No. 14-77

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

REPLY BRIEF

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REPLY BRIEF

The petition of Kolon Industries, Inc. ("Kolon") presents an issue of singular importance that divides the courts of appeals: namely, whether a district judge may be relieved of his mandatory duty of self-disqualification under 28 U.S.C. § 455(b)(2) simply because no party makes a timely motion. The brief in opposition of E.I. du Pont de Nemours and Company ("DuPont") is largely an exercise in diversion. DuPont devotes much of its brief to attempting to muddy the water with the untenable argument that disqualification is determined claim-by-claim, contending that a different analysis applies to the antitrust and trade secret claims that were pending as part of the same action when the disqualification issue was raised to the district judge. Opp. 2, 6-8, 12. That argument is not only wrong but irrelevant because it does not affect the question presented. The court of appeals resolved the section 455(b) issue in the antitrust and trade-secret appeals on the exact same legal ground: that Kolon's failure to move immediately for disqualification upon learning the relevant facts relieved the judge of his independent duty of self-disqualification. App. 17a-18a; *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 564 F. App'x 710, 715-16 (4th Cir. 2014) (trade-secret opinion), *petition for certiorari pending*, No. 14-207.

DuPont attempts diversion because it has no answer to Kolon's petition. It cannot diminish the 8-3 circuit split, and indeed mischaracterizes Federal and Sixth Circuit precedents that squarely favor Kolon. Critically, DuPont does not defend the Fourth Circuit's rationale, yet advances no cogent alternative justification of the majority rule.

Section 455(b) preserves public respect for the judiciary by imposing upon judges a mandatory duty of self-disqualification independent of any party motion. The Fourth Circuit and the other courts in its camp have no warrant to rewrite this important federal statute to incorporate their favored disqualification procedures. That is especially so because the only policy that the Fourth Circuit and DuPont trumpet as served by a timeliness bar — the deterrence of sandbagging — is completely satisfied by the Federal Circuit's contrary approach of treating timeliness as a potential equitable factor in determining relief from orders issued by the disqualified judge. This Court should grant review and vindicate the statute's plain meaning.

1. The Fourth Circuit acknowledged the circuit conflict, which is deeper than the court of appeals recognized. Pet. 15-22. DuPont's efforts to belittle the circuit split fall short.

Seventh Circuit. DuPont does not contest that *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977), conflicts with the decision below. Rather, because some Seventh Circuit decisions have acknowledged that *SCA* states a minority rule, DuPont urges this Court to treat it as weak precedent that will inevitably be overturned. Opp. 21-23. That is groundless. The Seventh Circuit "require[s] a compelling reason to overrule circuit precedent," *United States v. Kendrick*, 647 F.3d 732, 734 (7th Cir. 2011) (internal quotation marks omitted), *cert. denied*, 132 S. Ct. 1159 (2012), and "shall not disturb precedent absent 'special justification,'" *Chicago Truck Drivers, Helpers & Warehouse Union (Indep.) Pension Fund v. Steinberg*, 32 F.3d 269, 272 (7th Cir.

1994) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). This Court applies the same standard to its own precedents. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014).

Indeed, the Seventh Circuit frequently resists overtures to overrule precedent to conform to other circuits. *See, e.g.*, *Opp v. Office of State's Attorney of Cook Cty.*, 630 F.3d 616, 620 (7th Cir. 2010) ("The appellants urge this court to overrule *Americanos* and follow the approach of some other circuits, an invitation we decline to accept."); *United States v. Gibbs*, 578 F.3d 694, 696 (7th Cir. 2009) ("We acknowledge that other circuits disagree, but we decline to overrule our long-standing precedent."). For example, the Seventh Circuit consistently refused to overrule its decision in *United States v. Demaree*, 459 F. 3d 791 (2006), that the Ex Post Facto Clause did not apply to the federal sentencing guidelines, even though every other circuit to reach the issue had held the contrary. *See*, *e.g.*, *United States v. Wasson*, 679 F.3d 938, 951 (7th Cir. 2012) (refusing to "change course" even though "ours is a minority view among the circuits"), *cert. denied*, 133 S. Ct. 1581 (2013); *see also* Pet. for Certiorari, *Peugh v. United States*, No. 12-62, at 8-11 (2012). Only when this Court overruled *Demaree* in *Peugh v. United States*, 133 S. Ct. 2072 (2013), was uniformity restored.

