No. 18-9669

In The Supreme Court of the United States

FLOYD M. CHODOSH, ET AL.,

Petitioners,

V.

PALM BEACH PARK ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA FOURTH DISTRICT COURT OF APPEAL, DIVISION THREE

RESPONDENT PALM BEACH PARK ASSOCIATION'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

This case concerns Petitioners' dissatisfaction with the judgment entered against them in a case arising out of their membership rights in a California Resident-Owned mobilehome park in San Clemente, California, where they previously resided. Petitioners allege that the Palm Beach Park Association, who were owners of the Park, breached its fiduciary duties through alleged inappropriate land transactions.

Petitioners' lawsuit was tried by a bench trial in several phases before the Honorable Robert J. Moss, Judge of the Superior Court of the State of California for the County of Orange. Before the trial court reached a final judgment in favor of the Association, one of the Petitioners filed a second action against the Association, arising out of the sale of the real property for the Park. Ultimately, the court entered a judgment in favor of the Association and the second action concerning the land sale was voluntarily dismissed by the one Petitioner.

When efforts to challenge the trial judge proved unsuccessful, Petitioners filed an action in federal district court. They alleged that three state appellate court justices conspired to uphold Judge Moss' orders to enforce an alleged illegal foreclosure and taking of their homes by improperly denying Petitioners' appeals and writs. Following a hearing on a motion to dismiss filed by the various judicial officers in the federal action, the United

States District Court dismissed the action with prejudice as to Judge Moss; the Honorable Kathleen E. O'Leary, Presiding Justice of the California Court of Appeal, Division Three; the Honorable William W. Bedsworth, Justice of the California Court of Appeal, Fourth Appellate District, Division Three; and the Honorable William L. Rylaarsdam, Justice of the California Court of Appeal, Fourth Appellate District, Division Three (Ret.), on the ground the federal court lacked subject matter jurisdiction under the Rooker-Feldman doctrine. The Ninth Circuit Court of Appeals affirmed the judgment of dismissal, but changed the dismissal from "with prejudice" to "without prejudice." Subsequently, Petitioners failed to raise any federal or constitutional claim against these judicial officers in any state court action, or on appeal in the present action.

The Question Presented:

Does the Due Process Clause of the Fourteenth Amendment require California appellate justices to recuse themselves from hearing an appeal, where Petitioners have presented no "extreme facts" that the probability of actual bias rises to an unconstitutional level?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Palm Beach Park Association has no parent corporation and no publicly traded corporation owns ten percent or more of its stock.

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BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

A. Judicial Disqualification Under the Due Process Clause.

Recusal under the Due Process Clause is mandatory when a judge has a "direct, personal, substantial, pecuniary interest" in a case. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The Court has also identified additional instances, tested by objective standards, that may require recusal whether or not actual bias on the part of a judge exists or can be proved. The test is whether "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). This test establishes the constitutional floor and is confined to "rare case[s]" arising from "extreme facts" that create "an unconstitutional probability of bias." *Caperton v. A. T. Massey Coal Co.,* 556 U.S. 868, 887, 890 (2009). States are "free to impose more rigorous standards for judicial disqualification," making resort to the Constitution unnecessary. *Id.* at 889-90.

California's Code of Judicial Ethics promulgated by the California Supreme Court passes constitutional muster. Cannon 3, Section E(4) meets the constitutional floor because it tests impartiality by objective standards. Cannon 3, Section E(5) exceeds the constitutional floor in the context of bias arising from prospective employment. Section E(5) mandates disqualification

of a justice who has either a current arrangement concerning prospective employment as a dispute resolution neutral, or has engaged in such discussions within the last two years, if the matter before the justice includes issues relating to the enforcement of either an agreement to submit to a dispute to an alternative dispute resolution process, or an award or other final decision by a dispute resolution neutral.

B. The Underlying Action.

Petitioners are several former members of a fifty-five-and-over resident-owned mobilehome park called Palm Beach Park (Park) in San Clemente, California, where the members enjoyed below market rent. They sued their Park Association over its purchase of the real property for the Park and a $200,000 per member assessment to fund the purchase.

The Park is located across the street from the Pacific Ocean and has 126 spaces. The Association previously leased the land from a family trust, but was provided an opportunity to purchase the real property for the Park in 2007 for $24,750,000 that required borrowing $16,100,000 and levying a $200,000 per member assessment to generate the funds for a down payment. (App., A, 4-5.) Petitioners are all former members who opposed paying the $200,000 assessment and refused to pay any monthly rent to occupy space at the Park since their memberships were suspended. (*Id*. at 5.) Petitioners sued

the Association under various theories seeking to invalidate the land purchase, the purchase loan, and the assessment. (*Id.* at 6 n.3.)

The Association counter-sued petitioners for their refusal to pay the monthly rent and assessment, as well as for ejectment from the Park. (App., A, 6.) The court tried the case in four phases of a bench trial. (*Id.*) Following the Phase IV bench trial, the trial court issued a statement of decision in favor of the Association on the complaint, except as to a cause of action for violation of the Truth in Lending Act, and on the cross-complaint. The court entered a final judgment on April 14, 2016. (*Id.* at 9-10.) The Association obtained a collective judgment for $1,153,791.90 for unpaid rent against the cross-defendants, some of whom are Petitioners, and a judgment of ejectment allowing the Association to have Petitioners and the other cross-defendants removed from the Park. (*Id.*)

C. The Judicial Bias Accusations.

The litigation was originally assigned to a trial judge who presided over the Phase I bench trial, Orange County Superior Court Judge Nancy Wieben Stock [Ret.]. (App., A, 6.) After a Phase I trial resulted in an oral ruling from the bench, the parties began settlement talks with retired Justice John K. Trotter at Judicial Arbitration Mediation Services, Inc. (JAMS). (*Id.* at N, 4a-5a.) After the parties reached an impasse, Petitioners' counsel terminated all mediation efforts, claiming Justice Trotter "threatened" to tell Judge Stock

that petitioners were to blame for frustrating the settlement talks. (*Id.* at 5a-6a.)

A few months later, Judge Stock retired and the case was reassigned to Superior Court Judge Robert Moss. When Petitioners' counsel learned Judge Stock had joined JAMS, he moved on behalf of Petitioners to retroactively disqualify her based on the allegation she ordered the parties to mediation while she was negotiating employment at JAMS. (App., N, 6a.) Petitioners also moved to disqualify Judge Moss, who was allegedly tainted because he had purportedly communicated with Judge Stock. (*Id.*) This was after Petitioners had received adverse rulings from Judge Moss. (*Id.*) Judge Moss struck the statement of disqualification, and Division Three of the Fourth District Court of Appeal summarily denied their petition for a writ of mandate to vacate the order. (*Id.*)

While this action was pending, Petitioners filed a separate lawsuit against Justice Trotter and JAMS, asserting mediation misconduct. (App., N, 7a.) The action was dismissed, and the dismissal was affirmed on appeal. (*Id.* at 8a, 40a.) The Palm Beach Park Association was not a party in that action.

In an attempt to recuse the Division Three justices, Petitioners also filed a federal action challenging the neutrality of Superior Court Judge Moss, as well as that of Court of Appeal Presiding Justice O'Leary, Court of Appeal Associate Justice Bedsworth, and Court of Appeal Associate Justice

Rylaarsdam (Ret.) in a federal court action entitled, *Eicherly, et al. v. Moss* (Federal District Court Case No. SACV 8:16-cv-02233-CJC-KES), filed in February 2018. (App., O.) Petitioners alleged these judicial officers conspired with each other to enforce illegal leases, memberships, and residential loans in the Park. (*Id*. at 42a-43a.) As part of the alleged conspiracy, they claimed the appellate court justices wrongfully upheld and affirmed Judge Moss's "wrongful rulings" by which the court aided and abetted illegal leases and contracts. (*Id*.) The federal district court dismissed the action with prejudice, based on the Rooker-Feldman doctrine. (*Id*. at 45a.) On appeal, the Ninth Circuit Court of Appeals affirmed the dismissal but found the state law claims should not have been dismissed with prejudice, but rather, on the ground that they lacked supplemental jurisdiction. (App., P, 49a-50a.)

Petitioners appealed the judgment in the present action, expressly disclaiming any challenge of the judgment on the basis of any federal or constitutional claim. (App., Q, 57a.)

In an unpublished opinion, Division Three of the Fourth Appellate District Court of Appeal of California affirmed the judgment in all respects, except it reversed the collective judgment of $1,153,791.90 awarded to the Association for unpaid rent. (App., A, 2-3; B, 7-18.) The court remanded the case to the trial court to determine whether the Association was required to ensure that a statement of mobilehome acceptance was obtained for

Petitioners' mobilehomes or trailers. (App., A, 2-3, 23.) The answer to that question turns upon whether Petitioners' mobilehomes and trailers meet the definition and criteria as required by the California Department of Housing Community Development regulations to require a certificate of occupancy or other certification. If they meet that definition, which the Association disputes, then the Association's failure to obtain the certificates could be a complete defense to the collection of unpaid rent. (*Id*.) Further proceedings in the trial court will examine the factual questions.

The Court of Appeal addressed the accusations made by Petitioners' counsel in its opinion, observing:

> Attorney Evans has engaged in a pattern of inflammatory accusations against any number of judges who have ruled against him, including not only Judge Moss but the Presiding Justice of this Division. Worse, at oral argument in this court, he practically invited us to hold him in contempt for accusing Judge Moss of fixing the result.

(App., A, 20.)

The court found the adverse rulings in the trial court were the "natural outcome" of Petitioners' failure to timely raise issues or poor articulation of them, noting that they chose "not to set contempt proceedings for Attorney Evans for the calumnies he has casually hurled at Judge Moss, nor for those directed at this court." (*Id*.) In a footnote, the court alluded to the unpled conspiracy claims: "The general idea being that the Courts of Appeal are

engaged in a grand conspiracy to cover up injustice perpetrated by trial judges. Our primary sin, it seems, was to reject Attorney Evans' petition for writ of mandate to remove Judge Moss from the case." (*Id.*)

REASONS FOR DENYING THE PETITION

This Court will grant a petition for a writ of certiorari "only for compelling reasons" involving federal law. Sup. Ct. R. 10. This case, however, presents no such compelling grounds. Petitioners failed to raise any federal or constitutional issue below. *Infra* Part II. There is no conflict between state and federal recusal law. *Infra* Part III. The decision by the California Court of Appeal, as affirmed by the California Supreme Court when it denied Petitioners' petition for review, is interlocutory because the matter has been remanded to the trial court for further proceedings. *Infra* Part IV. The instant case would be a poor vehicle to address any constitutional challenge, since Petitioners have not and cannot show a state law violation that would exceed the constitutional floor. *Infra* Part V. And, the remanded proceedings could result in Petitioners receiving a favorable ruling that they owe no back rent. Thus, Petitioners have sustained no harm. *Infra* VI.

I. PETITIONERS' FACTUAL NARRATIVE IS MISLEADING.

Mindful of Supreme Court Rule 15(2)'s admonition of counsel's obligation to the Court to point out in the brief in opposition, and not later, "any perceived misstatement of fact or law in the petition," the Association

sets forth below the true facts refuting the misstatements or misleading inferences in Petitioners' narrative.

1. Petitioners contend they asserted viable conspiracy claims against these judicial officers in their federal court action. However, those claims were dismissed under the *Rooker-Feldman* doctrine, and Petitioners subsequently failed to raise those claims in any state court action, which the *Rooker-Feldman* doctrine requires. (App., Q, 57a.) Thus, no California court has ever considered the judicial bias claims Petitioners raise for the first time here.

2. Petitioners raise additional claims in a related case, as if those are part of the judgment on appeal in the present action. After the Phase III bench trial, Petitioner Ole Haugen filed a separate action challenging the sale of the Park. (App., F.) When this related action was assigned to Judge Moss, Haugen filed a peremptory challenge against Judge Moss. (*Id*. at 1.) After the case was initially transferred to another judge, Judge Moss reassumed jurisdiction over the case, finding the Association's objections to the peremptory challenge to be valid. (*Id*. at 3-4.) Haugen failed to file a timely petition for a writ of mandate challenging Judge Moss' reassumption of jurisdiction, and Haugen ultimately dismissed his action. (App., G, 8.)

3. Petitioners also cite to purported facts that are not contained in the record. There is no evidence in the record that JAMS actively recruits

judicial officers in Orange County, California, that many Orange County Justices retire to JAMS, or any evidence as to the current salary of a JAMS neutral. (Pet., 6, 8, 17.) There is also no evidence JAMS solicited any of these judicial officers or that the judicial officers actively pursed employment with JAMS at any time. (*Id*.) Petitioners also present no citation to the record that there was any evidence that any acts by the mediator, Justice John Trotter (Ret.), in any way affected the judgment rendered by Judge Moss.

4. Petitioners operate under the assumption they owned the real property underneath their mobilehomes. But the Association purchased the real estate for the Park in 2007. (Pet., 9-10.) Indeed, the judgment against Petitioners found that they "do not now and never have owned any fee interest in the real property which comprises Palm Beach Park." (App., B, 5.) Rather, when they were members in good standing, Petitioners each owned a 1/126th interest in the Association. (App., A, 4-5.) Since petitioners did not own real property, the trial court correctly ordered Petitioners' ejectment from the Park for nonpayment of rent, not an illegal foreclosure. (App., B, 5.)

5. Petitioners also claim Judge Moss in some way ignored rulings Judge Stock made during Phase I of the trial. However, Judge Stock's rulings were oral rulings from the bench; they were never reduced to a written statement of decision. California law is clear that once Judge Stock retired, the Association was entitled to a new trial on any factual and/or legal issues

decided by Judge Stock before her retirement in the Phase I trial. *European Beverage, Inc. v. Super. Ct. (Meara)*, 43 Cal. App. 4th 1211, 1214-16 (1996).

II. PETITIONERS' CONSTITUTIONAL ISSUES WERE NEITHER PRESENTED TO NOR DECIDED BY ANY STATE OR FEDERAL COURT.

Petitioners advance for the first time in their certiorari petition a constitutional objection to the state court proceedings. Petitioners argue three California Court of Appeal justices violated Petitioners' due process rights during the course of state court litigation, based on the allegation that these judicial officers hoped to secure employment with JAMS after leaving the bench, and thus had an incentive to rule in the Association's favor.

Whatever the merits of this constitutional challenge, it was not presented to nor decided by any state court. Petitioners informed the California Court of Appeal in their opening brief appealing from the judgment against them in the State action that they were not asserting any federal or constitutional claim. (App., Q, 57a.) The Ninth Circuit affirmed dismissal of their federal action against these judicial officers under the *Rooker-Feldman* doctrine to ensure that review of all state court decisions proceed through the state appellate process and then, if necessary, to this Court. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292 (2005). The California Supreme Court could have entertained the recusal. *Kaufman v. Court of Appeal*, 31 Cal. 3d 933, 940 (1982) ("[I]n this court the

sole question would be: 'Because of his bias, did the appellate proceeding wherein a justice participated become illegally and prejudicially unfair?'"). Yet, Petitioners failed to challenge the state court judgment on that basis. This is reason enough to deny certiorari. *See, e.g.*, *Zivotofsky v. Clinton*, 566 U.S. 189, 201-02 (2012) (declining to decide issue "in the first instance" where the Court was "without the benefit of thorough lower court opinions to guide [its] analysis").

Petitioners are asking this Court to take up and decide, in the first instance, a question of constitutional law that has never been decided by any tribunal, judicial or administrative. But this is "a court of review, not of first review." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see also CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016) ("It is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance."). Indeed, "[t]he very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance." *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in judgment). That is because this Court benefits from the considered views of lower tribunals before deciding significant questions.

