No. 18-215

In The
Supreme Court of the United States

LISA M. AUBUCHON and RACHEL ALEXANDER,

Petitioners,

v.

MARICOPA COUNTY, ARIZONA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Introduction

This case concerns the decision by an elected county attorney to deny the demands made by two former deputy county attorneys (one disbarred and the other suspended from the practice of law) for the payment of $101,293.75 in disciplinary sanctions assessed against them by the State Bar of Arizona. Those sanctions were the result of multiple egregious violations of Petitioners' ethical obligations that were ultimately upheld by the Arizona Supreme Court after a lengthy trial for which county taxpayers had already paid nearly $1.5 million in defense costs. *See In re Aubuchon*, 309 P.3d 886 (Ariz. 2013); *In re Alexander*, 300 P.3d 536 (Ariz. 2013).

Petitioners Lisa Aubuchon and Rachel Alexander sued Respondent Maricopa County (the "County"), its current County Attorney, and all five members of the County Board of Supervisors on various theories, seeking to recover the disciplinary sanctions imposed by the State Bar. [DE 37][1] On summary judgment, the District Court correctly determined (and the Court of Appeals later affirmed) that Petitioner Alexander did not comply with the notice of claim procedure mandated by Arizona statutes as a prerequisite for the assertion of state law claims against public entities, and neither Petitioner presented sufficient facts to support their alleged equal protection and First Amendment

[1] "DE" references are to the District Court docket entries in this case.

retaliation claims under 42 U.S.C. § 1983. *Aubuchon v. Maricopa County*, No. CV-14-01706, 2016 WL 7130942 (D.Ariz. Feb. 29, 2016), *aff'd*, 708 Fed.Appx. 436 (9th Cir. 2018). The District Court and the Court of Appeals likewise properly held that Petitioner Aubuchon failed to present evidence of an enforceable oral contract for the payment of those sanctions. *Id.*[2] The Court of Appeals also denied Petitioners' subsequent Petition for Panel Rehearing, with no judge on the Ninth Circuit voting to hear this case *en banc*. *Aubuchon v. County of Maricopa*, No. 16-15484 (9th Cir. March 6, 2018).

The decision entered below did not decide an important federal question, nor did that decision conflict with any decision of another federal court of appeals on the same matter, nor with any decision of the Supreme Court of Arizona, nor did the decision below conflict in any way with relevant decisions of this Court. U.S. Sup.Ct.R. 10. Instead, the Ninth Circuit's decision was based primarily on accepted principles of state contract law applied to the distinctive facts of this case under the normal and accepted standards of summary judgment. Petitioners' request for a writ of certiorari should consequently be denied.[3]

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[2] Both courts below further rejected Petitioners' claims for unjust enrichment and tortious interference with contract, but neither claim is a subject of their Amended Petition for Writ of Certiorari. Petitioners similarly do not challenge the lower court's conclusions that the provisions of the County's Self-Insured Trust Fund furnished no contractual basis for their claims

[3] The Amended Petition does not include "a list of all parties to the proceeding in the court whose judgment is sought to be reviewed" pursuant to Supreme Court Rule 14.1(b), and the caption

B. Material Facts and Proceedings Below

Petitioner Aubuchon was admitted to the State Bar of Arizona in 1990 and joined the Maricopa County Attorney's Office ("MCAO") in 1996, where she served as a prosecutor until her employment was terminated in 2010. [DE 56, ¶1; DE 62-3, Ex. 14] Petitioner Alexander was admitted to the State Bar of Arizona in 2000 and joined the MCAO in 2005, where she served as a deputy county attorney and special assistant to Maricopa County Attorney Andrew Thomas until 2010, when she voluntarily resigned. [DE 56, ¶2; DE 56-2, Ex. 2]

While serving as deputy county attorneys, Petitioners were public employees subject to the Maricopa County Employee Merit System, ARIZ.REV.STAT. ("A.R.S.") §§ 11-351 to 11-357, which provides the exclusive remedy for any improper dismissal or other disciplinary action taken against a county employee through an administrative review by the county merit system commission. [DE 56, ¶4] As merit system employees, there were no employment contracts between MCAO and either Aubuchon or Alexander. [DE 56, ¶20; DE 56-3, Ex. 9]

After they were hired, both petitioners acknowledged receipt of, and agreed to be bound by, MCAO's

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of the case only names Maricopa County as a Respondent. In addition, the vast majority of Petitioners' recitation of the "facts" of this case are not supported by any references to the record. Indeed, many of those purported facts are simply not in the record at all.

