No. 01-446

In the Supreme Court of the United States

WELLINGTON TRADE, INC., DBA CONTAINERHOUSE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 455(a) of Title 28 of the United States Code requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The question presented is whether the court of appeals abused its discretion by denying a motion to reopen a case, which had been finally disposed of almost six years earlier, based on allegations of perceived judicial partiality.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is unreported. The earlier opinion of the court of appeals (Pet. Supp. App. 1-25) is unreported. The opinion of the district court (Pet. Supp. App. 26-39) and the written order of that court (Pet. Supp. App. 40-45) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1994. A petition for rehearing was denied on February 1, 1995 (Pet. Supp. App. 46). A petition for a writ of certiorari was denied on June 26, 1995.

On February 2, 2001, petitioner moved for rehearing, vacatur, and recall of the court of appeals' mandate.

That motion was denied on March 7, 2001. A petition for rehearing was denied on June 6, 2001. The instant petition for a writ of certiorari was filed on August 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 30, 1991, the federal government, acting through the Navy's Military Sealift Command, contracted with petitioner for the production of 134 cargo containers, which were to carry ammunition during Operation Desert Storm. Pet. Supp. App. 2; Pet. 6. In accordance with that contract, petitioners manufactured the containers in Jacksonville, Florida, and shipped them to Anniston, Alabama for distribution. Pet. 6. Before delivery, a government inspector in Jacksonville certified that all of the containers satisfied the contract's specifications, but when government personnel in Anniston inspected the containers, they found that the containers did not meet such specifications. Pet. 6-7. Based on the second inspection, the government refused to pay for the containers, and petitioner filed this lawsuit. Pet. 7.

Petitioner's amended complaint, filed under the Contract Disputes Act, 41 U.S.C. 601 *et seq.*, alleged breach of contract and warranty, estoppel, and termination for convenience of the government. See Pet. Supp. App. 8-9 & n.7. The United States filed a counterclaim, requesting declaratory judgment that the containers belonged to petitioner, and seeking damages for the containers' storage expenses. *Id.* at 9. After a bench trial, the district court ruled that the government was permitted to inspect the containers twice before accepting them, that the government had never legally accepted the containers, and that the containers were

defective. *Ibid.* The district court also held, however, that the government had terminated the contract for its convenience; thus, the court awarded petitioner damages and prejudgment interest totaling $322,239.04, and dismissed the government's counterclaim. *Id.* at 9-10, 50.

The United States appealed to the Eleventh Circuit, and petitioner filed a cross-appeal. Pet. Supp. App. 10. The case was heard by Circuit Judge Cox, Senior Circuit Judge Morgan, and District Judge Lacey A. Collier of the United States District Court for the Northern District of Florida, who sat by designation. *Id.* at 1. On September 7, 1994, that panel issued an unpublished, per curiam opinion affirming judgment for the respondent on the contract claim, reversing judgment for petitioner on the termination for convenience claim, and reinstating the government's counterclaim. *Id.* at 1, 25. Petitioner filed a request for rehearing, which was denied on February 1, 1995, and a petition for a writ of certiorari, which this Court denied on June 26, 1995. *Wellington Trade Inc.* v. *United States*, 515 U.S. 1159.

2. On February 2, 2001, petitioner filed a motion asking the Eleventh Circuit to rehear, vacate, and recall its 1994 mandate. Petitioner claimed that District Judge Collier should have been disqualified from hearing the case because he was a retired naval officer who, while the appeal was pending, had helped plan and had financially contributed to the commissioning of a Navy destroyer in Pensacola, Florida. Petitioner asserted that Judge Collier's participation in such activities meant that "his impartiality might reasonably be questioned" in this case, which concerned a dispute over naval trans-

port equipment.[1] In opposing petitioner's motion, the government contended that, given the nearly six years since the court of appeals' mandate, there was no basis for the extraordinary relief requested.

On March 7, 2001, Judge Cox denied petitioner's motion as untimely filed. Petitioner then filed a petition for rehearing en banc, which the court of appeals construed as a request for reconsideration and denied on June 6, 2001. Pet. App. 1-2.

ARGUMENT

The Eleventh Circuit's decision is correct and does not conflict with the decisions of this Court or of any court of appeals. In addition, none of the relevant opinions in this case has been published. Further review is accordingly unwarranted.