It appears Petitioners have simply seized upon their repeated attempts to disqualify these judicial officers in multiple state and federal court lawsuits in a last ditch effort to resurrect their moribund property claims

that are now running on over a nine-year legal odyssey in the court system. But that is not how federal litigation works. Absent extraordinary circumstances not present here, litigants are expected to present and preserve their legal arguments, including constitutional challenges, *before* raising them in this Court. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944).

There is no basis whatsoever to excuse Petitioners' forfeiture of their due process challenge. This Court should follow its usual practice, and decline to review the constitutional challenge that Petitioners have attempted to inject into this long-running litigation for the first time in this Court.

III. THERE IS NO CONFLICT BETWEEN STATE AND FEDERAL LAW.

There is no conflict among the courts on the question of judicial recusal that warrants review under Rule 10. Petitioners have articulated no conflict among the circuits, nor with any state court of last resort, nor with any state court on any issue of Supreme Court due process jurisprudence.

This Court held long ago that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955).

"Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Id.*; *cf. Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").

"The Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard," for a judicial bias claim. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). While most claims of judicial bias are resolved "by common law, statute, or the professional standards of the bench and bar," the "floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' before a judge with no bias against the defendant or interest in the outcome of his particular case." *Id.* at 904-05 (quoting *Withrow*, 421 U.S. at 46).

The Constitution requires recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47. The inquiry is objective, requiring this Court to ask not whether the judge actually harbored subjective bias, but whether the average judge in his or her position was likely to be neutral or whether there existed an unconstitutional potential for bias. *Caperton*, 556 U.S. at 881. Thus, "[e]very procedure which would offer a possible temptation to the average . . . judge to forget the burden of proof required to convict the

defendant, or which might lead him not to hold the balance nice, clear true between the State and the accused, denies the [accused] due process of law." *Tumey*, 273 U.S. at 532.

Using this constitutional floor, due process requires recusal where the judge has a direct, personal and substantial pecuniary interest in convicting a defendant. *Tumey*, 273 U.S. at 523, 532. Other financial interests also may mandate recusal, even if less direct. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *see also Ward v. Monroeville*, 409 U.S. 57, 58, 61-62 (1972) (requiring recusal where village mayor with revenue production role also sat as a judge and imposed revenue-producing fines on the defendant); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986) (requiring recusal where: (1) a justice of the state supreme court cast the deciding vote and authored an opinion upholding punitive damages in certain insurance cases and (2) that same justice was a plaintiff in a pending action involving the same legal issues from which he obtained a large monetary settlement). Non-pecuniary conflicts "that tempt adjudicators to disregard neutrality" also offend due process. *Caperton*, 556 U.S. at 878. A judge must withdraw where he or she acts as part of the accusatory process, *Murchison*, 349 U.S. at 137, "becomes embroiled in a running, bitter controversy" with one of the litigants, *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971), or becomes "so

enmeshed in matters involving [a litigant] as to make it appropriate for another judge to sit." *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971).

This Court acknowledges most states have already adopted the American Bar Association's objective standard for testing impartiality and may "choose to 'adopt recusal standards more rigorous than due process requires.'" *Caperton*, 556 U.S. at 889. The California Supreme Court has done so.

The California Supreme Court, in adopting the California Code of Judicial Ethics, has set forth recusal standards that meet the constitutional floor. Cannon 3, Section E(4) requires appellate justice disqualification "if for any reason" the justice believes recusal furthers the interest of justice, doubts his or her ability to be impartial, or if "circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial." (App., R, 67a-68a.) "Impartial" means "the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as the maintenance of an open mind in considering issues that may come before a judge." (*Id*. at 62a.)

The state ethics code also exceeds the constitutional floor as it pertains to prospective employment. As relevant here, Cannon 3, Section E(5)(h), mandates disqualification of a justice who "has a current arrangement concerning prospective employment or other compensated service as a

dispute resolution neutral or is participating in, or within the last two years has participated in, discussions regarding prospective employment or service as a dispute resolution neutral, or has been engaged in such employment or service" if the matter before the justice includes issues relating to the enforcement of either an agreement to submit to a dispute to an alternative dispute resolution process, or an award or other final decision by a dispute resolution neutral. (App., R, 68a-69a.)

Cannon 3, Section E(5)(h) defines "participating in discussions" or "has participated in discussions" to mean that the justice solicited or otherwise indicated an interest in accepting or negotiating possible employment or service as an alternative dispute resolution neutral, or responded to an unsolicited statement regarding, or an offer of, such employment or service by expressing an interest in that employment service, or encouraging the persons making the statement, or offer to provide additional information about that possible employment or service. (App., R, 69a.)

Section (E)(5) also provides: "If a justice's response to an unsolicited statement regarding a question about, or offer of prospective employment or other compensated service as a dispute resolution neural is limited to responding negatively, declining the offer, or declining to discuss such employment or service, that response does not constitute participating in discussions." (App., R, 69a.)

The state's Code of Judicial Ethics provide more protection than due process requires because it goes beyond objective standards, addressing a justice's discussion of prospective employment with JAMS, regardless of whether a position has been secured. "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances." *Caperton*, 556 U.S. at 890.

In addition, California has also adopted the federal standard, where each appellate judge decides whether the facts require recusal. *Kaufman*, 31 Cal. 3d at 939-40.

Petitioners claim California law is at odds with due process considerations that may override the state's mediation privilege to give way to due process concerns. (Pet., 22, 34.) Petitioners are mistaken. The state supreme court has observed "[w]e must apply the plain terms of the mediation confidentiality statutes to the facts of this case *unless* such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose." *Cassel v. Superior Court*, 51 Cal. 4th 113, 119 (2011) (emphasis in original). Regardless, Petitioners have not presented any citation to the record that what occurred at the confidential mediations

conducted by two, separate retired judicial officers in any way affected the trial proceedings before Judge Moss.

Absence of a conflict between state and federal law mandates denial of the petition.

IV. THE DECISION BELOW IS INTERLOCUTORY AND WOULD NOT PRESENT THE FULL DISPUTE.

Review is also unwarranted because the decision under review is interlocutory. The Court of Appeal's decision expressly contemplates further proceedings. The California Court of Appeal reversed the judgment in favor of the Association to the extent it provides that Petitioners owe money to the Association. The Court of Appeal remanded the matter for the trial court to determine whether Petitioners' various units constitute "mobilehomes" within the meaning of state housing regulations.

This Court normally does not review interlocutory decisions, and for good reason—further development of the issues often crystallizes the arguments in preparation for this Court's review. *See Va. Military Inst. v. United States*, 508 U.S. 946, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring in denial of certiorari). Because the state trial court has not yet expressed its definitive view of Petitioners' claims after full development of the record, granting certiorari at this stage would embroil this Court in

piecemeal review without the ability to conclusively resolve the "ultimate merits" of Petitioners' claims. *Brown v. Chote*, 411 U.S. 452, 456-57 (1973).

Certiorari before judgment is such an extraordinary measure reserved only for cases of such "imperative public importance" that the Court's immediate review is necessary. Sup. Ct. R. 11. Petitioners fail to demonstrate why immediate review is necessary. Rather than engage in piecemeal review, this Court should deny certiorari here.

V. THIS CASE DOES NOT IN ANY EVENT PRESENT AN APPROPRIATE VEHICLE FOR REVIEW.

Even if this case did meet the other criteria for this Court's review—which it manifestly does not—it would still be a poor vehicle for addressing the question presented because Petitioners have failed to plead any actionable constitutional due process violation with plausibility and particularity. There is no reason for this Court to expend its limited resources on a case that, even if it had been sufficiently alleged, would be destined for dismissal.

The petition reveals fatal legal deficiencies in Petitioners' constitutional challenge. Petitioners claim their due process rights were violated because the trial judge and several Court of Appeal justices refused to recuse themselves "in the face of pecuniary interests and conflicts arising from their post-bench retirement employment opportunities at JAMS, Inc., recognized

as the world's largest provider of alternative dispute resolution ("ADR") services." (Pet., 1.) Petitioners also claim the refusal to recuse was a due process violation because Petitioners sued each of them in federal court. (*Id.* at 28-33.)

There is a cross-cutting flaw in Petitioners' theory: neither the trial court judge, nor any of the justices, has retired and secured employment at JAMS. At most, Petitioners claim these judicial officers hope to secure employment with JAMS after leaving the bench, but a complementary allegation of conduct on the party of anyone at JAMS or even by any of the judicial officers is wholly absent. *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 178-79 (3d Cir. 2010) (allegation that state court judges hope to secure employment with ADR entity after leaving the bench, without more, was insufficient to show conspiracy to obtain favorable rulings). Nor is there any allegation or evidence these judicial officers have participated in discussions for employment with JAMS, and no basis exists for claiming any one of them has some disqualifying pecuniary interest that would cause them to not be neutral. "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Here, the decision below presents no "extreme facts" that might otherwise justify this Court's review.

Likewise, the allegation a judge should recuse himself or herself because the plaintiff has filed a complaint against the judge is not grounds for disqualification. *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977), *cert. denied*, 435 U.S. 954 ("A judge is not disqualified merely because a litigant sues or threatens to sue him."). One reason courts have refused to do so is to prevent the plaintiffs from "judge-shopping," since a plaintiff might name a judge as a defendant to get a new (and perhaps more favorably inclined) judge. *In re Martin-Trigona*, 573 F. Supp. 1237, 1243 (D. Conn. 1983); *see also New York City Hous. Dev. Corp. v. Hart*, 796 F.2d 976, 981 (7th Cir. 1986) ("automatic disqualification allows the party to manipulate the identity of the decision maker. . . .").

The fact the appellate justices here denied writ petitions in this case after Petitioners had filed their federal court action is also not evidence of partiality. *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1356 (3d Cir. 1990) (disagreement with district court judge's legal conclusions does not support a suggestion of partiality).

Given the serious and substantial jurisdictional and justiciability concerns implicated by the claims here, and the manifest deficiencies in Petitioners' arguments in this regard, this case is not an appropriate vehicle for consideration of the judicial recusal question raised by the petition. *See, e.g.*, Eugene Gressman et al., *Supreme Court Practice* § 4.4(f), at 248 (9th ed.

2007) (review is generally unwarranted when the case may be dismissed on other grounds).

VI. PETITIONERS' ARGUMENTS DO NOT JUSTIFY REVIEW BECAUSE PETITIONERS HAVE SUSTAINED NO HARM.

Petitioners argue certiorari is warranted because the decisions of these judicial officers culminated in Petitioners "losing their homes" and "being ejected from the Park." (Pet., 23.) But this Court does not sit as a "court of error correction." *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (Alito, J., statement respecting denial of certiorari). Petitioners' arguments fail to demonstrate a compelling need for this Court's involvement at this stage.

Petitioners allege a violation of the Due Process Clause, even though the state trial court found Petitioners prevailed on their cause of action for violation of the federal Truth in Lending Act. The trial court declared the loans made by the Association to each Petitioner rescinded, and found they were *entitled to restitution* for any sums they had already paid the Association. (App., A, 8.)

Then on appeal, the state Court of Appeal *reversed* the judgment in excess of $1 million against Petitioners for unpaid rent. This was essentially a "gift," since Petitioners had not been paying rent to live in the Park, for years. (App., A, 5, 9.) If, on remand, Petitioners prevail in showing their trailers are mobilehomes under state law, the trial court will recalculate how

much Petitioners paid on their loans to the Association, made in violation of the Truth in Lending Act, and enter a new judgment for the reimbursement of those monies to Petitioners.

Regardless of whether unpaid rent is owed, termination of Petitioners' membership in the Park for their failure to pay rent and assessment was correct. Even a finding the petition is "certworthy" would not change that result, since Petitioners did not own the real property under their mobilehomes and trailers. Petitioners have shown no error that would upend the judgment.

At the end of the day, Petitioners were relieved of a judgment in excess of $1 million, and may potentially prevail on remand in their favor. This is hardly a prejudicial result warranting constitutional review.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: August 7, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
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APPENDICES

APPENDIX N

Filed 9/13/17 Chodosh v. Trotter CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FLOYD M. CHODOSH et al. Plaintiffs and Appellants, v. JOHN K. TROTTER et al., Defendants and Respondents.	D070952, D070953 (Super. Ct. No. 30-2014-722371)

APPEAL from orders and judgment of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Affirmed.

Law Office of Patrick J. Evans and Patrick J. Evans for Plaintiffs and Appellants.

Long & Levitt LLP, Joseph P. McMonigle, Jessica R. MacGregor, David S. McMonigle, and Noah S. Rosenthal for Defendants and Respondents.

Floyd M. Chodosh, Susan Eicherly, Bonnie P. Harris, Myrle A. Moore, Ole Haugen, and Chris McLaughlin (together, plaintiffs) sued the Honorable John R. Trotter (retired) and JAMS, Inc. (together, defendants) on numerous grounds, based on Justice Trotter's mediation of plaintiffs' litigation against the Palm Beach Park Association (the Association). Defendants filed a special motion to strike pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP (strategic lawsuit against public participation) statute.[1] The trial court found defendants' conduct was protected litigation-related activity, and that plaintiffs could not meet their burden in opposing the motion due to mediation confidentiality, quasi-judicial immunity, and the litigation privilege. The court granted the motion, awarded attorneys' fees to defendants, and dismissed the action.

Plaintiffs appealed. They argue the court's anti-SLAPP rulings were in error, but do not address the fee ruling. We conclude the court properly granted the anti-SLAPP motion, deem the fee issue waived (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4), and affirm the orders and judgment in favor of defendants.

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1 Except as noted *post*, further statutory references are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND[2]

I. *Underlying litigation and mediation proceedings*

Plaintiffs resided in the Palm Beach Mobilehome Park in San Clemente and were members of the Association. According to plaintiffs, the Association imposed a special assessment in 2007, and made loans to a number of members in the amount of the assessment. In 2010, plaintiffs and other residents (collectively, the PBPA plaintiffs) sued the Association regarding the assessment and the loans, and the cases were consolidated in a single action before the Honorable Nancy Wieben Stock. (*In re Palm Beach Park Association Cases,* Orange County Super. Ct. Case No. 30-2010-00423544-CU-BC-CXC.)

In February 2013, the parties mediated with the Honorable James L. Smith (retired) at JAMS, and the matter did not settle. The trial court held a Phase I bench trial on certain issues. In May 2013, the court delivered its tentative rulings and addressed next steps in terms of "courtroom" and "out-of-courtroom" ideas. As to the latter, the court stated: "You might want to consider using a very sophisticated mediator to help you navigate through some of the difficult discussion points. [¶] The current mediator that you have been utilizing for your pretrial efforts is, in the court's view in that league

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2 As discussed *post*, plaintiffs' allegations about communications at the mediation are barred by mediation confidentiality. We relate them solely for purposes of addressing plaintiffs' claims. We further note plaintiffs' factual summary, particularly as to court conferences in the underlying litigation, is substantially one-sided and argumentative. (See Cal. Rules of Court, rule 8.204(a)(2)(C) [brief must "[p]rovide a summary of the significant facts"]; *In re S.C.* (2006) 138 Cal.App.4th 396, 402 ["appellant must fairly set forth all the significant facts, not just those beneficial to the appellant"].) We rely on the record as needed to supply the significant facts.

and in that category. But if for any reason a different mediator were deemed to be more advisable, I would, nonetheless, still urge you to consider using outside services, if necessary . . . . I strongly recommend—but I have no authority—to order you to do those things." The court set a trial setting conference and ordered the Association to initiate a joint status report with updates on both in-court and out-of-court solutions.