Policies and Procedures Manual, which was expressly "subject to change without notice." [DE 56-2, Ex. 1, 2] Effective October 18, 2002, MCAO adopted procedures which dealt with State Bar ethical complaints against deputy county attorneys, providing that: "The Maricopa County Attorney's Office does not pay fines, penalties, or costs that may ultimately be assessed against a DCA under Rule 53 [now Rule 60], Supreme Court Rules." [DE 56-3, Ex. 8; DE 62-2, Ex. 10][4]

"Starting in 2006, the MCAO engaged in well-publicized disputes, lawsuits, investigations, and criminal prosecutions involving various members of the Maricopa County Board of Supervisors . . . , judges serving in the Maricopa County Superior Court . . . , and others." *In re Aubuchon*, 309 P.3d at 888, ¶3 (Ariz. 2013); *accord In re Alexander*, 300 P.3d at 539, ¶3 (Ariz. 2013). In March 2010, at the request of the State Bar, the Chief Justice of the Arizona Supreme Court appointed an independent bar counsel to investigate

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[4] Through written discovery requests Petitioners were asked to identify and produce "each document comprising the employment contract or contracts" alleged in their pleadings, but neither Aubuchon nor Alexander provided any response. [DE 56, ¶¶18-19] At her deposition, Aubuchon described her "contract" as follows:

> I was supposed to comply with the policies, procedures of the office, which included directives from my supervisors. And that as long as I did that, I would be compensated and protected from any other type of financial obligations.

[DE 56-2, Ex. 1] When asked what the terms of her contract were during her deposition, Alexander similarly testified "[t]hat the policies and procedures of the office would apply to you." [DE 56-2, Ex. 2]

allegations of ethical misconduct against Andrew Thomas and other MCAO lawyers relating to these activities. *In re Aubuchon*, 309 P.3d at 88, ¶4; *In re Alexander*, 300 P.3d at 539, ¶9.

Probable cause was subsequently found for a formal bar complaint against Thomas, Aubuchon, and Alexander, which was filed in February 2011. *Id.* Twenty-eight charges were alleged against Aubuchon arising from her "roles in several criminal investigations and prosecutions and in a federal civil racketeering ('RICO') lawsuit." *In re Aubuchon*, 309 P.3d at 888, ¶¶3, 4. Alexander was charged with violating six Ethical Rules concerning her involvement in the same RICO lawsuit, and failing (along with Aubuchon) to cooperate and furnish information during the disciplinary screening investigation. *In re Alexander*, 300 P.3d at 539, ¶9. Consistent with MCAO's Employee Policies and Procedures, Thomas's elected successor as County Attorney, William Montgomery, wrote letters to Aubuchon and Alexander on January 3, 2011, advising them that "the MCAO will not pay and shall not be responsible for any restitution, State Bar costs, or other monetary sanctions that may be imposed upon or charged to you as part of any decision on the Bar Complaint." [DE 56-3, Ex. 9]

After a 26-day hearing, a three-person hearing panel found that bar counsel had proven almost all charges against Aubuchon and all charges against Alexander. *In re Aubuchon*, 309 P.3d at 888, ¶5; *In re Alexander*, 300 P.3d at 540, ¶10. [DE 62-2, Ex. 13] The panel ordered Ms. Aubuchon disbarred and Ms.