The Seventh Circuit is particularly reluctant to overrule statutory precedents. In *Santos v. United States*, 461 F.3d 886 (7th Cir. 2006), the Seventh Circuit recognized that "all the other circuits that have confronted the statutory debate over whether 'proceeds' in [18 U.S.C.] § 1956(a)(1) means gross or net income have rejected" the Seventh Circuit's

approach. *Id.* at 891-92. Nonetheless, invoking "the compelling-reasons standard," the court held:

> Rather than vacillate over Congress's intent, it is better for our circuit here, having already considered and duly decided the issue, to stay the course at this juncture, for only Congress or the Supreme Court can definitively resolve the debate over this ambiguous term.

Id. at 894 (footnote omitted). DuPont falsely speculates that "there is every reason to believe that *SCA* will be discarded or overruled"; the Seventh Circuit *en banc* would have no compelling reason to overturn *SCA*, which is rightly decided. Pet. 22-34.

Moreover, DuPont exaggerates the supposed disquiet over *SCA* in the Seventh Circuit. A single active judge — Judge Posner — has called for *SCA*'s rejection, both in his own in-chambers disposition of a recusal petition in *Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1060 (7th Cir. 1992), and in dicta in *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 716-17 (7th Cir. 1986). But another currently active judge (Judge Flaum) refused to join that part of Judge Posner's *Union Carbide* opinion, stating that "with respect to section 455(b) disqualification, Congress's unequivocal language means that parties cannot waive financial disqualification, even by their own misconduct or inaction." *Id.* at 718 (Flaum, J., concurring in part and dissenting in part).[1] Moreover, this Court does

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[1] DuPont also repeats Judge Posner's erroneous analysis that *SCA* is inconsistent with *United States v. Patrick*, 542 F.2d 381 (7th Cir. 1976). Opp. 22 n.13. There is no inconsistency. *Patrick* stated that parties must raise recusal immediately, 542

not sit to predict future *en banc* decisions of circuit courts. *SCA* is Seventh Circuit precedent until overruled, and no district court in that circuit is free to depart from it. *See United States v. Balistrieri*, 779 F.2d 1191, 1203 n. 12 (7th Cir. 1985) ("it is currently the law of this circuit that there is no time limit on a motion for recusal under § 455"); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) (precedents are binding until reconsidered "regardless of whether subsequent cases have raised doubts about their continuing vitality").

Federal Circuit. The Fourth Circuit acknowledged its conflict with the Federal Circuit, characterizing the latter as "hav[ing] refused to read in a timeliness requirement." App. 17a.

DuPont objects to that characterization, noting that the Federal Circuit was guided in *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415 (Fed. Cir. 1989), by First Circuit law. Opp. 19. But the only guidance that the First Circuit provided in *United States v. Kelley*, 712 F.2d 884, 887-88 (1st Cir. 1983), addressed untimeliness under section 455(a), and *Polaroid* assimilated *all* circuit timeliness decisions (including the First Circuit's) to its preferred rule of treating timeliness as an equitable factor affecting the scope of remedy. 867 F.2d at 1419. The Federal Circuit reached its conclusion that section 455 does not impose a timeliness requirement based on its independent construction of the statute. *Id.* at 1418. If there were any doubt, the Federal Circuit

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F.2d at 390, but did not hold that failure to do so barred disqualification of the judge; instead, it found on the merits that the evidence did not show improper bias necessitating recusal. *Id.* at 391.

recognized *Polaroid* as binding circuit precedent on section 455 in *Shell Oil Co. v. United States*, 672 F.3d 1283, 1288, 1293 (Fed. Cir. 2012). Pet. 20 n.7. DuPont wrongly attempts to limit *Shell Oil* by claiming that it only "adopted the holding from *Polaroid* that failure to disqualify under §455(b) can be harmless error." Opp. 19 n.11. *Polaroid* cannot be so parsed; there was no separate harmlessness holding in *Polaroid*. Rather, *Polaroid* simply discussed a case involving harmless error in holding that it had the equitable discretion to deny vacatur of the judgment because the appellant did not timely raise the recusal issue below. 867 F.2d at 1420-21. *Polaroid* is binding Federal Circuit precedent in conflict with the decision below, as the Fourth Circuit acknowledged. App. 17a-18a.