The parties returned to mediation in September and October 2013, this time with Justice Trotter. Plaintiffs' complaint states the Association "approached Plaintiffs through the offices of a prominent plaintiff lawyer intermediary. . . . He requested that Plaintiffs agree to mediate again. [¶] The prominent lawyer suggested that Plaintiffs utilize Justice TROTTER as the mediator. Plaintiffs agreed to attend a mediation with Justice TROTTER at JAMS but not to pay for it." According to plaintiffs, the following statements and omissions occurred at the September mediation: "Justice Trotter stated he knew [Judge Stock] and that she had suffered a heart attack. No one from JAMS said or disclosed anything about . . . [her] having an arrangement or being in discussions with JAMS about her working at JAMS after she retired from the bench." The matter did not resolve.

At a status and trial setting conference in October 2013, the trial court stated: "Further mediation opportunities should be taken advantage of . . . . [¶] I think it's well known that Justice Trotter is one of the most skilled neutrals in the nation. So you are in good hands at least in that context." Association's counsel indicated it planned "to utilize Justice Trotter as to the go-between on the settlement documents . . . ." The court asked PBPA plaintiffs' counsel about "the possibility of settlement under the auspices of Justice

Trotter." Plaintiffs' counsel stated: "[A]t this point we would be happy to work with Justice Trotter, work with the other side, try to get this case resolved. Obviously, this case just cries out for resolution." The court noted: "[W]ith Justice Trotter navigating back and forth . . . , if there are proposals . . . that need to be discussed, my strong recommendation is to keep the conversation going." The court further noted: "[T]here are means by which parties can build in expectations, provide for accountability, but still get to the finish line. And I'm sure Justice Trotter has all of those in his [playbook] and you are experienced counsel, you would know as well." The court indicated there were "two choices" for further settlement talks, "directly communic[ating] in writing" or "through your mediator," and recommended defense counsel "clear the air, submit a written proposal with basic terms that doesn't have to be a final settlement agreement, or engage Justice Trotter . . . . "

In November 2013, the parties again mediated with Justice Trotter, and again did not resolve their dispute. According to plaintiffs, the following events took place: Justice Trotter suggested the PBPA plaintiffs and Association directors meet without counsel; they did so, reached an impasse, and went to get Justice Trotter. He allegedly told the PBPA plaintiffs that "the settlement . . . was a gift and that he would personally tell 'Judge Nancy' that Plaintiffs refused to settle . . . and were the reason why settlement

was not reached." He returned shortly thereafter, asked if there was a settlement, and, when the PBPA plaintiffs responded no, shut the door and left.[3]

In December 2013, the parties attended another status and trial setting conference. The PBPA plaintiffs sought a phased trial on the remaining issues, while the Association requested an unphased trial. The court set an unphased jury trial for May 2014. In January 2014, Judge Stock retired and the case was reassigned to the Honorable Robert J. Moss. Plaintiffs' counsel received information in February 2014 that Judge Stock had joined JAMS.

In May 2014, the PBPA plaintiffs moved to disqualify Judge Stock retroactively and to void her order for a jury trial. They alleged, among other things, that she directed the parties to continue mediating with Justice Trotter while she was in (or discussing) an arrangement with JAMS. They also moved to disqualify Judge Moss, on grounds that he communicated with Judge Stock and "might have . . . an interest in joining JAMS." Judge Moss denied the requests, finding no factual support for plaintiffs' allegations. The PBPA plaintiffs filed a petition for writ of mandate to vacate this ruling, which was denied.

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3 Plaintiffs claim, without citation to the record, that Justice Trotter "stated he would tell 'Judge Nancy' [plaintiffs] were the 'bad guys.' " We will not consider this alleged statement. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 ["[I]t is counsel's duty to point out portions of the record . . . ."].)

II. *Litigation below*

In May 2014, plaintiffs here filed this lawsuit against defendants for breach of contract, fraudulent concealment, negligence, intentional and negligent infliction of emotional distress, intentional and negligent misrepresentation, and unfair business practices (Bus & Prof. Code, § 17200 (Unfair Competition Law, hereafter the UCL)). The claims were based on Justice Trotter's alleged threat, in front of the Association directors, to tell Judge Stock that plaintiffs were the reason the case did not settle and the purported failure to disclose Judge Stock was joining JAMS. With respect to the alleged threat, the complaint stated: "[W]hile Plaintiffs should and do take Justice TROTTER at his word, they do not, at this time, specifically allege that ex parte communications occurred. . . . However, Plaintiffs could and do reasonably perceive a very high risk that Justice TROTTER communicated with the trial judge about the case because the facts show JAMS was in discussions with Hon. Nancy Wieben Stock about her joining JAMS."

Defendants filed a special motion to strike the complaint under anti-SLAPP, asserting their alleged acts were protected litigation-related conduct, and plaintiffs could not establish a likelihood of prevailing due to mediation confidentiality, quasi-judicial immunity, and the litigation privilege. Plaintiffs opposed the motion, challenging these arguments, and provided declarations from Chodosh and two other plaintiffs regarding Justice Trotter's alleged communications at the mediation sessions. Defendants objected to the declarations.

At the hearing, the trial court addressed the evidence. With respect to plaintiffs' statements in declarations about the alleged threat, the court noted: "[O]bviously [Justice] Trotter and Judge Stock can't counter that evidence, . . . their hands are tied . . . ." The court also observed there was "no evidence . . . [Judge Stock] was in any kind of conversations with JAMS at this time" and "no evidence . . . [Justice Trotter] ever had a conversation with Judge Stock about the case."

The trial court granted the anti-SLAPP motion. The court found the "gravamen of all of Plaintiffs' claims arise[s] out of statements made in connection with an issue under consideration by a judicial body and in mediation," and defendants thus met their burden to show the action arose from protected activity.

The court then determined plaintiffs did not meet their burden to present admissible evidence demonstrating a probability of prevailing on their claims. First, the court found "the statements made by Justice Trotter [were] inadmissible because they are protected by the mediation privilege set forth in Evidence Code section 1115 et seq." The court explained the statute "sets forth an extensive statutory scheme protecting the confidentiality of mediation proceedings, with narrowly delineated exceptions" and prohibits participants and mediators alike from revealing mediation communications. Second, the court found defendants "are protected by quasi-judicial immunity." The court stated this immunity "extends to services provided by Defendants in mediation, . . . even breach of contract claims except in rare cases where the mediator completely fails to conduct a mediation," and found plaintiffs "failed to establish that Defendants have completely failed to conduct a mediation and that judicial immunity does not apply."

Finally, the court found "the communications at issue are entitled to absolute protection under the litigation privilege." The court explained the privilege applies to settlement negotiations, and plaintiffs "failed to present admissible evidence demonstrating that the statements made exceed the protection afforded under the litigation privilege."

The court declined to rule on defendants' objections to plaintiffs' declarations (due to noncompliance with the Cal. Rules of Court), but stated it "considered only admissible evidence in ruling on the motion." Defendants moved for attorneys' fees and costs under section 425.16, which the trial court granted. The court entered judgment for defendants, and plaintiffs timely appealed.

DISCUSSION

I. *The Anti-SLAPP statute and standard of review*

"[S]ection 425.16 requires the trial court to undertake a two-step process in determining whether to grant a SLAPP motion. 'First, the court decides whether the defendant has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue.' [Citation]. [¶] If the court finds the defendant has made the requisite showing, the burden then shifts to the plaintiff to establish a 'probability' of prevailing on the claim by making a prima facie showing of facts that would, if proved, support a judgment in the plaintiff's favor. [Citation.] . . . [I]n assessing the probability the plaintiff will prevail, the court considers only the evidence that would be admissible at trial." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906 (*Kashian*).)

"Whether section 425.16 applies, and whether the plaintiff has shown a probability of prevailing, are both questions we review independently on appeal." (*Kashian, supra*, 98 Cal.App.4th at p. 906.) " 'The burden of affirmatively demonstrating error is on the appellant.' " (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)[4]

II. *Analysis*

A. *Prong one: Whether defendants established their conduct was protected*

A defendant meets its anti-SLAPP burden " 'by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e).' " (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "[I]t is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the

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4 Plaintiffs' briefs are deficient, in addition to the factual summary issue noted *ante*. First, briefs must"[s]tate each point under a separate heading or subheading summarizing the point . . . ." (Cal. Rules of Court, rule 8.204(a)(1)(B).) Plaintiffs' arguments are not confined to discrete headings and sections, and are repetitive. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294-1295 (*Provost*) ["[W]e do not consider all of the loose and disparate arguments . . . . [Citation.] [O]nce we have discussed and disposed of an issue it will not necessarily be considered again . . . ."].) Second, " '[e]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived . . . .' " (*People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*); Cal. Rules of Court, rule 8.204(a)(1)(B).) Plaintiffs fail to provide authority to support multiple arguments. Finally, " ' "points raised in the reply brief for the first time will not be considered," ' " absent good reason. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.) Plaintiffs raise certain points for the first time on reply. To the extent we understand their arguments and they are proper, we will consider them. If they intended to make other arguments, they are forfeited for lack of adequate briefing.

anti-SLAP[P] statute applies." (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414 (*Scott*).)

1. *Statements in connection with issue under consideration by judicial body*

One category of protected conduct includes "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e).) Courts "have adopted a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16." (*Kashian, supra*, 98 Cal.App.4th at p. 908.)

Protected litigation-related activities include statements made as part of settlement negotiations. (See, e.g., *Navellier v. Sletten* (2002) 29 Cal.4th 82, 87, 85-86 [anti-SLAPP statute applied to claim that party "committed fraud in misrepresenting . . . intention to be bound" by release in prior action]; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963-967 (*Seltzer*) [reversing denial of anti-SLAPP motion in homeowner's action for fraud in connection with settlement negotiations in underlying lawsuit]; *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 908 [affirming grant of anti-SLAPP motion in lawsuit based on firm's communication of settlement offer]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 [attorney's negotiation of stipulated settlement in unlawful detainer action was protected conduct].)

Plaintiffs do not dispute settlement negotiations are protected conduct under anti-SLAPP. Instead, they argue anti-SLAPP does not apply here because defendants'

conduct was unlawful, citing a number of statutes and rules, and because there is no anti-SLAPP protection for false advertising.[5] Neither argument has merit.

2. *Illegal conduct*

"[C]onduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is alleged to have been unlawful or unethical. If that were the test, the statute (and the privilege) would be meaningless." (*Kashian, supra*, 98 Cal.App.4th at pp. 910-911, fn. omitted.) There is a "narrow circumstance in which a defendant's assertedly protected activity could be found to be illegal as a matter of law and therefore not within the purview of section 425.16"; namely, "where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence, the motion must be denied." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 315-316 (*Flatley*); *id.* at p. 332 [demand letter threatening to publicize rape allegations and other alleged crimes was "criminal extortion as a matter of law . . . [¶] . . . based on the specific and extreme circumstances of this case"].) Plaintiffs do not establish *Flatley* precludes defendants from meeting their burden.

a. *Testimony regarding the mediation*

We begin with two threshold issues: mediation confidentiality and the Evidence Code section 703.5 bar on mediator reports about the mediation. As we shall explain,

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[5] The cited sources include: (i) Evidence Code section 1121; (ii) conspiracy under Penal Code section 182; (iii) extortion and attempted extortion under Penal Code sections 518 and 524; (iv) Civil Code sections 1572, 1709, and 1710 (which they characterize as implicating fraud, intentional misrepresentation and deceit, and false advertising); (v) Business and Professions Code sections 6068 and 6128, and Rules of Professional Conduct, rule 5-300(B); and (vi) Code of Civil Procedure section 170.1.

these principles apply here, meaning plaintiffs have no admissible evidence about the mediation and for this reason—among others—cannot establish the narrow exception under *Flatley*.

i. *Mediation confidentiality*

The trial court found the alleged statements made by Justice Trotter were inadmissible under the Evidence Code provisions governing mediation. The court did not err in this regard. (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444 [addressing anti-SLAPP motion; "[w]e review the trial court's evidentiary rulings for an abuse of discretion"]; see *Kashian, supra*, 98 Cal.App.4th at p. 906 [only admissible evidence may be considered].)[6]

Evidence Code section 1119, subdivision (a) provides, in relevant part, that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible" in noncriminal proceedings. Evidence Code section 1119, subdivision (c) states that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." Participants include the mediator. (Evid. Code, § 1122.) These provisions "are clear and absolute," and "[e]xcept in rare circumstances, they must be strictly applied and do not

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6 The court used the term mediation privilege, but "mediation confidentiality" better describes the protections provided to communications made in connection with mediation (see *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 150, fn. 4), and we will use that term. We also note defendants do not rely on Evidence Code section 1152 (offers to compromise), as plaintiffs suggest, and we do not address it.

permit judicially crafted exceptions or limitations, even where competing public policies may be affected." (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 118 (*Cassel*).)

Justice Trotter's alleged communications here are from mediation proceedings. These communications are confidential. (See *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 6-8 (*Foxgate*) [rejecting exception that would permit mediator or party to reveal mediation communications relating to allegedly sanctionable conduct by a party], 13-14 ["[Evidence Code] [s]ection 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation."].)

Plaintiffs fail to establish mediation confidentiality should not apply.

First, they argue Justice Trotter's purported lack of neutrality, illustrated by his alleged statements in front of the Association directors, meant there "was not and could not have been a 'mediation,' " citing the parallel definitions in the Evidence Code and California Rules of Court (as well as JAMS materials). (Evid. Code, § 1115, subds. (a)-(b) [" 'Mediation' means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement[;] [¶] . . . 'Mediator' means a neutral person who conducts a mediation."]; Cal. Rules of Court, rule 3.852(1)-(2) [accord].)[7] This argument implicates statutory

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7 Plaintiffs also contend (i) defendants' decision not to seek costs for documents from the PBPA litigation reflects cooperation with the Association and, thus, a lack of neutrality, and (ii) their failure to disclose Judge Stock was joining JAMS prevented "formation of mediation." Because we reject their interpretation of the meaning of "mediation," we need not address these particular contentions.

interpretation, and plaintiffs' view is contrary to the plain language of the statute. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 (*Nolan*) ["The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] . . . When the language of a statute is clear, we need go no further."].) Neutral in this context implies the individual is not affiliated with a party. (See *Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536, 540 ["During [mediation], a neutral third party with no decisionmaking power intervenes in the dispute to help the litigants voluntarily reach their own agreement."]; *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 265 (*Saeta*) [mediation confidentiality did not apply to termination review board; noting "mediation appears to require a neutral mediator or group of mediators," and that "[a]part from [a retired judge], this review board was comprised of two others, both employees of Farmers. An attorney or other *representative of a party is not a mediator*."].)

This interpretation is consistent with the California Law Revision Commission comments on Evidence Code section 1115, and the purpose of mediation confidentiality. (See Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (2009 Ed.) foll. § 1115, p. 382 ["An attorney or other representative of a party is not neutral and so does not qualify as a 'mediator' for purposes of this chapter."]; *Cassel, supra,* 51 Cal.4th at p. 124 ["the purpose of these provisions is to encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant"].) To permit a party to claim after the fact that the mediator

acted in a biased manner, and that mediation confidentiality did not apply, could discourage parties from mediating in the first place.