Alexander suspended from the practice of law for six months and one day. *Id.* Mr. Thomas was also disbarred, but unlike Aubuchon and Alexander, he did not appeal the panel's ruling. *In re Aubuchon*, 309 P.3d at 888 n.2.[5]

On appeal, the Arizona Supreme Court affirmed the hearing panel's finding that Alexander had violated ER 3.1 by knowingly maintaining a frivolous RICO lawsuit against the county board of supervisors, four superior court judges, and others, alleging "bribery and extortion as part of a conspiracy to hinder the investigation and prosecution of elected officials, county employees, and their attorneys concerning the funding and construction of a court tower in Maricopa County," despite a warning from Alexander's supervising attorney and MCAO's designated RICO expert, Peter Spaw, that the complaint appeared "legally deficient at every issue" making it "dead-on-arrival." *In re Alexander*, 300 P.3d at 539-42. The Supreme Court further upheld the panel's finding that Alexander violated ER 1.1 by failing to competently represent the plaintiffs in the RICO lawsuit, and also contravened ER 8.4(d) by maintaining that lawsuit against the defendant judges who were absolutely immune from civil liability, thereby impeding the administration of justice. *Id.* at 546-47. The Court accordingly

[5] Maricopa County spent $902,498.79 defending Thomas in the State Bar proceedings, $341,729.73 to defend Alexander, and $6,398.85 in defending Aubuchon before she engaged her own counsel. In addition, MCAO paid $240,499 in fees, costs, and expenses in defending Aubuchon while she was under investigation by the State Bar. [DE 62-2, Ex. 10-11]

affirmed Alexander's suspension from the practice of law, but reduced it by a period of one day to six months. *Id.* at 548-51.

In Aubuchon's appeal, the Arizona Supreme Court likewise upheld the hearing panel's finding that she violated ER 8.4(d) by filing the RICO action to intimidate and retaliate against the defendant judges who were immune from suit. *In re Aubuchon*, 309 P.3d at 894, ¶¶37-38. The Supreme Court further affirmed two additional violations of ER 8.4(d) concerning Aubuchon's criminal indictment of Maricopa County Supervisor Don Stapley on 44 misdemeanor charges that she knew were barred by the statute of limitations, and Aubuchon's requests to interview three superior court judges in connection with the Stapley matter which, as a result, prejudiced the administration of justice "by seeking to ascertain the judges' thought processes and intimidate them." *Id.* at 892-94.

The Supreme Court also upheld the hearing panel's determination that Aubuchon breached ERs 3.8(a) and 8.4(d) by knowingly filing a criminal complaint without probable cause charging Judge Gary Donahoe with bribery, hindering prosecution, and obstructing a criminal investigation, in order to improperly compel his recusal from grand jury matters. *Id.* at 894-96. The Supreme Court consequently affirmed Ms. Aubuchon's disbarment, holding that: "Without question, Aubuchon failed to fulfill her responsibilities as a prosecutor, abused the public trust, and misused the justice system." *Id.* at 888, ¶1.

Subsequently, on December 16, 2013, pursuant to Arizona Supreme Court Rule 60(b), the hearing panel entered an Order approving the parties' stipulation to assess the costs and expenses of the disciplinary proceedings against Thomas, Aubuchon, and Alexander in a reduced amount of $101,293.75. [DE 56-2, Ex. 3] Both Aubuchon and Alexander then made written demands upon Maricopa County (purportedly in compliance with Arizona's Actions Against Public Entities or Public Employees Act, A.R.S. §§ 12-820, *et seq.*) for the payment of that amount, with Aubuchon also threatening punitive damages claims for the "witch hunt" and "vendetta" that allegedly resulted in the decision to disbar her "well before any hearing took place or evidence was presented, exposing further the scheme that Maricopa County was part of perpetrating against me." [DE 58-1, Ex. C, D] When the County did not agree, Aubuchon and Alexander filed the instant lawsuit on July 2, 2014. [DE 1]

Following the close of discovery, both sides moved for summary judgment, which was granted in favor of the County. [DE 55-58, 70] In its Order, the District Court first noted that Ms. Alexander did not dispute that her notice of claim failed to comply with the strictly-construed requirements of A.R.S. § 12-821.01(A) because it was not served upon the Clerk of the County Board of Supervisors. *Aubuchon v. Maricopa County*, 2016 WL 7130942, at *2. The District Court then held that the County had not waived its right to assert this affirmative defense to all of Alexander's state law claims, finding that "[t]he plain

language of that statute places no burden on the public entity to dispute the validity of an improperly filed claim prior to litigation" and that the County's conduct after the filing of Petitioners' lawsuit was not "inconsistent with an intent to assert that right." *Id.* at *3-*4.

