application" of a party. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. Similarly, 28 U.S.C. § 144 — which requires automatic disqualification of a district judge — explicitly makes such disqualification contingent upon a party action:

Whenever a party to any proceeding in a district court makes and files a timely

and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144. These statutes demonstrate that, if Congress intended to make disqualification contingent on a timely party motion, “it knew how to do so.” *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). Congress’s decision in section 455 to place the burden of determining disqualification on the federal judge, and not on the parties, must be honored.

**C. The Legislative History of Section 455,
and the Judicial Canons of Ethics that
the Statute Codifies, Reveal the Error of
the Court Below.**

The legislative history of the statute confirms the plain meaning of the statutory text. Section 455 “was amended in 1974 to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C (1987).” *Liljeberg*, 486 U.S. at 858 n.7 (citing S. Rep. No. 93-419, at 1 (1973); H.R. Rep. No. 93-1453, at 1-2 (1974)). Congress did not want judges to be faced with “dual standards” under the ABA Canons and section 455, and so decided to “make both the statutory and the ethical standard virtually identical” by importing ABA Canon 3C into the statute. H.R. Rep. No. 93-1453, at 3. And, indeed, the grounds of mandatory disqualification in section 455(b) are exactly the same as those found in Canon

3C, save that Congress added subsection 455(b)(3) relating to judges who previously served as government lawyers. *Id.* at 4-6. The statutory provision at issue here, mandating disqualification where the judge “served as a lawyer in the matter in controversy, or a lawyer with whom [the judge] previously practiced law served during such association as a lawyer concerning the matter,” 28 U.S.C. § 455(b)(2), replicates almost verbatim Canon 3C(1)(b) of the Code of Conduct for United States Judges (which adopted the ABA standards).

Federal judges are solely responsible for complying with the ethical canons of the Code of Conduct, and the judge’s fulfillment of his or her ethical duty does not depend on the existence of a party motion. Indeed, the commentary to Rule 2.11 of the current ABA Model Code of Judicial Conduct (which corresponds to Canon 3C) explicitly states that “[a] judge’s obligation not to hear or decide matters in which disqualification is required applies *regardless of whether a motion to disqualify is filed.*” Comment on Rule 2.11, ABA Model Code of Judicial Conduct (emphasis added), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule_2_11disqualification/commentonrule2_11.html (last visited Aug. 19, 2014). Furthermore, the federal judiciary’s rules and regulations provide that “[i]f a judge fails to remove herself from hearing a case when necessary, she may be subject to judicial complaint, investigation, and corrective measures.” Rules and Regulations for the U.S. Judiciary, Judicial Conduct and Discipline, *available at* <http://www.fjc.gov/public/pdf.nsf/lookup/IJR00053.pdf>

[\\$file/IJR00053.pdf](#) (last visited Aug. 19, 2014). It simply makes no sense to adopt a statutory construction that allows a judge to continue to preside over a case when it is unethical and even sanctionable for him to do so.

Moreover, Congress specifically considered a proposal to amend section 455 to include the requirement of a timely motion, and did not adopt it. The Department of Justice wrote a letter to Congress suggesting that “consideration should be given to adding a provision such as is embodied in 28 U.S.C. 144 to assure that applications for disqualification shall be timely made so as to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before.” Letter of W. Vincent Rakestraw, Assistant Attorney General, Department of Justice, to Hon. Peter W. Rodino, Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C. (April 4, 1974), *reproduced in* H.R. Rep. No. 93-1453, at 9. When the Department of Justice asks for an amendment to the bill to require a timely motion, and Congress does not adopt the suggestion, courts should not step into the breach. Where Congress considered, and rejected, a specific legislative proposal, a court may not “disregard the legislative history” and “distort” the statutory definition “to reach what it believes to be an ‘equitable’ result.” *Jacksonville Bulk Terminals, Inc. v. Int’l Longshoremen’s Ass’n*, 457 U.S. 702, 717-20 (1982); *see also Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (“It is quite unlikely that the same Congress

that rejected [specific legislative] proposals ... sought to accomplish that very purpose *sub silentio* ... ”).¹¹

Finally, the Fourth Circuit’s rule, by requiring parties to be adverse to the district judge in demanding his disqualification, is contrary to the intent of Congress. One area where Congress chose to depart from the ABA Canons was on the question of waiver. Whereas the ABA Canons had permitted party waivers, Congress instead chose in section 455(e) to forbid any waiver of the disqualification grounds set forth in subsection 455(b). See H.R. Rep. No. 93-1453, at 7. The legal scholar who advised the Senate to adopt this provision explained that “[t]he practicalities of life are that waiver can be a kind of a velvet blackjack in which the lawyer who is going to appear before the same judge at another time in another case really has very little choice.” *S. 1064, Judicial Disqualification, Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 93rd Cong. 13 (1974) (Statement of John P. Frank). Indeed, the Judicial Conference of the

¹¹ The Fourth Circuit unconvincingly claimed that the legislative history is “murky” because, it argued, Congress may have ratified the construction of some courts of the prior version of section 455 as requiring a timely motion. App. 73a-74a n.7. But there was no such single construction that Congress could be deemed to ratify; there was a circuit split over whether a timely-filing rule should be implied under the prior statute. See *Barry v. United States*, 528 F.2d 1094, 1097 n.7 (7th Cir. 1976) (collecting cases); *United States v. Amerine*, 411 F.2d 1130, 1134 (6th Cir. 1969). Moreover, section 455 was completely rewritten in 1974, and “the doctrine of congressional ratification applies only when Congress reenacts a statute without relevant change.” *Holder v. Martinez-Gutierrez*, 132 S. Ct. 2011, 2013 (2012).

United States has resolved that federal judges who are deciding whether to disqualify themselves should not even approach party counsel for their opinions, for “asking counsel to indicate their approval of a judge’s remaining in a particular case is fraught with potential coercive elements which make this practice undesirable.” Judicial Conference, Resolution L, *quoted in* 13D Charles Wright et al., *FEDERAL PRACTICE & PROCEDURE* § 3550, at 126 n.14 (3d ed. 2008). *A fortiori*, it is unduly coercive and unfair to require party counsel to move to disqualify a judge, especially where the judge is fully apprised of the facts that give rise to disqualification.

Congress therefore had good reason to “place[] the obligation to identify the existence of [disqualification] grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit.” *Liteky*, 510 U.S. at 548. The Fourth Circuit should not have rewritten section 455 according to its policy views on proper disqualification procedure.

III. This Case Is the Perfect Vehicle for the Court To Review the Question Presented.

As Kolon demonstrated in its certiorari petition in the companion antitrust case, currently pending as No. 14-77 (docketed July 24, 2014), this case is the perfect vehicle for this Court to resolve the important federal questions upon which the courts of appeals are divided. First, this case arises under subsection 455(b), but the Fourth Circuit was explicit that the same requirement of a timely party motion applied under subsection 455(a) as well. App. 71a; 76a-77a (citing *Owens*, 902 F.2d at 1156). Therefore, this Court may choose at its option to address only

subsection 455(b), or announce a rule that applies to all of section 455. Second, the Fourth Circuit disposed of the recusal issue solely on the basis of the timeliness issue; other questions of interpretation of section 455 are not presented to this Court, and thus there is no risk of a fractured opinion in this single-issue case. The question of whether judges should be permitted to continue to preside over cases even where Congress has mandated their disqualification is critical to public confidence in the judiciary. This Court should grant review both in this case and in No. 14-77 to resolve the split of authority that has developed on this important issue of federal law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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