Plaintiffs maintain neutrality is a fact question, citing the concurrence and dissent of Justice Danielson in *Howard v Drapkin* (1990) 222 Cal.App.3d 843 (*Howard*). We disagree. In *Howard*, the mother in a family law dispute sued a psychologist case evaluator retained by the parties for professional negligence and other claims, the psychologist demurred, and the trial court sustained the demurrer. (*Id.* at p. 850.) The Court of Appeal affirmed, concluding the psychologist, as a nonadvocate, was protected by quasi-judicial immunity, as well as the litigation privilege. (*Id.* at pp. 863-864.) Justice Danielson disagreed as to quasi-judicial immunity on the grounds that, among other things, neutrality could not be assumed. (*Id.* at p. 865 (conc. & dis. opn. of Danielson, J.).) But the majority stated immunity applies to those who function as neutrals, confirming the focus is on role, not conduct. (*Id.* at p. 860.) And mediation confidentiality was never at issue. " 'It is axiomatic that cases are not authority for propositions not considered.' " (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

Second, plaintiffs contend application of mediation confidentiality here "violates due process and leads to an absurd result," referencing a narrow exception identified—but not applied—in *Cassel*. In *Cassel*, the California Supreme Court found Evidence Code section 1119 applied to "communications between a mediation participant and his or her own attorneys outside the presence of other participants in the mediation," and precluded a legal malpractice action from proceeding. (*Cassel*, *supra*, 51 Cal.4th at pp. 121-122.) The court explained: "We must apply the plain terms of the mediation

confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose. No situation that extreme arises here." (*Id.* at p. 119.)[8]

The due process issues and absurd results alleged by plaintiffs do not warrant an exception. Plaintiffs argue defendants "denied [them] due process by threatening to unlawfully taint their constitutional right to an impartial judge," and also that depriving them of a claim against defendants "denies them due process." The issue is not whether defendants impeded plaintiffs' due process rights, but whether mediation confidentiality would do so. And even if their ability to pursue claims were limited by mediation confidentiality, *Cassel* confirms this scenario does not, without more, establish a due process violation: "We further emphasize that application of the mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds. Implicit in our decisions in *Foxgate*, *Rojas*, *Fair*, and *Simmons* is the premise that the mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest." (*Cassel*, *supra*, 51 Cal.4th at p. 135; see *Foxgate*, *supra*, 26 Cal.4th at pp. 17-18; *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 574, 586

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8 Plaintiffs cite Justice Chin's concurrence in *Cassel*, where he "concur[red] in the result, but reluctantly," expressed concerns about attorneys not being held accountable, and still concluded the results were not absurd (though "just barely"). (*Cassel*, *supra*, 51 Cal.4th at p. 138 (conc. opn. of Chin, J.)) We reject plaintiffs' view of this concurrence as "rein[ing] in *Cassel*." Justice Chin was explaining the consequences of mediation confidentiality, not altering it—a task which both he and the majority agreed is for the Legislature. (*Id.* at p. 124; *id.* at pp. 139-140 (conc. opn. of Chin, J.).)

[rejecting exception for alleged oral contract at mediation]; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194 [affirming exclusion of statements regarding purported settlement at mediation]; *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415-416 [rejecting good cause exception]; see also *Provost, supra*, 201 Cal.App.4th at pp. 1302-1303 [Evid. Code, § 1119 precluded plaintiff from establishing duress and coercion at mediation where, among other things, mediator allegedly told him defendants "would have criminal charges filed . . . if he did not sign the stipulated settlement"].)[9]

We also find unpersuasive plaintiffs' claim that use of the "mediation statutes to protect . . . mediator misconduct" is an absurd result contrary to legislative intent. The intent of the Evidence Code mediation provisions is to encourage mediation. (*Cassel, supra*, 51 Cal.4th at p. 124.) This requires confidentiality, which means participants generally must forego claims arising from mediation conduct. (*Id.* at p. 133 ["As the court in *Wimsatt* acknowledged, '[t]he stringent result we reach here means that when clients . . . participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation . . . .' "].)

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9 *Milhouse v Travelers Commercial Ins. Co*. (C.D. Cal. 2013) 982 F.Supp.2d 1088, cited by plaintiffs here, does not compel a different result. (Compare *id.* at p. 1108 [due process entitled defendant to admit evidence of its own mediation conduct]; with *Silicon Storage Technology, Inc. v. National Union Fire Insurance Co. of Pittsburgh* (N.D. Cal. 2015) 2015 WL 4347711, at *4 [*Milhouse* "appears to be in conflict with . . . *Cassel*"]; see *Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 175 [" 'decisions of the lower federal courts are not binding precedent' "].) Plaintiffs' reliance on Civil Code section 3523 ("[f]or every wrong there is a remedy") does not aid them either. There are numerous limits on actions under California law.

Plaintiffs' reliance on Evidence Code section 1121 to establish absurd results is unavailing. That section provides that "[n]either a mediator nor anyone else may submit to a court . . . any report, assessment, evaluation, recommendation, or finding of any kind . . . concerning a mediation . . . ." Evidence Code section 1121 limits communications about mediation to the court, consistent with Evidence Code section 1119 and further ensuring confidentiality. Plaintiffs claim Evidence Code section 1121 also precludes threats to communicate made during the mediation, and suggest Evidence Code section 1119 must yield to this prohibition. We disagree. The comments following Evidence Code section 1121 do provide "the focus is on preventing coercion" and "a mediator should not be able to influence the result of a mediation . . . by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (2009 Ed.) foll. § 1121, p. 405.) But the comments, at most, reflect that discouraging coercion and threats to disclose is a goal of limiting reports about mediation. They do not expand Evidence Code section 1121 to prohibit such threats (which *would* create tension with Evid. Code, § 1119).[10]

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10 Plaintiffs contend *Vitakis-Valchine v. Valchine* (Fla. Dist. Ct. App. 2001) 793 So.2d 1094 (*Valchine*) is consistent with California law and supports liability against Justice Trotter. Not so. There, the wife in a marital dissolution moved to set aside an agreement based on mediator conduct that included, among many other things, stating he would tell the judge "the settlement failed because of her" and imposing time pressure (including saying the parties had five minutes to finish because his "family [was] more important"). (*Id*. at pp. 1097, 1098-1100.) The court held an agreement could be set aside due to violations of Florida's mediator conduct rules, but added no misconduct findings were made and only that "[a]t least some" claims were sufficient. (*Id*. at p.

Finally, Plaintiffs argue we have a duty "not to . . . shield the misconduct" and suggest we should decline to follow Evidence Code section 1119, craft an exception, and recognize the need to protect parties from private mediators (noting the existence of rules for court-program mediators). First, they argue "[t]he [L]egislature could not sanctify mediator misconduct, even were that its intent" and that Evidence Code "section 1119 and *Cassel* cannot be read . . . to protect . . . mediator misconduct." But we cannot ignore legislative intent, Evidence Code section 1119 itself, or its interpretation in *Cassel*. (*Nolan*, *supra*, 33 Cal.4th at p. 340; *All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 956 ["We may not ignore the express language of a statute."]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [inferior tribunals "are required to follow decisions of courts exercising superior jurisdiction"].) *Superior Court v County of Mendocino* (1996) 13 Cal.4th 45, cited by plaintiffs for the proposition that "courts have the inherent and implied powers necessary to carry out their functions" does not impact our analysis. That principle is not in dispute and the case is otherwise inapposite. (*Id*. at pp. 58-59.) Second, with respect to an Evidence Code section 1119 exception for mediator misconduct, plaintiffs cite a 2014 memorandum and 2015 tentative recommendations from the California Law Revision Commission purportedly supporting such an exception. Again, we are bound by existing law. Lastly, as for

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1100.) California law is not in accord. (See *Provost*, *supra*, 201 Cal.App.4th at p. 1302 [declining to set aside settlement from mediation involving alleged counsel and mediator misconduct].) *Valchine* would not aid plaintiffs, regardless. The comment about a report to the judge was one of many at issue, no misconduct finding was made, and the remedy was to set aside the agreement.

whether California law should provide rules for private mediators, that is a decision for the Legislature. (Cf. *Cassel, supra,* 51 Cal.4th at p. 124.)

ii. *Bar on testimony by mediator*

Defendants also contend Evidence Code section 703.5 bars Justice Trotter from testifying about the mediation proceedings. We agree. That section provides:

> "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. "

Justice Trotter's role as mediator renders him incompetent to testify about the mediation. (See *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 365-366 [marital dissolution in which party sought to depose mediator; granting writ directing trial court to vacate denial of protective order for mediation communications and explaining that "[u]nder [Evidence Code] section 703.5, [the mediator] is incompetent to testify"].)

Plaintiffs do not establish any of the Evidence Code section 703.5 exceptions apply. First, with respect to criminal conduct, plaintiffs claim defendants' conduct was criminal, but lack both allegations and evidence. We address the purported crimes, *post*.

Second, plaintiffs identify three provisions that arguably relate to State Bar enforcement. (See Rules Prof. Conduct, rule 5-300(B) ["[a] member shall not . . . communicate with . . . a judge . . . upon the merits of a contested matter pending before

such judge," absent certain exceptions]; Bus. & Prof. Code, § 6068, subd. (f) [duties of attorneys, including "[t]o advance no fact prejudicial to the honor or reputation of a party"]; Bus. & Prof. Code, § 6128, subd. (a) [attorney is guilty of misdemeanor for "deceit or collusion . . . with intent to deceive the court or any party"].). Rule 5-300 is in the "Advocacy and Representation" section of the conduct rules, and inapposite. Even if this and the other provisions pertained to attorneys acting as mediators, they would not apply here. Except as to collusion (which plaintiffs allege, but decline to explain), the provisions implicate communications. But plaintiffs' position is that Justice Trotter *threatened to communicate* what they view as prejudicial and deceitful statements to Judge Stock. To the extent plaintiffs allege the communications actually took place, they rely on speculation and Justice Trotter's failure to deny he spoke to Judge Stock.[11] Speculation is not evidence (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 864), and we address why the adoptive admission argument lacks merit, *post*.

Third, the judicial disqualification provisions do not apply here either. Section 170.1, subdivision (a)(1) requires disqualification when the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." Section 170.1, subdivision (a)(6) applies where there are doubts as to the judge's neutrality. There are

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11 Plaintiffs' complaint stated they were not alleging ex parte communications occurred. In their opening brief here, they contend the "undisputed facts show and infer that Justice Trotter did communicate with Judge Stock" (citing the timeline of events in the PBPA litigation); it is "reasonable to believe he did so . . . since JAMS was very likely to have been in discussions with [Judge Stock] at the same time as the 'mediation' "; and "the evidence is that he did ha[ve] a conversation with Judge Stock about this case. He promised to do so and should be taken at his word. He does not deny but adoptively admits it."

no disputed evidentiary facts at issue here regarding the PBPA litigation, and the only alleged impartiality alleged by plaintiffs is that of Justice Trotter, not Judge Stock.

b. *Whether defendants conceded illegality*

Turning back to *Flatley*, Plaintiffs do not establish the first ground for its application: a concession of illegality. (*Flatley, supra*, 39 Cal.4th at pp. 315-316; see also *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367 (*Paul*) [no anti-SLAPP protection where defendants "effectively conceded the illegal nature of their election campaign finance activities"], disapproved on other grounds by *Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 68, fn. 5.) Defendants have not conceded anything and, to the contrary, maintain that mediation confidentiality and Evidence Code section 703.5 preclude Justice Trotter from addressing plaintiffs' allegations.

Plaintiffs contend that "[b]y not denying the charge of wrongdoing, JAMS and Justice Trotter adoptively admit to it." Plaintiffs do not establish they offered defendants' silence as an adoptive admission below, and, to the extent they did, we can infer the trial court rejected it. That rejection was sound. An adoptive admission is a hearsay exception: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) Silence can operate as an adoptive admission, but only where there was an opportunity to reply. (See *J & J Builders Supply v. Caffin* (1967) 248 Cal.App.2d 292, 297-298 [failure of ostensible partner to deny other partner's representation of

partnership during business meeting was admissible as adoptive admission]; *People v. Riel* (2000) 22 Cal.4th 1153, 1189-1190 (*Riel*) [accomplices' use of "they" in conversation with witness, while defendant was present, was admissible as adoptive admission: " 'To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation . . . .' "]; *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 83-85 [accord].) Here, defendants are unable to deny plaintiffs' allegations due to mediation confidentiality and Evidence Code section 703.5. Under the circumstances, their silence is not an adoptive admission.

Plaintiffs contend Evidence Code section 1119 "does not cover silence or conduct," meaning defendants were free to deny plaintiffs' allegations. We disagree. Evidence Code section 1119 does not apply to noncommunicative conduct (*Foxgate*, *supra*, 26 Cal.4th. at p. 18, fn. 14), but silence and other conduct can be communicative (as plaintiffs' adoptive admission argument implies). (See, *e.g.*, *Kupiec v. Am. Internat. Adjustment Co.* (1991) 235 Cal.App.3d 1326, 1333 [alleged concealment of facts held communicative in nature, in litigation privilege context].) Allowing evidence as to what *was not* said during the course of mediation proceedings could expose alleged communications (if only for purposes of denial) and permit inferences as to what *was* said, thus undermining mediation confidentiality. Further, Evidence Code section 703.5 expressly encompasses "conduct . . . at or in conjunction with" the mediation, and would bar Justice Trotter from addressing the mediation regardless.

Plaintiffs' remaining arguments likewise are unpersuasive. First, they rely on three criminal cases, *Riel*, *Salinas v. Texas* (2013) 133 S.Ct. 2174 (*Salinas*) and *People v. Tom* (2014) 59 Cal.4th 1210 (*Tom*), and all three are distinguishable. *Riel* did not involve any limitation on the defendant's speech. (*Riel, supra*, 22 Cal.4th at pp. 1189-1190.) *Salinas* and *Tom* held silence could be used against criminal defendants who failed to invoke the Fifth Amendment. (See *Salinas*, at p. 2180 [prosecution's use of noncustodial silence did not violate Fifth Amendment, where defendant failed to invoke privilege]; *Tom*, at p. 1215 [prosecution cited defendant's failure to inquire about vehicle occupants after crash; holding "defendant . . . needed to make a timely and unambiguous assertion of the privilege in order to benefit from it"].) Here, in contrast, defendants have consistently maintained that mediation confidentiality and Evidence Code section 703.5 bar them from responding to plaintiffs' allegations. Second, plaintiffs cite Evidence Code section 413, which provides: "In determining what inferences to draw from the evidence or facts . . . , the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him . . . ." For the reasons discussed *ante*, no inferences can be drawn from defendants' silence.

c. *Whether the evidence conclusively shows illegality*

Plaintiffs also do not establish "illegality is conclusively shown by the evidence," the other *Flatley* ground. (*Flatley, supra*, 39 Cal.4th at pp. 315-316; see *Seltzer, supra*, 182 Cal.App.4th at pp. 963-967 [rejecting argument that settlement negotiations fell outside § 425.16, where plaintiff failed to " 'conclusively demonstrate[]' " they were conducted in unlawful manner].)

As an initial matter, plaintiffs cannot rely on purported statutory violations unrelated to criminal activity, such as Evidence Code provisions. "[T]he . . . use of the phrase 'illegal' [in *Flatley*] was intended to mean criminal, and not merely violative of a statute." (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654; *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1169 [declining to apply *Flatley* to statements by lawyer that plaintiff claimed violated duties of confidentiality and loyalty; explaining: "[T]he rule from *Flatley* . . . is limited to criminal conduct. Conduct in violation of an attorney's duties of confidentiality and loyalty to a former client cannot be 'illegal as a matter of law' [citation] within the meaning of *Flatley*"]; *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 807 [collecting cases].)[12]

We now address the crimes plaintiffs do allege: conspiracy and extortion. They do not identify evidence sufficient to conclusively establish the elements of these crimes.