1. Petitioner claims that this Court should hear this case in order to resolve "a basic split among the Circuits as to whether § 455(a) has a timeliness requirement." Pet. 28. That claim is inaccurate. Following this Court's guidance in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), virtually every court of appeals, including the Eleventh Circuit, has adopted a timeliness requirement for recusal motions. *E.g.*, *United States* v. *Pearson*, 203 F.3d 1243, 1276 (10th Cir.), cert. denied, 530 U.S. 1268 (2000) ("§ 455(a) motions for recusal must be timely filed") (internal quotation mark omitted); *United States* v. *Mathison*, 157 F.3d 541, 545 (8th Cir. 1998), cert. denied, 525 U.S. 1089 (1999); *Hollywood Fantasy Corp.* v. *Gabor*, 151 F.3d 203, 216 (5th Cir. 1998); *Bivens Gardens Office*

[1] See generally 28 U.S.C. 455(a) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

Bldg., Inc. v. *Barnett Banks of Fla., Inc.*, 140 F.3d 898, 913 (11th Cir. 1998); *United States* v. *Rogers*, 119 F.3d 1377, 1382-1383 (9th Cir. 1997); *United States* v. *Barrett*, 111 F.3d 947, 951-952 (D.C. Cir.), cert. denied, 522 U.S. 867 (1997); *United States* v. *Brinkworth*, 68 F.3d 633, 639 (2d Cir. 1995); *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 862 (6th Cir. 1992); *United States* v. *Owens*, 902 F.2d 1154, 1155 (4th Cir. 1990) ("Timeliness is an essential element of a recusal motion.").[2]

Petitioner is correct that the courts of appeals have occasionally used different language to describe the requirement that recusal motions be made in a timely

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[2] See also *Liljeberg*, 486 U.S. at 869 (observing that "a delay of 10 months after the affirmance by the Court of Appeals would normally foreclose relief based on a violation of § 455(a)"); *United States* v. *Noah*, 130 F.3d 490, 499 n.5 (1st Cir. 1997) (collecting cases, and noting that, "in all likelihood," untimely recusal motions are "procedurally defaulted").

Petitioner incorrectly characterizes the Seventh Circuit as a "lone holdout." Pet. 28. *Edgar* v. *K.L.*, 93 F.3d 256 (1996), cert. denied, 519 U.S. 1111 (1997), indicates that the Seventh Circuit has recently put aside any doubt as to whether 28 U.S. 455(a) motions may be untimely. 93 F.3d at 257-258 ("Delay can be fatal * * * [.] Indeed, we have held, parties who know of a problem under § 455 but permit the trial to occur may not seek relief later.").

In *United States* v. *Antar*, 53 F.3d 568 (1995), the Third Circuit asserted discretion, on direct review of a criminal conviction, to review a judge's failure to recuse himself in a criminal case, where such a failure constituted plain error. See Fed. R. Crim. P. 52(b) ("Plain errors * * * may be noticed although they were not brought to the attention of the court."). *Antar*, however, did not address an attempted collateral attack on a final judgment. Nor did that decision deal with a civil case, cf. Fed. R. Civ. P. 61, where petitioner has not shown that the alleged error was "plain," see *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997), and the court of appeals properly exercised its discretion *not* to address an error that was untimely raised.

fashion. Pet. 29-30. Various courts have required such motions to be filed at the "earliest possible time after facts are discovered," at a "reasonable time in the litigation," or "in a timely fashion." *Ibid.* (collecting cases). But petitioner has failed to show that courts applying those similar locutions have, in any case or class of cases, reached inconsistent results. See, *e.g.*, *United States* v. *Anderson*, 160 F.3d 231, 234 (5th Cir. 1998) (using different expressions of the timeliness requirement interchangeably). Therefore, petitioner's claim that the courts of appeals operate under conditions of jurisprudential "discord" (Pet. 30) lacks support.