DuPont next parrots the Fourth Circuit's inaccurate remark that *Polaroid* established "a de facto filing obligation under principles of equity." Opp. 21 (quoting App. 17a-18a). As Kolon argued (and DuPont does not address), the Federal Circuit expressly held that a timely-filing requirement is inimical to section 455, and that "[t]he passage of time is *merely one factor* and events preceding the motion require equal if not greater consideration." *Polaroid*, 867 F.2d at 1418-19 (emphasis added). The Fourth and Federal Circuits' rules directly conflict, and (as Judge Shedd noted) Kolon would prevail under *Polaroid*. Pet. 13 n.6.

Sixth Circuit. DuPont misstates Sixth Circuit precedent. DuPont claims that *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980), "had nothing to do with timeliness." Opp. 18. To the contrary, *Roberts* held that, unlike 28 U.S.C. § 144, section 455 "sets forth a

mandatory guideline that federal judges must observe sua sponte" without prescribing any party procedures, and "Congress disregarded suggestions that requirements such as timeliness apply to disqualification under § 455." 625 F.2d at 128 & n.8. DuPont further accuses Kolon of "ignor[ing] subsequent Sixth Circuit precedent, holding that timeliness is required," Opp. 18, but in fact Kolon devoted a paragraph to that precedent: *In re City of Detroit*, 828 F.2d 1160 (6th Cir. 1987) (per curiam). Pet. 21. It is DuPont, not Kolon, that disregards *City of Detroit*'s holding; the Sixth Circuit did not (like the Fourth Circuit) hold that timeliness is a condition precedent to disqualification, but characterized it merely 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." 828 F.2d at 1167-68.

If there were any doubt, *Easley v. University of Michigan Board of Regents*, 853 F.2d 1351 (6th Cir. 1988), settles the matter. During the appeal, Easley filed an emergency motion to expand the record on bias. The Sixth Circuit held that Easley "failed to present his newly discovered allegations in a timely manner," and that while this foreclosed relief under section 144, "the procedural shortcomings of Easley's motion do not bar our consideration of its merits under the separate disqualification provisions of § 455." *Id.* at 1357. The Court, relying on *Roberts*, explained:

> "Section 455(a) is a self-executing provision for the disqualification of federal judges. There is no particular

> procedure that a party must follow to obtain judicial disqualification under § 455(a). Instead, this section sets forth a mandatory guideline that federal judges must observe *sua sponte*."

Id. (quoting *Roberts*, 625 F.2d at 128).[2]

Thus, the majority rule adopted by the Fourth Circuit clearly conflicts with the rules of the Sixth, Seventh, and Federal Circuits. This Court should resolve this conflict.

2. In section 455, 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 statutory structure manifests the self-executing nature of this duty, particularly the prohibition of party waiver of disqualification. 28 U.S.C. § 455(e). The Fourth Circuit rule — which enforces waiver by delay — is inimical to this provision, which serves to protect public confidence in the judiciary regardless of party action. Pet. 16-18.

It is extraordinary for courts to rewrite a statute to prescribe unwritten procedures, the violation of which relieves a district judge of the unqualified statutory duty that he "*shall … disqualify himself*"

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[2] In addition to disregarding that only "[p]ublished panel opinions are binding on later panels," Sixth Cir. Rule 32.1(b), DuPont (Opp. 19) misplaces reliance upon (and selectively quotes from) *Callihan v. Eastern Kentucky Production Credit Ass'n*, which simply applies the *City of Detroit* rule that "'[t]imeliness is a factor'" in determining bias. 895 F.2d 1412, 1990 WL 12186, at *2 (6th Cir. 1990) (unpublished) (quoting *City of Detroit*, 828 F.2d 1167-68).

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) (emphasis added). Congress was entitled to make that duty independent of party action.