First, a conspiracy exists where "two or more persons conspire" to, among other things "pervert or obstruct justice." (Pen. Code, § 182, subd. (a)(5).) Plaintiffs contend defendants conspired to obstruct justice through their "promise and threat to malign Appellants to the trial judge" and "by failing to disclose that JAMS was going to hire the trial judge," which "would have allowed [them] to seek disqualification . . . ." But a conspiracy to obstruct justice generally requires either " 'malfeasance [or] nonfeasance by

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12 We recognize Business and Professions Code section 6128 treats certain attorney misconduct as a misdemeanor. Even if this qualified as criminal conduct under *Flatley*, plaintiffs' allegations are insufficient, for the reasons discussed *ante*. We decline to address each purported violation of a civil statute (except as relevant to other issues).

an officer,' " or " 'anything done . . . in hindering or obstructing an officer in the performance of his official obligations.' " (*People v. Redd* (2014) 228 Cal.App.4th 449, 460, quoting *Lorenson v. Superior Court of Los Angeles County* (1950) 35 Cal.2d 49, 59.) Plaintiffs do not allege, much less identify conclusive evidence of, malfeasance by Judge Stock or that defendants' alleged conduct obstructed the *judge's* performance of her duties.[13]

Plaintiffs' view that they would have been able to disqualify Judge Stock is also meritless. They rely on section 170.1, subdivision (a)(8), which supports disqualification where the judge has an "arrangement concerning prospective employment . . . as a dispute resolution neutral" with an entity, or is participating in such discussions, and "directs the parties" to participate in dispute resolution with that entity. Plaintiffs identify no evidence as to when Judge Stock began discussions to join JAMS, besides speculation and the purported adoptive admissions.[14] As discussed *ante*, neither is sufficient. There also is no evidence Judge Stock directed the parties to mediate with Justice Trotter and

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13 We decline to address defendants' reliance on a civil conspiracy case to contend conspiracy requires two parties and that Justice Trotter and JAMS, as principal and agent, do not qualify. (*Everest Investors 8 v. Whitehall Real Estate Partnership XI* (2002) 100 Cal.App.4th 1102, 1109.) The issue is whether plaintiffs have conclusive evidence of criminal conspiracy. They lack the evidence for this showing, and we need not decide whether agency principles could operate as a separate bar.

14 Plaintiffs acknowledge the trial court found there was no evidence Judge Stock was in conversations with JAMS at the time, but (i) state Judge Stock was absent from court in August 2013 (without a record citation) and note the date of other alleged events in the PBPA litigation, (ii) contend the trial court "overlook[ed]" defendants' adoptive admissions. We observe plaintiffs could have sought discovery on this issue, by noticed motion and for good cause (§ 425.16, subd. (g)).

JAMS. The record reflects the parties initially retained Justice Trotter following an attorney's suggestion and chose to return to him for further negotiations.

Second, extortion consists of "the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear . . . ." (Pen. Code, §§ 518; 524 [attempted extortion].) Fear "may be induced by a threat . . . [t]o expose, or to impute to him, her, or them a deformity, disgrace or crime." (Pen. Code, § 519.) Plaintiffs allege Justice Trotter's purported threat required them "to settle on the terms he dictated . . . , or else he would malign them to their trial Judge in order to prejudice the Judge against them, resulting in them losing their case and property, i.e. their homes." They note he "follow[ed] up to see if his extortionate threat was successful." They further argue defendants "concede that a threat underlies the claims," and their "[f]ailure to deny simple, serious charges prove that Justice Trotter's promise and threat, together with follow-up, was extortion and attempted extortion."[15]

This is not conclusive evidence of extortion, attempted or otherwise. Among other things, plaintiffs do not suggest Justice Trotter's goal was to get their homes, and do not otherwise allege or identify evidence that he intended to or did obtain their property. In their reply brief, plaintiffs contend Penal Code section 518 "does not say the extortionist has to obtain the property," "[t]he extortion just has to be motivated by and involve a financial or beneficial return to the extortionist," and Justice Trotter was motivated by

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15 Plaintiffs also state defendants' actions were "extortion and attempted extortion" under Penal Code section 523. That section applies to writings and ransomware and is irrelevant.

financial gain (i.e., to benefit "repeat JAMS customers"). Plaintiffs raise this point for this first time on reply, cite no authority for it, and it lacks merit regardless. (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1294 (*Malin*) ["[c]riminal extortion laws prohibit the wrongful use of threats to obtain the property of another"]; see *Scheidler v. National Organization for Women, Inc.* (2003) 537 U.S. 393, 404 [under federal Hobbs Act, even when conduct "achieved . . . ultimate goal of 'shutting down' a clinic that performed abortions, such acts did not constitute extortion because petitioners did not 'obtain' respondents' property."].) As for defendants' awareness of plaintiffs' claims, that is no concession as to their truth and we reiterate that defendants' silence does not support an admission of wrongdoing.

Plaintiffs' reliance on *Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405 is misplaced. The case involved a settlement demand by a party, with threats unrelated to the litigation at issue. (*Id.* at pp. 1405, 1410, [demand e-mail that "threatened to expose [Sareen] to federal authorities for alleged violations of the False Claims Act unless [he] negotiated a settlement of [Stenehjem's] private claims" was "extortion as a matter of law"].) Here, in contrast, there is no evidence Justice Trotter sought to obtain anything by way of his alleged threat, and its content related to the PBPA litigation being mediated.

In sum, "we do not find this to be one of those rare cases in which there is uncontroverted and uncontested evidence that establishes the crime as a matter of law." (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 386.)[16]

3. *False advertising*

Plaintiffs also argue they have claims for "unfair and false advertising," and that these claims are not barred by anti-SLAPP. They direct us to statements on the JAMS website, including a Mission Statement that provides, in part: "Everything we do and say will reflect the highest ethical and moral standards. We are dedicated to neutrality, integrity, honesty, accountability, and mutual respect in all of our interactions." Plaintiffs do not establish error here.

First, it does not appear their complaint even alleges false advertising. This claim typically arises under California's False Advertising Law (hereafter FAL) (Bus. & Prof. Code, § 17500 et seq.) and the UCL. (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626 [FAL and UCL "prohibit 'unfair, deceptive or misleading advertising' "].) Plaintiffs did not raise the FAL. They did assert a UCL claim, but regarding defendants' mediation conduct, not the website. The website statements appear in the intentional misrepresentation claim, but this too focuses mainly on the alleged statements and omissions during the mediation proceedings. Meanwhile, on reply here, plaintiffs do not

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16 Under *Flatley*, if "a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Flatley*, *supra*, 39 Cal.4th at p. 316.) Given the dearth of admissible evidence or sufficient allegations to support conspiracy or extortion, we conclude plaintiffs could not establish a probability of success on these issues and need not address them further.

dispute the complaint lacks a false advertising claim (but, rather, suggest defendants' brief concedes they engaged in false advertising; it does not). In any event, to the extent plaintiffs' allegations relate to false advertising, those issues are peripheral to their claims—which, by their own characterization, are based on "mediation misconduct." (See *Scott*, *supra,* 115 Cal.App.4th at p. 414 [gravamen of claim controls].)[17] Second, regardless of whether plaintiffs pled a false advertising claim (or misrepresentation or fraud allegations implicating this issue), they cannot establish error. They provide no legal authority to establish the purported false advertising lacks anti-SLAPP protection, and forfeit the argument. (*Stanley*, *supra*, 10 Cal.4th at p. 793.)[18]

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17 Although we do not base our reasoning here on *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, decided after the parties completed their briefing, we note it reaches a consistent outcome. (*Id.* at p. 396 [when allegations involve protected and unprotected activity, unprotected activity is disregarded at prong one].)

18 We recognize there is a commercial speech exemption under section 425.17, which can limit protection where the speech at issue is primarily commercial. But here, the grounds for plaintiffs' case are Justice Trotter's alleged statements and omissions at the mediation, not the reasons plaintiffs decided to mediate or continue mediating. (See *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 490-491 [commercial exemption did not apply to attorney communications with prospective client; "A dispute involving a lawyer's advice . . . on pending litigation . . . , while it may include an element of commerce or commercial speech, is fundamentally different from the 'commercial disputes' the Legislature intended to exempt from the anti-SLAPP statute."].) At any rate, plaintiffs did not raise the exception, and we do not address it further. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 26 ["The burden of proof as to the applicability of the commercial speech exemption, therefore, falls on the party seeking the benefit of it—i.e., the plaintiff."].)

B. *Prong two: Whether plaintiffs established a probability of prevailing at trial*

1. *Plaintiffs have no admissible evidence*

As we concluded *ante*, mediation confidentiality and Evidence Code section 703.5 apply here. As a result, plaintiffs cannot rely on their own declarations about the mediation, compel Justice Trotter to testify, or infer anything from his silence. They also have identified no evidence as to when Judge Stock joined JAMS. Plaintiffs therefore lack admissible evidence to support their claims and cannot meet their burden to show a probability of prevailing at trial. (*Kashian*, *supra*, 98 Cal.App.4th at p. 906.)[19] Nevertheless, we elect to address the trial court's conclusions on quasi-judicial immunity and the litigation privilege.

2. *Quasi-judicial immunity*

Howard, *supra*, 222 Cal.App.3d at page 853, the psychologist case noted *ante*, supports application of quasi-judicial immunity here. In *Howard*, the court explained that "in determining whether a person is acting in a quasi-judicial fashion, the courts look at 'the nature of the duty performed [to determine] whether it is a judicial act . . . .' " (*Id.* at p. 853.) The court contrasted this nonadvocacy work with that of advocates, like public defenders. (*Id.* at p. 859 ["the focus is more correctly placed on a nonadvocate vs.

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19 Defendants contend mediation confidentiality and Evidence Code section 703.5 preclude them from defending themselves, and also limits plaintiffs' ability to prevail. We recognize this principle (e.g., *Solin v. O'Melveny and Myers* (2001) 89 Cal.App.4th 451, 466 [affirming dismissal of malpractice action where defense would involve confidential and privileged client information]), but we do not see how it becomes relevant here. If mediation confidentiality applies, as we conclude it does, plaintiffs have no evidence on which to proceed—and defendants' ability to defend themselves becomes moot.

advocate analysis"]; *ibid.* [criminal defense attorney's "job as an *advocate* for the defendant . . . makes him or her responsible . . . to the defendant and susceptible to a later civil action"].) Applying these principles, the court concluded quasi-judicial immunity applied not only to the psychologist case evaluator there, but also to other third party neutrals, including mediators (and without limitation to court-connected mediators):

> "The job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee; hence, there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes. . . . [¶] We therefore hold that absolute quasi-judicial immunity is properly extended to these neutral third parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes."

(*Id.* at p. 860.)

Courts have followed *Howard's* approach, and applied quasi-judicial immunity in a variety of contexts. (See, *e.g.*, *McClintock v. West* (2013) 219 Cal.App.4th 540, 550-552 (*McClintock*) [quasi-judicial immunity applied to guardian ad litem]; *La Serena Properties, LLC v. Weisbach* (2010) 186 Cal.App.4th 893, 903 (*Weisbach*) [concluding arbitrator's "alleged failure to make adequate disclosures of potential conflicts of interest falls within the scope of the absolute immunity for quasi-judicial acts"].) Federal courts have applied *Howard*, or similar reasoning, to accord immunity to mediators. (See *St. Paul Fire & Marine Ins. Co. v. Vedatech Int'l., Inc.* (9th Cir. 2007) 245 Fed.Appx. 588, 592 (*Vedatech*) [concluding quasi-judicial immunity under California law applied to

mediator, citing *Howard*]; *Wagshal v. Foster* (D.C. Cir. 1994) 28 F.3d 1249, 1250 [applying federal quasi-judicial immunity principles and concluding a "court-appointed mediator or neutral case evaluator, performing tasks within the scope of his official duties, is entitled to absolute immunity"].)

We conclude quasi-judicial immunity applies here. Justice Trotter was "performing dispute resolution services which are connected to the judicial process," involving "mediation . . . of [a] pending dispute[]." (*Howard, supra,* 222 Cal.App.3d at p. 860; see *Vedatech,* 245 Fed.Appx. at p. 592; see also *Weisbach*, *supra*, 186 Cal.App.4th at p. 901 ["Where immunity applies, it likewise shields the sponsoring organization . . . from liability arising out of the quasi-judicial misconduct alleged."].)

Plaintiffs make several arguments against application of *Howard*, and all lack merit. First, they contend the psychologist in *Howard* was a decision maker (or, at least, intended to influence the court) and "[t]he foundation of immunity is the decision maker protection." *Howard* is to the contrary. The psychologist "render[ed] *nonbinding* findings and recommendations . . . ." (*Howard, supra,* 222 Cal.App.3d at p. 848, italics added.) The court found quasi-judicial immunity protects not only those who make binding decisions, but also those who make recommendations or, as here, mediate disputes. (*Id.* at p. 860.) In a related contention, plaintiffs argue: "*Howard* is illogical to extend immunity to a private contract mediator that by definition is not a decision maker." Given *Howard*'s reasoning does not require decisionmaking ability, there is nothing inconsistent about its conclusion that immunity applies to mediators.

Second, plaintiffs purport to accept *Howard's* distinction between advocates and nonadvocates (with only the latter receiving immunity), but then contend that "[o]ther than court appointed mediators, the immunity benefactors [in *Howard*] are all decision makers" and "[i]n the end they are an advocate for one side," while "as non-advocates, mediators cannot be granted immunity." *Howard* is again to the contrary. The psychologist was "not an advocate," and did have immunity. (*Howard*, *supra*, 222 Cal.App.3d at p. 859; cf. *ibid.* [criminal defense attorney *was* advocate and not immune to civil action]; see *Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88, 98 [holding psychologist retained by public defender did not have immunity; explaining *Howard* "reasoned that the availability of the immunity turns on whether the person is functioning as an advocate or a nonadvocate" and that in "[i]n this role as [defendant's] advocate, [the psychologist] is not entitled to quasi-judicial immunity."].)

Plaintiffs also contend that "[a] conflicted and biased 'mediator' is not a mediator at all but an advocate for one side against the other. . . . Without neutrality, there can be no immunity." This contention appears to contradict their other advocate argument, and still misconstrues *Howard*. *Howard* requires neutrality in role, not impartiality in practice and the factual inquiry such a standard would require. (*Howard, supra*, 222 Cal.App.3d at p. 864 ["If such protection is to be meaningful it must be effective to prevent suits such as this one from going beyond demurrer. . . . In order to best protect the ability of neutral third parties to aggressively mediate or resolve disputes, a dismissal at the very earliest stage of the proceedings is critical to the proper functioning and continued availability of these services."].)

Third, plaintiffs argue there is no immunity for crime, and "*Howard* does not apply where the facts are the mediator committed prohibited archetype mediator misconduct." They cite *Forrester v. White* (1988) 484 U.S. 219, in which the United States Supreme Court held federal official immunity did not shield a judge from an employee's claim that he demoted and discharged her on the basis of sex, explaining the "decisions were not judicial acts for which he should be held absolutely immune." (*Id.* at p. 221.) *Forrester* applies federal, not California, law, and does not aid plaintiffs regardless. Plaintiffs do not allege misconduct separate from Justice Trotter's quasi-judicial role as a mediator. It is only where the conduct at issue is *not* judicial or quasi-judicial in nature, as with the employee demotion and discharge in *Forrester*, that immunity is inapplicable.