More importantly, petitioner has not demonstrated that any alleged circuit conflict could possibly affect the result in this case. Petitioner's motion to vacate was filed over six years after the Eleventh Circuit's opinion issued, and petitioner admits that it spent four years researching the issue before filing any motion with the court of appeals. Pet. 4. Petitioner's evidence of Judge Collier's alleged bias, however, comes exclusively from newspapers, Senate hearings, and other matters of public record, Pet. Lodging 1-46, and all of that evidence was available when petitioner filed its initial request for rehearing. The instant petition does not purport to explain why petitioner required more than six years to discover and assemble such publicly available evidence for presentation to the Eleventh Circuit. Without such explanation, petitioner's filing cannot be deemed timely, or excusably untimely, under the legal standards applied by *any* court of appeals. See, *e.g.*, *Pope* v. *Federal Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992) ("A party introducing a motion to recuse carries a heavy burden of proof; a judge is presumed to be impartial and the party seeking disqualification bears the substantial burden of proving

otherwise."); see also *United States* v. *Sarno*, 73 F.3d 1470, 1499 & n.19 (9th Cir. 1995), cert. denied, 518 U.S. 1020 (1996) (denying a recusal motion as untimely because the movant had "not attempted to excuse his delay in filing the proper motion" and had "not alluded to any lack of knowledge that prevented him from filing the proper motion").[3]

2. Circuit conflict aside, petitioner claims that this Court should intervene because the Eleventh Circuit "disregard[ed] completely," Pet. 26, and "blatantly [ran] afoul of," Pet. 24, its own standard of reasonableness, in favor of "some sort of *per se* rule" regarding the timeliness of recusal motions, *ibid.* Petitioner's argument finds no support, however, in the Eleventh Circuit's unpublished opinion, which does not purport to apply the per se approach petitioner seeks to challenge. Moreover, it is well settled that an intra-circuit conflict generally furnishes no basis for a grant of certiorari. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Petitioner provides no reason to depart from that rule here.

In the alternative, petitioner characterizes the Eleventh Circuit's decision as "extremely unclear" and as "provid[ing] no guidance whatsoever." Pet. 19. The absence of detailed explanation, however, is not a sufficient ground for finding an abuse of discretion. Cf. *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998) ("[T]he

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[3] Cf. *Tezak* v. *United States*, 256 F.3d 702, 717 (7th Cir. 2001) (indicating, in applying a parallel disqualification statute, that "it remains [the movant's] burden to establish that the motion was filed at the earliest possible moment after learning of the facts showing bias. Because [movant] has failed to state with particularity when he learned of the pertinent facts prior to filing the motion, we cannot say he has met this burden.").

analysis of allegations, the balancing of policies, and the resulting decision whether to disqualify are in the first instance committed to the district judge. And, * * * in many cases, reasonable deciders may disagree * * *. The appellate court, therefore, must ask itself not whether it would have decided as did the trial court, but whether that decision cannot be defended as a rational conclusion supported by [a] reasonable reading of the record.") (internal quotation mark omitted). Moreover, because the Eleventh Circuit's decision in this case was unpublished, its allegedly "unclear" pronouncements will have no effect on other cases.

Under the circumstances of this case, the Eleventh Circuit's disposition of this case in a brief, unpublished order was entirely appropriate. Petitioner has not asserted any direct connection between Judge Collier's participation in the Navy's decision to commission a destroyer in Pensacola and his judicial participation in this case. Nor has petitioner explained the fact that his motion was filed more than six years after the disputed Eleventh Circuit decision issued. In light of such facts, petitioner cannot identify *any* legal test or appropriate balancing of circumstances that would require the Eleventh Circuit to reach the merits of his untimely motion for the extraordinary remedy of vacatur. Cf. *Liljeberg*, 486 U.S. at 862 ("There need not be a draconian remedy for every violation of § 455(a)."). By summarily denying petitioner's motion, the Eleventh Circuit preserved the finality of judicial resources already invested in the case, without expending further such resources reciting factors and circumstances that were plain from the record. Petitioner has not shown that the Eleventh Circuit abused its discretion in making that choice; much less has petitioner shown that

any such fact-bound error warrants this Court's intervention.

3. Finally, petitioner requests that this Court hear this case on the ground that there "is a dearth of case law giving specific guidance as to the disqualification of appellate judges." Pet. 20-22. Petitioner does not explain, however, why it is important that most cases dealing with judicial disqualification concern district judges, rather than appellate judges. The statutory text establishes a unified standard of recusal for "[a]ny justice, judge, or magistrate of the United States," 28 U.S.C. 455(a), and petitioner offers neither authority nor justification for treating court of appeals judges differently from other types of judges. Nor is it clear that the absence of reported decisions counsels in favor, rather than against, a grant of certiorari in this case. Generally, this Court grants certiorari to resolve important and recurring issues on which the courts of appeals have divided, cf. Sup. Ct. R. 10(a), not issues that the courts of appeals have neglected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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