The Fourth Circuit made no pretense of interpreting statutory text; rather, it took the extraordinary measure of engrafting "a timeliness requirement" on the statute to avoid absurd results and vindicate a putative unspoken congressional intent. App. 14a, 16a. Remarkably, DuPont does not defend that rationale. Instead, it attempts to recast the Fourth Circuit rule as interpretive, suggesting that section 455 should be interpreted *in pari materia* with section 144. Opp. 24. But that canon applies only when the legislature uses the *same language* in two statutes addressing the same subject; where Congress uses different words, it presumably intends different meanings. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62 (2006); *United States v. Shirey*, 359 U.S. 255, 262 n.6 (1959). Moreover, section 144 operates completely differently: a party's filing of a timely and sufficient affidavit of bias "withdraws from the presiding judge a decision upon the truth of the matters alleged" and requires designation of a new judge, *Berger v. United States*, 255 U.S. 22, 36 (1921), whereas section 455(b) vests the determination of self-disqualification in the judge herself.

Alternatively, DuPont incorrectly suggests that the Fourth Circuit's timeliness rule is simply a matter of remedy. Opp. 24. Questions of remedy (such as vacatur of orders) arise only when there is a violation. *See Liljeberg v. Health Servs. Acquisition*

Corp., 486 U.S. 847, 863 (1988). By contrast, the Fourth Circuit's timeliness bar precludes consideration of the merits of disqualification and is decided (as here) in the first instance by the district judge who is challenged. It has nothing to do with remedies for section 455 violations.

Finally, DuPont contends that the grounds for disqualification may not be immediately apparent to a district judge, and having parties raise the issue is salutary. Opp. 24-25. But a district court's misperception of the law or facts cannot justify relief from its mandatory duty. And, as explained, limiting the scope of vacatur of orders issued by the disqualified judge can fully neutralize any tactical conduct by parties.[3]

The legislative history likewise shows that Congress rejected a timeliness requirement in amending section 455(b). Pet. 30-34. DuPont claims that Congress may have intended to ratify the holdings of some circuits that implied a timeliness requirement under the former statute, Opp. 24, but ignores Kolon's showing that ratification cannot apply when (1) the statutory language has been amended, and (2) the circuits were split on the former statute's interpretation. Pet. 33 n.8. Nor does DuPont even address that section 455's purpose was to align with the ABA Code of Judicial Conduct, which requires recusal even absent a party motion.

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[3] DuPont, like the Fourth Circuit, uses the rhetoric of "sandbagging" against Kolon, effectively treating any untimeliness as *ipso facto* sandbagging. DuPont has no basis to claim that Kolon strategically withheld its motion in anticipation of favorable rulings from the district court. Pet. 27-28.

Pet. 30-32. DuPont disregards arguments that it cannot answer.

3. DuPont cannot refute Kolon's showing that this is the perfect vehicle to decide the question presented. Pet. 34-35.

DuPont is wrong that resolution of this case will not affect the outcome. Applying an abuse-of-discretion standard, the Fourth Circuit upheld critical discovery rulings — including preventing discovery of DuPont's transactional data necessary to show market power and foreclosure of critical market segments — that disabled Kolon from defending fully against summary judgment; Kolon is entitled to have a non-disqualified judge exercise discretion on discovery and for summary judgment to be determined on a proper record. Pet. 9, 11-12. Moreover, DuPont omits to mention pending sanctions motions, which should not be heard before a disqualified judge. Pet. 14. This case presents cleanly (and solely) the issue of whether the absence of a timely party motion relieves a judge of his mandatory statutory duty of self-disqualification.[4]

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[4] DuPont spends much of the time arguing the question of whether the prior litigation was a "matter in controversy" — which it ironically labels as "implausible" (Opp. 16, 25) even though Judge Shedd ruled against DuPont (App. 50a-51a; Pet. 13). DuPont's argument is based on its misconceived notion that the "matter in controversy" must be determined separately for each claim in the case (although, if that were so, the *Akzo* litigation is relevant to both claims, Pet. 6). Regardless, this groundless dispute is irrelevant; it was not decided below and is not presented to this Court, which is why this petition is a clean vehicle on the timeliness issue. Finally, Kolon must refute DuPont's repeated misrepresentation of the record: its counsel did not "initially assur[e] the trial judge that there was no cause

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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for concern." Opp. 3, 9, 14, 26. Counsel simply explained that he initially had not recognized grounds for recusal because an index disclosing Judge Payne's participation did not indicate "bias," App. 71a; he was making no concession about section 455(b)(2), which does not require bias. Moreover, section 455(b)(2) disqualifies the judge based on his former partners' participation regardless of his personal participation.