Finally, plaintiffs contend *Howard* is a "non-binding decision" and "must be judicially overturned or legislatively nullified," at least with respect to private mediators. We decline plaintiffs' invitation to reject *Howard*. Stare decisis compels us to consider it, and we believe it was correctly decided. (*The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529 ["We, of course, are not bound by the decision of a sister Court of Appeal. [Citation.] But '[w]e respect stare decisis . . . . Thus, we ordinarily follow the decisions of other districts without good reason to disagree.' "].)

3. *Litigation privilege*

The litigation privilege can preclude a plaintiff from meeting his or her prong two burden. (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194

Cal.App.4th 873, 888 ["A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim."].)

The litigation privilege is codified in Civil Code section 47, subdivision (b), and provides that publications in legislative, judicial, and certain other official proceedings are privileged. The litigation privilege is "applicable to any communication, whether or not it amounts to a publication," and "even though the publication is made outside the courtroom and no function of the court or its officers is involved." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).) The privilege applies "without respect to the good faith or malice of the person who made the statement . . . ." (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.) "Any doubt about whether the privilege applies is resolved in favor of applying it." (*Kashian, supra,* 98 Cal.App.4th at p. 913.)

In determining whether the litigation privilege applies, "[t]he usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg, supra,* 50 Cal.3d at p. 212.) Plaintiffs dispute the existence of all four elements, and we address them in turn.

With respect to the first two elements, plaintiffs maintain there was no mediation and Justice Trotter "had no authority to participate . . . other than as a mediator, which he was not for lack of neutrality . . . ." Those arguments lack merit, for the reasons discussed *ante*, and plaintiffs do not dispute the litigation privilege applies to mediations generally. (See *Makaeff v. Trump Univ., LLC* (9th Cir. 2013) 715 F.3d 254, 264 [noting

California courts have extended litigation privilege to mediation proceedings, citing *Howard*].) Further, elements one and two would be satisfied anyway, as the communications were made during settlement negotiations. (See *Howard*, *supra*, 222 Cal.App.3d at p. 863 [litigation privilege applied to psychologist's statements; rejecting argument that "communications were 'collateral' because they were not made during the course of and as a part of the judicial proceeding' "]; *id*. at pp. 865-866 (conc. & dis. opn. of Danielson, J.) [agreeing litigation privilege applied]; *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 843-844 ["Numerous courts have held that statements relating to settlements also fall within the privilege, including those made during settlement negotiations."].)

As for the third element, the objects of the litigation, plaintiffs contend the "threat to malign [plaintiffs] to their trial judge ha[d] nothing to do with achieving 'the objects of the litigation.' " But there is no dispute Justice Trotter made the alleged statement during settlement negotiations to resolve the PBPA litigation. Plaintiffs' concern appears to be with the content or purpose of the statement. But "[t]he 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent." (*Silberg*, *supra*, 50 Cal.3d at p. 220; see *Asia Investment Co. v. Borowski* (1982) 133 Cal.App.3d 832, 843 [litigation privilege applied to settlement proposal "made in a manner which might be considered a veiled 'threat' "]; see also *Silberg*, at p. 220 [alleged failure to disclose relationship that could impact expert's neutrality was privileged].) For the same reasons, we reject plaintiffs' assertion that "[u]nlawful speech that is extortion cannot 'achieve the objects of the litigation.' "

Finally, with respect to the fourth element, plaintiffs contend Justice Trotter's "statement and threat, i.e. the extortion, had no 'connection or logical relation to the action," citing *Silberg*. Plaintiffs also cite *Flatley* and argue, among other things, that the alleged threat "does not square with the reason for the litigation privilege." Plaintiffs misconstrue both *Silberg* and *Flatley*. There is no real dispute the alleged statement was connected to the PBPA action. What plaintiffs appear to be arguing is that the privilege does not apply to allegedly unlawful conduct, and the law is to the contrary. (*Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 921 [" 'communications made in connection with litigation do not necessarily fall outside the privilege merely because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal' assuming they are logically related to litigation."]; *Malin*, *supra*, 217 Cal.App.4th at p. 1294 ["Under the second step of the statutory analysis, we conclude . . . [the] demand letter is protected by the litigation privilege [citation], which precludes Malin from prevailing on his claim for extortion."].)[20] *Flatley* is consistent with these cases. (39 Cal.4th at pp. 322 & 324 [in concluding litigation privilege was not co-extensive with anti-SLAPP, noting privilege "has been applied in 'numerous cases' involving 'fraudulent communication or perjured testimony" and explaining that applying the "privilege to some forms of unlawful litigation-related activity may advance [its] broad goals . . .

---

20 Plaintiffs' contention that this case involves "criminal claims" is unavailing. This is a civil lawsuit and, even in the criminal prosecution context, exceptions are for specific actions. (See *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1245 ["[T]he City contends that the privilege does not apply to criminal prosecutions . . . . We disagree."; noting crimes for which exceptions had been found].)

notwithstanding the 'occasional unfair result' "]; *ibid*. [assuming without deciding the litigation privilege may apply to extortionate threats].)[21]

DISPOSITION

The orders and judgment are affirmed. Defendants are awarded costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

DATO, J.

---

21 We observe that, at prong two, plaintiffs focus below and here on defendants' arguments, rather than their claims. But their burden is "to substantiate *each* element of their cause of action, and not merely to counter defendant's affirmative defenses." (*Balzaga v. Fox News Network LLC* (2009) 173 Cal.App.4th 1325, 1337.) To the extent plaintiffs fail to reach these issues, they have forfeited them. Further, we note, and reject, plaintiffs' suggestion that whether defendants had an obligation to refrain from making an alleged threat in front of their opponents or to disclose Judge Stock's alleged discussions with JAMS are issues of law in this anti-SLAPP appeal. Where these issues are implicated by the anti-SLAPP questions before us, we address them.

APPENDIX O

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

SUE EICHERLY *et al.*, **Plaintiffs,** **v.** **ROBERT J. MOSS *et al.*,** **Defendants.**	**Case No.: SACV 16-02233-CJC(KESx)** **ORDER DISMISSING CASE WITH PREJUDICE**

Plaintiffs Sue Eicherly, Myrle Moore, Floyd Chodosh, Ole Haugen, Todd Peterson, Kathleen Schowalter, and Rodger Kane bring this action against Defendants the Honorable Kathleen E. O'Leary, Presiding Justice of the California Court of Appeal, Fourth Appellate District, Division Three; the Honorable William W. Bedsworth, Justice of the California Court of Appeal, Fourth Appellate District, Division Three; the Honorable William L. Rylaarsdam, Justice of the California Court of Appeal, Fourth Appellate District, Division Three; the Honorable Charles Margines, Presiding Judge of

the Superior Court of California, County of Orange; the Honorable Robert J. Moss, Judge of the Superior Court of California, County of Orange, (collectively, the "Judicial Officers"); Palm Beach Park Association ("PBPA"); ICC 35902 LLC; 3187 Redhill LLC (together, the "LLC Defendants"); Jefferies Loancore LLC ("Jefferies"); Fidelity National Title Company ("Fidelity"); John Saunders; Robert Coldren; Lisa Salisbury; Philip Anshutz; Diana Mantelli; George Fiori; and Dan Smith. (*See generally* Dkt. 1 [Complaint, hereinafter "Compl."].) Before the Court is the Judicial Officers' motion to dismiss the Complaint on the grounds of judicial immunity, the *Rooker-Feldman* doctrine, *Younger* abstention, the Eleventh Amendment, and for failure to state a claim. (Dkt. 11 [Motion, hereinafter "Mot."].) The motion is GRANTED under the *Rooker-Feldman* doctrine and the entire case is DISMISSED WITH PREJUDICE.[1]

The core of Plaintiffs' complaint is that the Judicial Officers agreed and conspired with each other and with the other Defendants in this case to enforce leases, HOA memberships, and residential loans pertaining to a mobile home park where Plaintiffs used to reside that they allegedly "knew were illegal," resulting in judgments against Plaintiffs in two cases decided by Judge Moss, *Chodosh v. Palm Beach Park Assoc., et al.*, Super. Ct. Case No. 30-2010-00423544 ("*Chodosh*"), and *Haugen v. PBPA*, Super. Ct. Case No. 30-2015-0081937 ("*Haugen*"). (Compl. ¶¶ 25–128.) After Judge Moss re-assumed jurisdiction over the litigation, which Plaintiffs allege was a deliberate attempt to meddle with the outcome, Justices O'Leary, Bedsworth, and Rylaarsdam denied Plaintiffs' to disqualify him, and later denied Plaintiffs' challenges of Judge Moss's decisions. (*Id.* ¶¶ 65–186.) Plaintiffs had previously sued Justice Trotter and JAMS, Inc., for alleged misconduct during mediation as part of this state court legal battle, and claim that the Judicial Officers' alleged conspiracy was based on a desire to protect

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for April 3, 2017, at 1:30 p.m. is hereby vacated and off calendar.

Justice Trotter and to secure positions for themselves at JAMS upon retirement. (*Id.* ¶¶ 25–29, 48–64, 187–241.) They also contend that their counsel wrote to Judge Margines about Judge Moss' alleged misconduct, but Judge Margines did nothing about it. (*Id.* ¶¶ 129–32.)

Plaintiffs allege that as part of the conspiracy, Justices O'Leary, Rylaarsdam, and Bedsworth "wrongfully upheld and affirmed Judge Moss' wrongful rulings and decisions by which the court aided and abetted illegal leases and contracts," and the LLC Defendants participated with Judge Moss in the conspiracy through *ex parte* communications, in violation of 42 U.S.C. § 1983. (*Id.* ¶ 242–55.) They allege that the "extreme facts that cause intolerable appearance of impropriety" by the Judicial Officers, including Judge Moss's re-assumption of jurisdiction, Judge Margines' ignoring of wrongdoing, and other wrongful conduct justifies a declaration that the Judicial Officers "could not afford and provide to Plaintiffs the impartial tribunal and decision makers that is the core of due process." (*Id.* ¶¶ 256–64.) They also allege that as part of the conspiracy, Judge Moss and Justices O'Leary, Rylaarsdam, and Bedsworth, along with PBPA, violated the Truth in Lending Act, 15 U.S.C. §§1601*et seq.*, by failing to enforce the Act so that Plaintiffs would lose their case. (*Id.* ¶¶ 265–79.) Finally, they claim that PBPA, Mantelli, Fiore, and Smith breached their fiduciary duties through alleged illegal land transactions, (*id.* ¶¶ 280–98), and that the LLC Defendants, Saunders, Anschutz, Coldren, Salisbury, Jefferies, and Fidelity aided and abetted in that breach of fiduciary duty, (*id.* ¶¶ 299–322). They seek compensatory and punitive damages only against the non-Judicial Defendants, (*id.* ¶¶ 255, 298, 322), and request declaratory relief against all Defendants under 28 U.S.C. §§ 2201–2202, (*id.* ¶¶ 323–39.)

The Court does not have subject matter jurisdiction over this case pursuant to the *Rooker-Feldman* doctrine, which provides that federal courts do not have jurisdiction over cases that constitute de facto appeals from state court judgments. *Bianchi v.*

Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003). If "claims raised in the federal court action are 'inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction." *Id.* This doctrine applies even if the plaintiff asserts that the state judgment violated his or her federal rights. *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th Cir. 1986). If the alleged injury resulted from the state judgment itself, *Rooker-Feldman* applies. *Bianchi*, 334 F.3d at 900.

Plaintiffs rely on *Kougasian v. TMSL, Inc.*, 359 F.3d 1136 (9th Cir. 2004), for the proposition that *Rooker-Feldman* does not apply because they challenge "base wrongdoing" and "do not seek any relief in the nature of reversal or overturn [sic] of a state court judgment, order, or ruling." (Dkt. 16 at 20–21.) As an initial matter, Plaintiffs' reliance on *Kougasian* is misplaced, because in that case, the Ninth Circuit explained that although the plaintiff sought relief from a state court judgment, *Rooker-Feldman* did not apply because she did "*not* assert 'as a legal wrong an allegedly erroneous decision by a state court,' but rather 'an allegedly illegal act or omission by an adverse party.'" *Kougasian*, 359 F.3d at 1140 (emphasis added).

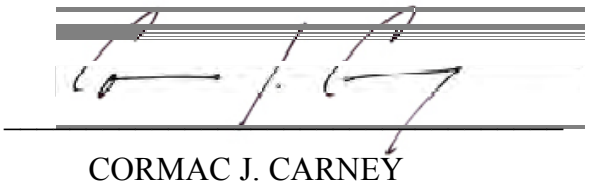
Additionally, Plaintiffs' argument elevates form over substance. Courts applying *Rooker-Feldman* "must pay close attention to the *relief* sought by the federal-court plaintiff." *Bianchi*, 334 F.3d at 900 (emphasis in original). Here, Plaintiffs seek, among other things, a determination that PBPA violated the Truth in Lending Act; a declaration that the "rulings, orders and judgments" against the Plaintiffs were made "at a time when Judge Moss and the Defendant Justices were engaged in an agreement and conspiracy" to deprive Plaintiffs of their constitutional rights; a declaration that "at the time" the Judicial Officers entered orders against Plaintiffs, they were denying Plaintiffs their due process rights; a declaration that Plaintiffs' property and rights are owned and held by them free

and clear of any claim of non-Judicial Defendants that they own the mobile home park at issue because the they obtained title to the park "with the help and assistance of Judge Moss at a time that Judge Moss was engaged in an agreement and conspiracy to deny Plaintiffs" their constitutional rights; and a declaration that Plaintiffs' property and rights are owned and held by them free and clear of any claim of defendant Jefferies because the sale of the park "occurred during and as a result of Judge Moss [sic] willful judicial misconduct in carrying out an agreement and conspiracy to deprive Plaintiffs" of their constitutional rights. (Compl. at Prayer for Relief.) While Plaintiffs' Complaint spends considerable time describing the alleged conspiracy, the alleged injuries are the direct result of the state court judgments and their requested relief asks the Court to issue declarations directly adverse to those state court decisions—it "is difficult to imagine what remedy the district court could award in this case that would not eviscerate the state court's judgment." *Bianchi*, 334 F.3d at 902.

Although this motion to dismiss was brought only by the Judicial Officers, the Court finds that dismissal of the entire case is warranted under *Rooker-Feldman*. *Riding v. Cach LLC*, 992 F. Supp. 2d 987, 992 (C.D. Cal. 2014) (A challenge under the *Rooker-Feldman* doctrine is a challenge for lack of subject-matter jurisdiction and may be raised at any time by either party or sua sponte by the court.").

For the foregoing reasons, the Judicial Officers' motion to dismiss GRANTED. The entirety of this case is DISMISSED WITH PREJUDICE.[2]

DATED: March 29, 2017



CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

[2] Accordingly, Defendant Fidelity's motion to dismiss, (Dkt. 15), and Plaintiffs' motion to extend time for service of summons and complaint on three defendants, (Dkt. 21), are DENIED AS MOOT.

APPENDIX P

User Name: ALLISON ARABIAN
Date and Time: Tuesday, July 9, 2019 3:04:00 PM EDT
Job Number: 92501396

Document (1)

1. *Eicherly v. O'Leary, 721 Fed. Appx. 625*
   Client/Matter: 333333.333333
   Search Terms: eicherly v. moss
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	Sources: 9th Cir., U.S. Sup.Ct.