> Arizona courts have found waiver by conduct only when the parties were involved in litigation for significant periods of time prior to raising the defense. [*City of Phoenix v.*] *Fields*, 201 P.3d [529,] 536 [(Ariz. 2009)] (defendants' conduct waived their claims defense because they waited more than four years after the filing of the complaint and engaged in extensive briefing prior to raising the issue); *Jones* [*v. Cochise County*,] 187 P.3d [97,] 101 n.4 [(Ariz.App. 2008)] ("The County did not raise the notice of claim as a possible defense until nearly a year after the Joneses filed their complaint."). Here, Plaintiffs filed suit on July 2, 2014. Defendants raised the defense in their Answer on August 5, 2014. [DE 4] Defendants did not delay in raising their defense. Additionally, the cross-motions for summary judgment are the first significant briefing in the case. Defendants did not engage in "significant litigation" prior to raising the defense.

Aubuchon v. Maricopa County, 2016 WL 7130942, at *4.

The District Court next rejected Aubuchon's claim that she had an oral contract with the County to pay her State Bar disciplinary sanctions:

Aubuchon was an at-will employee hired under the merit system. If an employment contract existed, it was executed on her first day of work. Aubuchon's description of additional promises and changing terms would be a modification of an existing contract as she has presented no evidence, nor has she alleged, that she was told at the time of hiring that all bar costs would be paid in the case of a formal bar complaint being filed against her for ethical violations.

* * *

Assuming . . . the existence of a valid employment contract, modification requires consideration other than continued employment. Here, Aubuchon describes the terms as "promises that bec[a]me a contract of employment." [DE 59 at 5] In Aubuchon's own words, there were only promises but no consideration. Aubuchon also alleges that "[t]he offer of the job was accepted by the Plaintiffs and continued employment was CONDITIONED on following those *additional* directives." [DE 59 at 6] However, Arizona law prevents an employment contract from being modified based on continued employment. *Demasse* [*v. ITT Corp.*] 984 P.2d [1138], 1145 [(Ariz. 1999)]. Here, Aubuchon was under a preexisting duty to perform work for MCAO for which she received a paycheck. *See Travelers Ins. Co. v. Breese*, 675 P.2d 1327, 1330 (Ariz. Ct. App. 1983) ("A promise lacks consideration if the promissee is under a preexisting duty to counter-perform."). Aubuchon bears the

> burden to show a valid contract modification. She has failed to show that there was a modification to include payment of Bar Costs, because, assuming verbal promises were made, those additional promises lacked consideration.
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> * * *
>
> Alternatively, assuming the existence of an employment contract, Aubuchon must be able to identify "sufficient specification of terms so that the obligations involved can be ascertained." *Savoca Masonry Co. v. Homes & Sons Constr. Co.*, 542 P.2d [817], 819 [(Ariz. 1975)]. * * * No reasonable jury could find that Aubuchon has sufficiently identified terms in order to find the existence of an enforceable contract.

Aubuchon v. Maricopa County, 2016 WL 7130942, at *6.[6]

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[6] The District Court was "particularly troubled" by Petitioners' statement that they would not have followed County Attorney Thomas's directives if they could be subjected to financial ruin: "It infers that Plaintiffs knew they were acting unethically, but did so anyway because they believed they were indemnified against potential economic consequences even if wrong. Plaintiffs' position that they are indemnified because they were acting on the orders of their employer does not hold weight. An employer may not require his employees to act criminally or unethically." *Aubuchon v. Maricopa County*, 2016 WL 7130942, at *6 n.8 (citing *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1036 (Ariz. 1985)).