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Eicherly v. O'Leary

United States Court of Appeals for the Ninth Circuit

December 4, 2017, Argued and Submitted, Pasadena, California; January 3, 2018, Filed

No. 17-55446

Reporter
721 Fed. Appx. 625 *; 2018 U.S. App. LEXIS 152 **; 2018 WL 283524

SUE EICHERLY; et al., Plaintiffs-Appellants, v. KATHLEEN O'LEARY, individually, and in her capacity as Presiding Justice of the California Court of Appeal, Fourth District, Div. 3; et al., Defendants-Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Dismissed without prejudice by ***Eicherly v. Moss***, *2018 U.S. Dist. LEXIS 24776 (C.D. Cal., Feb. 1, 2018)*

Later proceeding at ***Eicherly v. Moss***, *2018 U.S. Dist. LEXIS 24777 (C.D. Cal., Feb. 1, 2018)*

Prior History: [1]** Appeal from the United States District Court for the Central District of California. D.C. No. 8:16-cv-02233-CJC-KES. Cormac J. Carney, District Judge, Presiding.

Disposition: AFFIRMED in part and REMANDED.

Core Terms

state court, district court, plaintiffs', federal claim, decisions, declaratory, judgments

Case Summary

Overview
HOLDINGS: [1]-The state court decisions at issue were sufficiently final for Rooker-Feldman purposes; [2]-Notwithstanding plaintiffs' argument to the contrary, they could not avoid the Rooker-Feldman doctrine's bar and obtain review of adverse state court decisions in federal district court just because at least one of their cases remained pending on appeal in state court; [3]-The Rooker-Feldman doctrine barred plaintiffs' federal claims; [4]-The relief they sought amounted to a declaration that the state court judgments were invalid; [5]-They could not make an end-run around the Rooker-Feldman doctrine by limiting their claim against the state court judges to one for declaratory relief; [6]-The district court erred by dismissing the federal claims with prejudice.

Outcome
Affirmed in part and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Rooker-Feldman Doctrine

HN1[] **De Novo Review**

An appellate court reviews de novo a district court's dismissal of a case under the Rooker-Feldman doctrine.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Rooker-Feldman Doctrine

HN2[] **Rooker-Feldman Doctrine**

The Rooker-Feldman doctrine bars cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. That jurisdictional bar is not limited to direct appeals of state

court judgments; it also extends to their de facto equivalents. As the United States Court of Appeals for the Ninth Circuit explained in the Noel decision, it is a forbidden de facto appeal under the Rooker-Feldman doctrine when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Rooker-Feldman Doctrine

HN3 **Rooker-Feldman Doctrine**

The purpose of the Rooker-Feldman doctrine is to ensure that review of state court decisions proceeds through the state appellate process and then, if necessary, to the Supreme Court of the United States. A party may not avoid the Rooker-Feldman doctrine's bar and obtain review of adverse state court decisions in federal district court just because at least one of their cases remains pending on appeal in state court.

Civil Procedure > Appeals

HN4 **Appeals**

An appellate court may affirm a district court's dismissal on any ground supported by the record.

Counsel: For Sue Eicherly, Floyd Chodosh, Myrle Moore, Ole Haugen, Todd Peterson, Kathleen Schowalter, Rodger Kane, Plaintiffs - Appellants: Patrick Joseph Evans, Esquire, Attorney, Evans & Associates, Huntington Beach, CA.

For KATHLEEN O'LEARY, individually, and in her capacity as Presiding Justice of the California Court of Appeal, Fourth District, Div. 3, WILLIAM F. RYLAARSDAM, individually, and in his capacity as a former justice of Div. 3, WILLIAM W. BEDSWORTH, individually, and in his capacity as a justice of Div. 3, ROBERT J. MOSS, individually, and in his capacity as Judge of the Orange County Superior Court, CHARLES MARGINES, individually, and in his capacity as Presiding Judge of the Orange County Superior Court, Defendants - Appellees: Sarah Lee Overton, Attorney, Cummings, McClorey, Davis, Acho & Associates, P.C., Riverside, CA.

For PALM BEACH PARK ASSOCIATION, a California non-profit mutual benefit corporation, Diana Mantelli, George Fiori, Dan Smith, Defendants - Appellees: Jeffry A. Miller, **[**2]** Attorney, Lewis Brisbois Bisgaard & Smith LLP, San Diego, CA.

For FIDELITY NATIONAL TITLE COMPANY, a California corporation, Defendant - Appellee: Kevin Broersma, Attorney, Los Angeles, CA.

Judges: Before: TASHIMA and BERZON, Circuit Judges, and KENNELLY,** District Judge.

Opinion

[*626] MEMORANDUM*

Plaintiffs are former residents of or owners of property in Palm Beach Park, a mobile home park in San Clemente, California. Plaintiffs appeal from the district court's dismissal, with prejudice, of their complaint against two Orange County Superior Court judges, three Court of Appeal justices, the Palm Beach Park Association (PBPA), and a number of other defendants for lack of subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine. ***HN1*** We review de novo a district court's dismissal of a case under *Rooker-Feldman*. *See* *Noel v. Hall, 341 F.3d 1148, 1154 (9th Cir. 2003)*.

Prior to bringing the present lawsuit in federal court, plaintiffs were involved in multiple state court lawsuits concerning the Park. Plaintiffs alleged that the Orange County Superior Court judges and Court of Appeal justices violated their constitutional rights during the course of the state court litigation. Specifically, plaintiffs claimed violations of due process based on the state court **[**3]** judges' alleged conspiracy "to ignore and defy the law . . . and rule against Plaintiffs, even though Plaintiffs were in the right and the law was clearly on their side," and the existence of extreme facts creating an unconstitutional probability of judicial bias. Plaintiffs additionally claimed that the state court judges violated the *Truth in Lending Act, 15 U.S.C. § 1635(b)*, by failing to enforce the law properly. Plaintiffs also brought state

** The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

* This disposition is not appropriate for publication and is not precedent except as provided by *Ninth Circuit Rule 36-3*.

law claims for breach of fiduciary duty and aiding and abetting of the same against a number of other defendants.

Plaintiffs sought declaratory relief against the state court judges and both damages and declaratory relief against the other defendants. The relief requested included a declaration that when they entered orders and judgments adverse to the plaintiffs, the state court judges were engaged in a conspiracy to deprive plaintiffs of their due process rights. Plaintiffs also sought a declaratory judgment that they held their property free and clear of any claim of the private defendants because the rulings that ultimately allowed the private defendants to obtain title to the Park were made as part of the same judicial conspiracy.

HN2[] *Rooker-Feldman* bars "cases **[**4]** brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)*. This jurisdictional bar is not limited to direct appeals of state court judgments; it also extends to their "de facto equivalent[s]." *Cooper v. Ramos, 704 F.3d 772, 777 (9th Cir. 2012)*. As we explained in *Noel*, "[i]t is a forbidden de facto appeal under *Rooker-Feldman* when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court." *Noel, 341 F.3d at 1163*.

[*627] As a preliminary matter, we are satisfied that the state court decisions at issue in this case are sufficiently final for *Rooker-Feldman* purposes. HN3[] The purpose of the *Rooker-Feldman* doctrine is to ensure that review of state court decisions proceeds through the state appellate process and then, if necessary, to the Supreme Court of the United States. *See Exxon, 544 U.S. at 292*. Notwithstanding plaintiffs' argument to the contrary, they may not avoid *Rooker-Feldman*'s bar and obtain review of adverse state court decisions in federal district court just because at least one of their cases remains pending on appeal in state court. *See Worldwide Church of God v. McNair, 805 F.2d 888, 893 n.3 (9th Cir. 1986)*.

The **[**5]** district court correctly ruled that *Rooker-Feldman* barred plaintiffs' federal claims. The relief they sought amounts to a declaration that the state court judgments were invalid. Plaintiffs may not make an end-run around *Rooker-Feldman* by limiting their claim against the state court judges to one for declaratory relief; they conceded at argument that they would use a federal declaratory judgment to try to undo the state court judgments. Plaintiffs' contention that their federal claims assert legal injuries independent of any state court decision—and therefore not barred by *Rooker-Feldman*—is also belied by the fact that they rely on the allegedly erroneous state court orders and decisions as the primary "evidence" of the underlying due process violations. At bottom, plaintiffs' federal claims (1) complain of legal wrongs committed by the state court and (2) seek relief from the decisions of that court. As such, they are de facto appeals barred by *Rooker-Feldman*.[1]

Although the district court properly dismissed plaintiffs' federal claims on this basis, it erred in dismissing those claims with prejudice. *See Frigard v. United States, 862 F.2d 201, 204 (9th Cir. 1988)* ("Ordinarily, a case dismissed for lack of subject matter jurisdiction **[**6]** should be dismissed without prejudice so that a plaintiff may reassert his claims in a competent court."). We therefore vacate the dismissal with prejudice and remand with instructions to dismiss these claims without prejudice.

Even though the district court appears to have dismissed the remaining state law claims on *Rooker-Feldman* grounds, we may affirm the dismissal on the alternative ground that the district court should have relinquished supplemental jurisdiction over those claims pursuant to *28 U.S.C. § 1367(a)*. *See Prather v. AT&T, Inc., 847 F.3d 1097, 1108 (9th Cir.)*, *cert. denied*, *137 S. Ct. 2309, 198 L. Ed. 2d 751 (2017)* ("Without subject matter jurisdiction over [plaintiff's] federal claim, the district court properly concluded it had no discretion to exercise supplemental jurisdiction over [plaintiff's] state law claims."); *Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004)* (HN4[] "We may affirm the district court's dismissal on any ground supported by the record."). Once again, however, these claims should not have been dismissed with prejudice, but rather for lack of supplemental jurisdiction under *28 U.S.C. § 1367*.

We therefore AFFIRM the dismissal of plaintiffs' federal

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[1] Plaintiffs' additional argument that *Rooker-Feldman* does not apply because they have alleged extrinsic fraud on the state court, *see Kougasian v. TMSL, Inc., 359 F.3d 1136, 1139-40 (9th Cir. 2004)*, is without merit. Plaintiffs did not allege extrinsic fraud anywhere in their complaint.

claims based on *Rooker-Feldman* but REMAND for entry of judgment dismissing plaintiffs' federal claims **[*628]** for lack of federal subject matter jurisdiction and dismissing plaintiffs' state **[**7]** claims for lack of supplemental jurisdiction.

AFFIRMED in part and REMANDED.

End of Document

APPENDIX Q

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH DISTRICT - DIVISION THREE

No. G053798

FLOYD M. CHODOSH, et al.,
Plaintiffs and Appellants,

v.

PALM BEACH PARK ASSOCIATION,
Defendant and Respondent.

Superior Court of California
Orange County
30-2010-00423544
Hon. Robert J. Moss

Appellants' Opening Brief

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Attorney for Plaintiffs and Appellants Floyd M. Chodosh, Sue Eicherly, Kathleen A. Schowalter, Myrle A. Moore, Ole Haugen, Todd M. Peterson, Rodger Kane

Received by Fourth District Court of Appeal, Division Three

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The appearance of bias is overwhelming. Judge Moss himself and the Justices had no right or basis to deny Judge Moss' disqualification. Judge Moss should have been and must be disqualified, with the result that the judgment is nullified.[7]

H. Appellants Assert State Law Rights; Not Federal

In *S. Eicherly, et al., v. Hon. Robert J. Moss*, et al. supra, (RJN IV), Appellants sue on United States Constitution and federal law claims. Here Appellants do not assert any federal law or constitutional claim.

IV. BACKGROUND FACTS

A. Palm Beach Trailer–Then Mobilehome-Park

In the 1940s and 1950s Palm Beach Park was a trailer park. (VIIIRJN:10102) In the 1960s the residents banded together to upgrade the Park for mobilehomes. They procured a long term

---

[7] Judge Moss purported to rule on Appellants' two disqualification challenges against him. (6AA30;11AA78–80) This violated Code Civ. Proc., § 170.3, subd. (c)(5). Appellants raised the issue. (VIIRJN23:0942) Judge Moss knew he could not decide his disqualification: "Yeah. And I won't, of course, hear the motion to disqualify myself. That will go to some other judge." (TR6/2/14pg.7,lines13–15) But Judge Moss ruled twice not to disqualify himself. (6AA34;12AA81) When it comes to disqualification, Judge Moss goes both ways. When challenged with disqualification, he rules himself qualified. When another judge disqualifies him, he "re-qualifies" himself! (12AA79:2439,2451)

Justice Scalia famously posited the "Rule of law as a Law of Rules." Justice Traynor held no rule is "better settled" than a court shall not support illegality. Judge Moss and the appellate justices flagrantly broke that rule.

More rudimentary, they transgressed Rule of Law No. 1 - that a judge follows the law. At Palm Beach Park, and in the Palm Beach Park litigation, there has been no Rule of Law.

XVI. CONCLUSION

The Judgment is and must be declared a nullity.

Law Office of Patrick J. Evans

Respectfully submitted,

Dated: June 23, 2017

By: /s/ Patrick J. Evans

Attorney for Plaintiffs and Appellants Floyd M. Chodosh, Sue Eicherly, Kathleen A. Schowalter, Myrle A. Moore, Ole Haugen, Todd M. Peterson, Rodger Kane

APPENDIX R

CALIFORNIA CODE OF JUDICIAL ETHICS

Amended by the Supreme Court of California effective October 10, 2018; adopted effective January 15, 1996; previously amended March 4, 1999, December 13, 2000, December 30, 2002, June 18, 2003, December 22, 2003, January 1, 2005, June 1, 2005, July 1, 2006, January 1, 2007, January 1, 2008, April 29, 2009, January 1, 2013, January 21, 2015, August 19, 2015, and December 1, 2016.

PREFACE

Formal standards of judicial conduct have existed for more than 65 years. The original Canons of Judicial Ethics promulgated by the American Bar Association were modified and adopted in 1949 for application in California by the Conference of California Judges (now the California Judges Association).

In 1969, the American Bar Association determined that then current needs and problems warranted revision of the canons. In the revision process, a special American Bar Association committee, headed by former California Chief Justice Roger Traynor, sought and considered the views of the bench and bar and other interested persons. The American Bar Association Code of Judicial Conduct was adopted by the House of Delegates of the American Bar Association August 16, 1972.

Effective January 5, 1975, the California Judges Association adopted a new California Code of Judicial Conduct adapted from the American Bar Association 1972 Model Code. The California code was recast in gender-neutral form in 1986.

In 1990, the American Bar Association Model Code was further revised after a lengthy study. The California Judges Association again reviewed the model code and adopted a revised California Code of Judicial Conduct on October 5, 1992.

Proposition 190 (amending Cal. Const., art. VI, § 18, subd. (m), operative March 1, 1995) created a new constitutional provision that states, "The Supreme Court shall make rules for the conduct of judges, both on and off the bench, and for judicial candidates in the conduct of their campaigns. These rules shall be referred to as the Code of Judicial Ethics."

The Supreme Court formally adopted the 1992 Code of Judicial Conduct in March 1995, as a transitional measure pending further review.

The Supreme Court formally adopted the Code of Judicial Ethics effective January 15, 1996.

The Supreme Court has formally adopted amendments to the Code of Judicial Ethics on several occasions. The Advisory Committee Commentary is published by the Supreme Court Advisory Committee on the Code of Judicial Ethics.

PREAMBLE

Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and must strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and is a highly visible member of government under the rule of law.

The Code of Judicial Ethics ("code") establishes standards for ethical conduct of judges on and off the bench and for candidates for judicial office.* The code consists of broad declarations called canons, with subparts, and a terminology section. Following many canons is a commentary section prepared by the Supreme Court Advisory Committee on the Code of Judicial Ethics. The commentary, by explanation and example, provides guidance as to the purpose and meaning of the canons. The commentary does not constitute additional rules and should not be so construed. All members of the judiciary must comply with the code. Compliance is required to preserve the integrity* of the bench and to ensure the confidence of the public.

The canons should be read together as a whole, and each provision should be construed in context and consistent with every other provision. They are to be applied in conformance with constitutional requirements, statutes, other court rules, and decisional law. Nothing in the code shall either impair the essential independence* of judges in making judicial decisions or provide a separate basis for civil liability or criminal prosecution.

The code governs the conduct of judges and candidates for judicial office* and is binding upon them. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, requires a reasoned application of the text and consideration of such factors as the seriousness of the transgression, if there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

TERMINOLOGY

Terms explained below are noted with an asterisk (*) in the canons where they appear. In addition, the canons in which these terms appear are cited after the explanation of each term below.

"Candidate for judicial office" is a person seeking election to or retention of a judicial office. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. See Preamble and Canons 3E(2)(b)(i), 3E(3)(a), 5, 5A, 5A (Commentary), 5B(1), 5B(2), 5B(3), 5B(4), 5B (Commentary), 5B(4) (Commentary), 5C, 5D, and 6E.

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Canons 3E(5)(d), 4E(1), 4E(2), 4E(3), 4E (Commentary), 6B, and 6F (Commentary).

"Gender identity" means a person's internal sense of being male, female, a combination of male and female, or neither male nor female. See Canons 2C, 2C (Commentary), 3B(5), 3B(6), 3C(1), and 3C(3).

"Gender expression" is the way people communicate or externally express their gender identity to others, through such means as pronouns used, clothing, appearance, and demeanor. See Canons 2C, 2C (Commentary), 3B(5), 3B(6), 3C(1), and 3C(3).

"Gift" means anything of value to the extent that consideration of equal or greater value is not received, and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. See Canons 4D(5), 4D(5) (Commentary), 4D(6), 4D(6)(a), 4D(6)(b), 4D(6)(b) (Commentary), 4D(6)(d), 4D(6)(f), 4D(6)(i), 4D(6)(i) (Commentary), 4D(6) and 4D(7) (Commentary), 4H (Commentary), 5A (Commentary), 5B(4) (Commentary), 6D(2)(c), and 6D(7).

"Impartial," "impartiality," and "impartially" mean the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as the maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 1 (Commentary), 2A, 2 and 2A (Commentary), 2B (Commentary), 2C (Commentary), 3, 3B(9) (Commentary), 3B(10) (Commentary), 3B(12), 3B(12) (Commentary), 3C(1), 3C(5), 3E(4)(b), 3E(4)(c), 4A(1), 4A (Commentary), 4C(3)(b) (Commentary), 4C(3)(c) (Commentary), 4D(1) (Commentary), 4D(6)(a) (Commentary), 4D(6)(b) (Commentary), 4D(6)(g) (Commentary), 4D(6)(i) (Commentary), 4H (Commentary), 5, 5A, 5A (Commentary), 5B (Commentary), 5B(4) (Commentary), 6D(2)(a), and 6D(3)(a)(vii).

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY,* COMPETENTLY, AND DILIGENTLY

A. Judicial Duties in General

All of the judicial duties prescribed by law* shall take precedence over all other activities of every judge. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities

(1) A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

ADVISORY COMMITTEE COMMENTARY: Canon 3B(1)

Canon 3B(1) is based upon the affirmative obligation contained in Code of Civil Procedure section 170.

(2) A judge shall be faithful to the law* regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law.*

ADVISORY COMMITTEE COMMENTARY: Canon 3B(2)

Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office. Canon 1 provides that an incorrect legal ruling is not itself a violation of this code.*

(3) A judge shall require* order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers and of all staff and court personnel under the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias, prejudice, or harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity,* gender expression,* religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment.

E. Disqualification and Disclosure

(1) A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.*

ADVISORY COMMITTEE COMMENTARY: Canon 3E(1)

The term "proceeding" as used in this canon encompasses prefiling judicial determinations. Thus, if a judge has a disqualifying interest in a matter, the judge is disqualified from taking any action in the matter, even if it predates the actual filing of a case, such as making a probable cause determination, signing a search or arrest warrant, setting bail, or ordering an own recognizance release. Interpreting "proceeding" to include prefiling judicial determinations effectuates the intent of the canon because it assures the parties and the public of the integrity and fairness of the judicial process.*

(2) In all trial court proceedings, a judge shall disclose on the record as follows:

(a) Information relevant to disqualification

A judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.

(b) Campaign contributions in trial court elections

(i) Information required to be disclosed

In any matter before a judge who is or was a candidate for judicial office* in a trial court election, the judge shall disclose any contribution or loan of $100 or more from a party, individual lawyer, or law office or firm in that matter as required by this canon, even if the amount of the contribution or loan would not require disqualification. Such disclosure shall consist of the name of the contributor or lender, the amount of each contribution or loan, the cumulative amount of the contributor's contributions or lender's loans, and the date of each contribution or loan. The judge shall make reasonable efforts to obtain current information regarding contributions or loans received by his or her campaign and shall disclose the required information on the record.

(ii) Manner of disclosure

The judge shall ensure that the required information is conveyed on the record to the parties and lawyers appearing in the matter before the judge. The judge

has discretion to select the manner of disclosure, but the manner used shall avoid the appearance that the judge is soliciting campaign contributions.

(iii) Timing of disclosure

Disclosure shall be made at the earliest reasonable opportunity after receiving each contribution or loan. The duty commences no later than one week after receipt of the first contribution or loan, and continues for a period of two years after the candidate takes the oath of office, or two years from the date of the contribution or loan, whichever event is later.

ADVISORY COMMITTEE COMMENTARY: Canon 3E(2)(b)

Code of Civil Procedure section 170.1, subdivision (a)(9)(C) requires a judge to "disclose any contribution from a party or lawyer in a matter that is before the court that is required to be reported under subdivision (f) of Section 84211 of the Government Code, even if the amount would not require disqualification under this paragraph." This statute further provides that the "manner of disclosure shall be the same as that provided in Canon 3E of the Code of Judicial Ethics." Canon 3E(2)(b) sets forth the information the judge must disclose, the manner for making such disclosure, and the timing thereof.

"Contribution" includes monetary and in-kind contributions. See Cal. Code Regs., tit. 2, § 18215, subd. (b)(3). See generally Government Code section 84211, subdivision (f).

Disclosure of campaign contributions is intended to provide parties and lawyers appearing before a judge during and after a judicial campaign with easy access to information about campaign contributions that may not require disqualification but could be relevant to the question of disqualification of the judge. The judge is responsible for ensuring that the disclosure is conveyed to the parties and lawyers appearing in the matter. The canon provides that the judge has discretion to select the manner of making the disclosure. The appropriate manner of disclosure will depend on whether all of the parties and lawyers are present in court, whether it is more efficient or practicable given the court's calendar to make a written disclosure, and other relevant circumstances that may affect the ability of the parties and lawyers to access the required information. The following alternatives for disclosure are non-exclusive. If all parties are present in court, the judge may conclude that the most effective and efficient manner of providing disclosure is to state orally the required information on the record in open court. In the alternative, again if all parties are present in court, a judge may determine that it is more appropriate to state orally on the record in open court that parties and lawyers may obtain the required information at an easily accessible location in the courthouse, and provide an opportunity for the parties and lawyers to review the available information. Another alternative, particularly if all or some parties are not present in court, is that the judge may disclose the campaign contribution in a written minute order or in the official court minutes and notify the parties and the lawyers of the written disclosure. See

California Supreme Court Committee on Judicial Ethics Opinions, CJEO Formal Opinion No. 2013-002, pp. 7-8. If a party appearing in a matter before the judge is represented by a lawyer, it is sufficient to make the disclosure to the lawyer.

In addition to the disclosure obligations set forth in Canon 3E(2)(b), a judge must, pursuant to Canon 3E(2)(a), disclose on the record any other information that may be relevant to the question of disqualification. As examples, such an obligation may arise as a result of contributions or loans of which the judge is aware made by a party, lawyer, or law office or firm appearing before the judge to a third party in support of the judge or in opposition to the judge's opponent; a party, lawyer, or law office or firm's relationship to the judge or role in the campaign; or the aggregate contributions or loans from lawyers in one law office or firm.

Canon 3E(2)(b) does not eliminate the obligation of the judge to recuse himself or herself where the nature of the contribution or loan, the extent of the contributor's or lender's involvement in the judicial campaign, the relationship of the contributor or lender, or other circumstance requires recusal under Code of Civil Procedure section 170.1, and particularly section 170.1, subdivision (a)(6)(A).

(3) A judge shall disqualify himself or herself in accordance with the following:

(a) Statements that commit the judge to a particular result

A judge is disqualified if the judge, while a judge or candidate for judicial office,* made a statement, other than in a court proceeding, judicial decision, or opinion, that a person aware of the facts might reasonably believe commits the judge to reach a particular result or rule in a particular way in a proceeding.

(b) Bond ownership

Ownership of a corporate bond issued by a party to a proceeding and having a fair market value exceeding $1,500 is disqualifying. Ownership of a government bond issued by a party to a proceeding is disqualifying only if the outcome of the proceeding could substantially affect the value of the judge's bond. Ownership in a mutual or common investment fund that holds bonds is not a disqualifying financial interest.

ADVISORY COMMITTEE COMMENTARY: Canon 3E(3)(b)

The distinction between corporate and government bonds is consistent with the Political Reform Act (see Gov. Code, § 82034), which requires disclosure of corporate bonds, but not government bonds. Canon 3E(3) is intended to assist judges in complying with Code of Civil Procedure section 170.1, subdivision (a)(3) and Canon 3E(5)(d).

(4) An appellate justice shall disqualify himself or herself in any proceeding if for any reason:

(a) the justice believes his or her recusal would further the interests of justice; or

(b) the justice substantially doubts his or her capacity to be impartial;* or

(c) the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.*

(5) Disqualification of an appellate justice is also required in the following instances:

(a) The appellate justice has served as a lawyer in the pending* proceeding, or has served as a lawyer in any other proceeding involving any of the same parties if that other proceeding related to the same contested issues of fact and law as the present proceeding, or has given advice to any party in the present proceeding upon any issue involved in the proceeding.

ADVISORY COMMITTEE COMMENTARY: Canon 3E(5)(a)

Canon 3E(5)(a) is consistent with Code of Civil Procedure section 170.1, subdivision (a)(2), which addresses disqualification of trial court judges based on prior representation of a party in the proceeding.

(b) Within the last two years, (i) a party to the proceeding, or an officer, director or trustee thereof, either was a client of the justice when the justice was engaged in the private practice of law or was a client of a lawyer with whom the justice was associated in the private practice of law; or (ii) a lawyer in the proceeding was associated with the justice in the private practice of law.

(c) The appellate justice represented a public officer or entity and personally advised or in any way represented that officer or entity concerning the factual or legal issues in the present proceeding in which the public officer or entity now appears.

(d) The appellate justice, his or her spouse or registered domestic partner,* or a minor child residing in the household, has a financial interest or is either a fiduciary* who has a financial interest in the proceeding, or is a director, advisor, or other active participant in the affairs of a party. A financial interest is defined as ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding $1,500. Ownership in a mutual or common investment fund that holds securities does not itself constitute a financial interest; holding office in an educational, religious, charitable, service,* or civic organization does not confer a financial interest in the organization's securities; and a proprietary interest of a policyholder in a mutual insurance company or mutual savings association or similar interest is not a financial interest unless the outcome of the proceeding could substantially affect

the value of the interest. A justice shall make reasonable efforts to keep informed about his or her personal and fiduciary* interests and those of his or her spouse or registered domestic partner* and of minor children living in the household.

(e)(i) The justice or his or her spouse or registered domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or registered domestic partner* thereof, is a party or an officer, director, or trustee of a party to the proceeding, or

(ii) a lawyer or spouse or registered domestic partner* of a lawyer in the proceeding is the spouse, registered domestic partner,* former spouse, former registered domestic partner,* child, sibling, or parent of the justice or of the justice's spouse or registered domestic partner,* or such a person is associated in the private practice of law with a lawyer in the proceeding.

(f) The justice

(i) served as the judge before whom the proceeding was tried or heard in the lower court,

(ii) has personal knowledge* of disputed evidentiary facts concerning the proceeding, or

(iii) has a personal bias or prejudice concerning a party or a party's lawyer.

(g) A temporary or permanent physical impairment renders the justice unable properly to perceive the evidence or conduct the proceedings.

(h) The justice has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding prospective employment or service as a dispute resolution neutral, or has been engaged in such employment or service, and any of the following applies:

(i) The arrangement is, or the prior employment or discussion was, with a party to the proceeding;

(ii) The matter before the justice includes issues relating to the enforcement of either an agreement to submit a dispute to an alternative dispute resolution process or an award or other final decision by a dispute resolution neutral;

(iii) The justice directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual

or entity with whom the justice has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service; or

(iv) The justice will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the justice, and among those available for selection is an individual or entity with whom the justice has the arrangement, with whom the justice has previously been employed or served, or with whom the justice is discussing or has discussed the employment or service.

For purposes of Canon 3E(5)(h), "participating in discussions" or "has participated in discussions" means that the justice (i) solicited or otherwise indicated an interest in accepting or negotiating possible employment or service as an alternative dispute resolution neutral, or (ii) responded to an unsolicited statement regarding, or an offer of, such employment or service by expressing an interest in that employment or service, making any inquiry regarding the employment or service, or encouraging the person making the statement or offer to provide additional information about that possible employment or service. If a justice's response to an unsolicited statement regarding a question about, or offer of, prospective employment or other compensated service as a dispute resolution neutral is limited to responding negatively, declining the offer, or declining to discuss such employment or service, that response does not constitute participating in discussions.

For purposes of Canon 3E(5)(h), "party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.

For purposes of Canon 3E(5)(h), "dispute resolution neutral" means an arbitrator, a mediator, a temporary judge* appointed under article VI, section 21 of the California Constitution, a referee appointed under Code of Civil Procedure section 638 or 639, a special master, a neutral evaluator, a settlement officer, or a settlement facilitator.

(i) The justice's spouse or registered domestic partner* a person within the third degree of relationship* to the justice or his or her spouse or registered domestic partner,* or the person's spouse or registered domestic partner,* was a witness in the proceeding.

(j) The justice has received a campaign contribution of $5,000 or more from a party or lawyer in a matter that is before the court, and either of the following applies:

PROOF OF SERVICE

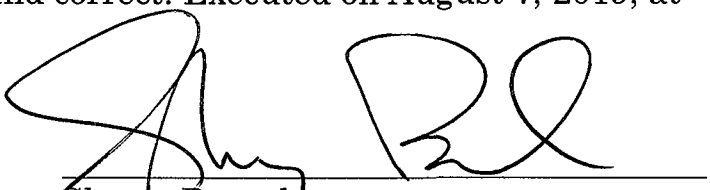
Chodosh, et al. v. Palm Beach Park Association
United States Supreme Court Number 18-9669

I, Sherry Bernal, state:

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 701 B Street, Suite 1900, San Diego, California 92101.

On August 7, 2019, I served the foregoing **RESPONDENT PALM BEACH PARK ASSOCIATION'S BRIEF IN OPPOSITION AND ACCOMPANYING APPENDICES OF EXHIBITS** by placing a true copy enclosed in a sealed envelope addressed as stated on the attached service list. I am readily familiar with the firm's practice for collection and processing correspondence for regular and overnight mailing. Under that practice, this document will be deposited with the Overnight Mail provider and/or U.S. Postal Service on this date with postage thereon fully prepaid at San Diego, California to addresses listed on the attached service list in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 7, 2019, at San Diego, California.



Sherry Bernal

SERVICE LIST

Chodosh, et al. v. Palm Beach Park Association
United States Supreme Court Number 18-9669

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