Finally, the District Court addressed Petitioners' § 1983 claims, beginning with their First Amendment cause of action:

> Plaintiffs allege that defendants retaliated against them by failing to pay Plaintiffs' Bar Costs because they exercised their First Amendment right to speak during the Bar disciplinary proceedings. [DE 59 at 15]
>
> Plaintiffs must prove that they exercised their First Amendment right to speak as a private citizen rather than pursuant to their official duties. *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006). Here, however, the Court need not engage in an analysis of whether Plaintiffs' speech was as private citizens or public employees. The timing of events is dispositive of the claim.
>
> On January 3, 2011, Montgomery issued letters to Plaintiffs stating that "the MCAO will not pay and shall not be responsible for any restitution, State Bar costs, or other monetary sanctions that may be imposed upon or charged to you as part of any decision on the Bar Complaint." [DE 56-3 at 50-51] A formal complaint by the State Bar was not filed until February 2011. [DE 56 ¶ 8] Plaintiffs, therefore, could not have engaged in speech until February 2011. Accordingly, Montgomery could not have retaliated against Plaintiffs for speaking during the disciplinary hearing process.

Aubuchon v. Maricopa County, 2016 WL 7130942, at *9.

With regard to Plaintiffs' Fourteenth Amendment equal protection claim, the District Court agreed that this Court's decision in *Engquist v. Oregon Dep't of Agriculture*, 533 U.S. 591 (2008), was "dispositive" and precluded any relief because "Defendants were acting as employers and a class-of-one claim is inapposite." *Aubuchon v. Maricopa County*, 2016 WL 7130942 at *10-*11. The District Court nevertheless went on to analyze and reject the "merits" of Petitioners' claim under the standard set forth in *Gerhart v. Lake County, Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011):

> Plaintiffs allege that they were treated differently than other deputy county attorneys who went through disciplinary proceedings, specifically Peter Spaw and [Ted] Duffy. [DE 59 at 8] Defendants, however, explain their assertions in detail. Defendants took the position that Duffy was wrongly disciplined and, therefore, elected to pay the costs assessed by the State Bar. [DE 67 at 4] In the case of Spaw, Alexander's supervisor, he was indeed disciplined for being negligent in his supervision of Alexander. [*Id.*] Spaw stipulated to his negligent conduct and to the sanctions imposed rather than fight the charges. [*Id.*] The County made a rational business decision to pay $15,000 to cover Spaw's bar costs because the alternative was to pay Spaw's defense costs for a bar proceeding, which could cost hundreds of thousands of dollars. [*Id.*] * * * Naming two other prosecutors who had their

> Bar costs paid does not create a pattern or practice that MCAO will always pay Bar costs, regardless of the circumstances. Defendants made individual determinations based on the individual circumstances. Plaintiffs failed to show that Spaw and Duffy were similarly situated or that there was no rational basis for any difference in treatment in this case.

Aubuchon v. Maricopa County, 2016 WL 7130942, at *11.[7]

On appeal, the Ninth Circuit affirmed the District Court in all respects, initially agreeing that Alexander failed to strictly comply with the notice of claim statute. *Aubuchon v. County of Maricopa*, 708 Fed.Appx. at 437 (citing *Simon v. Maricopa Med. Ctr.*, 234 P.3d 623, 630 (Ariz. 2010)). The Court of Appeals next held that "Aubuchon's breach of contract claims fail because she provided no evidence creating a material issue of fact as to whether her original employment contract obligated the County to cover bar costs or that there was a subsequent relevant modification of the contract." *Id.* The Court of Appeals likewise upheld the grant of summary judgment on Petitioners' § 1983 claims:

> Aubuchon's First Amendment retaliation claim fails because the decision not to pay her

[7] The District Court also denied Petitioners' related (but "not well-defined or well-developed") argument under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), that their alleged constitutional deprivation resulted from unequal treatment under Maricopa County's purported policy, custom, or practice of paying all Bar costs no matter the situation. *Aubuchon v. Maricopa County*, 2016 WL 7130942, at *11.

> bar costs was made before she testified about alleged corruption in the County. Her equal protection claim fails because "the class-of-one theory of equal protection does not apply in the public employment context," *Engquist* . . . , 553 U.S. [at] 598 . . . . And, Aubuchon's *Monell* claim fails because she has not established that the County had a policy that "amounts to deliberate indifference to [her] constitutional right." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (citation omitted).

Aubuchon v. County of Maricopa, 708 Fed.Appx. at 438.

ARGUMENT

As expressed by Chief Justice Taft nearly a century ago:

> The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. ***The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.***

Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923) (emphasis added); *see also Braxton v. United States*,

500 U.S. 344, 347 (1991) ("principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning and provisions of federal law"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (certiorari review "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance").

In other words, "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.'" *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 456 (1951) (citation omitted). Accordingly,

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. * * * In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations."

Id. (citation omitted); *accord General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) (granting certiorari "would not be warranted merely to review the evidence or inferences drawn from it").

In their Amended Petition, Ms. Aubuchon and Ms. Alexander provide no compelling reasons for granting certiorari in this case. Petitioners do not claim that the Ninth Circuit decided any important question of federal or state law in conflict with the decision of another federal court of appeals or state court of last resort, nor do they identify any issue decided by the Ninth Circuit as an important federal question that (i) should be settled by this Court or (ii) conflicts with any relevant decision of this Court.

Indeed, the "Questions Presented For Review" by Petitioners do not include a single question of federal law but instead simply request another hearing of the propriety of summary judgment on two state law questions having no general importance to the public: (i) the existence of a contract to pay Ms. Aubuchon's State Bar sanctions; and (ii) whether an admitted failure by Ms. Alexander to comply with Arizona's notice of claim statute was waived. Neither of these questions involve any novel issues of law, but would rather be entirely dependent on a further review of the evidence presented by the parties with their motion papers.[8] Moreover, although the Argument section of the Amended

[8] Both the District Court and the Ninth Circuit followed the well-settled standards of summary judgment procedure. Thus, for example, contrary to Ms. Alexander's contention, whether a party has waived a notice of claim defense under Arizona law is not always a question of fact for the jury. Rather, where the facts relating to the purported waiver by conduct are undisputed, "the question of waiver need not be submitted to the jury but instead should be decided by the trial court as a matter of law." *Jones v. Cochise County*, 187 P.3d 97, 106 (Ariz.App. 2008).

Petition briefly discusses Petitioners' § 1983 claims, they do not contend that the Ninth Circuit misconstrued federal law, but instead, once again, only that the Court of Appeals purportedly erred in applying that established law to the peculiar facts of this case. These circumstances are plainly inappropriate for certiorari relief.

Lastly, Petitioners contend that Judge Andrew Hurwitz, one of the Ninth Circuit panelists below, was "biased" because of his purported participation as a Justice of the Arizona Supreme Court in a special action appeal from 2009 involving the frivolous RICO action against Judge Gary Donahoe mentioned above.[9] Both the Petitioners and Respondent, however, were provided written notice of Judge Hurwitz' appointment to the panel on September 5, 2017, more than two months before the November 13, 2017 oral argument date, yet Petitioners failed to raise any objection to Judge Hurwitz' participation until after that argument took place and the Ninth Circuit issued its decision.

Moreover, Petitioners have presented no record of Judge Hurwitz' alleged "bias" other than their unsupported (and mischaracterized) assertion that he "criticized Appellant Aubuchon for her misdeeds and referred to her disbarment." Amended Petition at 17.[10]

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[9] Respondent has been unable to locate this special action appeal under the case number cited by Petitioners, CV-09-00372SA.

[10] Petitioners included no transcript or other recording of the oral argument in the Appendix to their Amended Petition. There

There is accordingly no basis for Judge Hurwitz' disqualification under 28 U.S.C. § 455. *See Liteky v. United States*, 510 U.S. 540 (1994) (allegedly biased admonishments and conduct of district judge during judicial proceedings were not disqualifying when they were neither based upon knowledge acquired outside such proceedings nor displayed deep-seated and unequivocal antagonism that would render fair judgment impossible), *followed in In re Marshall*, 721 F.3d 1032, 1041 (9th Cir. 2013).

CONCLUSION

For the reasons discussed above, the Amended Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 17th day of September, 2018.

SACKS TIERNEY P.A.

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(Admission Pending)

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is likewise no record support for Petitioners' assertion that the Ninth Circuit's decision was "politically charged.