No. 18-9669

IN THE

SUPREME COURT OF THE UNITED STATES

FLOYD M. CHODOSH, SUE EICHERLY, and OLE HAUGEN,

PETITIONERS,

v.

PALM BEACH PARK ASSOCIATION,

a California non-profit mutual benefit corporation,

RESPONDENT.

On Petition for a Writ of Certiorari to the
California Fourth District Court of Appeal, Division 3

After California Supreme Court Denied Petition for Review

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. SUMMARY OF REPLY

Respondent Palm Beach Park Association ("PBPA") falsely posits as legally correct the extreme fact that Petitioners' disqualified trial judge "self-re-qualified" back on to a case, that in the disqualified judge's words, he "reassumed" jurisdiction by order made to himself. (Respondent Opposition Brief, "Opp." at 8) Respondent assails Petitioners for "judge shopping" by filing a Section 1983 lawsuit (42 U.S.C. §1983) against appellate justices. (Opp. 4-5) Petitioners did not sue justices on their case. They sued justices, whom, many months later, took Petitioners' appeal. Having been sued, the justices should have recused and left the case to their not-sued colleagues. Instead, they placed themselves on the appeal of appellants that had sued them in federal court, and then, predictably, ruled against them.

Petitioners objected to a court of appeal justice that they sued in federal court authoring the opinion in their appeal that upheld illegal strict foreclosure taking of their homes. Petitioners protested the appeal court Presiding Justice, also sued in federal court, taking their appeal to issue adverse decisions, including the instant summary ruling, contrary to court rule, denying Petitioners their right to depose the "self-re-qualifying" disqualified judge that "called in" from vacation just in time to enable the fiduciary fraudulent, self-dealing give-away real estate sale that appropriated Petitioners' homes and their senior coastal mobilehome park.

Petitioners' counsel declared in pleadings and open court that the "self-re-qualifying" disqualified judge "fixed" the case. One sued justice, later to author the opinion for Petitioners' appeal, threatened contempt. But because there was a "fix",

counsel was not held in contempt. Despite the "fix", the sued justice authored an opinion that mostly upheld the "fixing" judge's decisions. The Opposition does not explain how these and other extreme facts do not patently offend due process.

PBPA exclaims Petitioners have not proven that the world's biggest alternative dispute resolution ("ADR") company, JAMS, Inc., actually interfered in their cases. Petitioners' original trial judge retired to JAMS and was replaced by the same disqualified judge that later "self-re-qualified" in the related case. The judge actually assigned to the related case silently acquiesced to the disqualified judge's self-re-qualification. Later, she went to JAMS.

Forgetting the standard is not demonstrated actual bias, but one of appalling appearance of bias, Respondent protests Petitioners have not proven that the sued justices that sat on their appeal will retire to JAMS. (Opp. 9) No matter, as there are extreme facts of intolerable appearance of JAMS' job pecuniary motivation.

In state court Petitioners sued JAMS because its mediator stated and threatened he would malign Petitioners to their trial judge, which JAMS asserted, is a "classic" mediator tactic used to "pressure" litigants. When Petitioners moved to disqualify the justices, JAMS urged the justices not to recuse. They complied.

The Petition is grounded on numerous "extreme" facts that exude judicial bias to a point that is constitutionally intolerable. No jurisprudence allows a disqualified judge to "self-re-qualify." A justice sued by appellants should not sit on their appeal, much less author opinion that takes their homes, or breach court rules

to immediately and summarily rule to deny Petitioners' motion for testimony from the vacationing disqualified judge that had called in to "self-re-qualify" just in time to enable closing of the fiduciary fraudulent real estate sale of Petitioners' park.

Most living Orange County Appellate Court justices have retired to JAMS. Historically, many Orange County Superior Court judges retire to JAMS. Post bench JAMS pay is substantially more than state court salary. JAMS urging the justices to not recuse, and the justices' compliance with the request, demonstrates JAMS' ability and effort to influence the courts against litigants that defied JAMS.

The extreme facts glaringly signpost highly probable judicial bias, and offend Constitutional 14th Amendment due process guarantee. The Opposition (at iii) is wrong, Petitioners have "presented" ample "extreme facts".

The apparent extreme facts point to Petitioners' losing their cases and appeal because they sued the ADR vendor that history and tradition demonstrate stands to offer post-bench job opportunity to the judges and justices that decided Petitioners' case. It is fact that, during the litigation, two (2) of the judges that acted and ruled against Petitioners to deny them due process, retired and went to JAMS.

II. RESPONDENT DEFENDS AS LAWFUL THE CENTRAL EXTREME FACT OF DISQUALIFIED JUDGE "SELF RE-QUALIFICATION"

In the related case with the same trial judge whose judgement was appealed, Petitioners sued to stop the fiduciary fraudulent below market sale of their homes and mobilehome park. They peremptorily challenged the judge. The Supervising Judge disqualified the judge and reassigned the case. (Petition, Appendix, F)

Weeks later, the self-dealing, fiduciary breaching HOA Board scheduled closing of the fraudulent fiduciary give-away sale of the prime coastal senior mobilehome park at millions under market. Petitioners filed an ex parte application for temporary restraining order ("TRO") to halt the fraudulent sale. In response, the disqualified judge "called in" from vacation. First, he ordered delay of the TRO, postponing it for hearing in his courtroom after his return from vacation. Second, he issued orders "self-re-qualifying" himself; what he termed "re-assumption of jurisdiction." (Appendix, F)

The Opposition admits these facts: "When this related action was assigned to Judge Moss, [plaintiff and Petitioner] Haugen filed a peremptory challenge against Judge Moss. After the case was initially transferred to another judge, Judge Moss *reassumed jurisdiction* over the case". (Emphasis added) As for the supposed legal procedure disqualified Judge Moss followed to "reassume jurisdiction", the Opposition states Judge Moss found "the Association's [PBPA] objections to the peremptory challenge to be valid." (Opp. at 8)

Supreme Court Rule 15 states a "brief in opposition should address any perceived misstatement of fact or law." Respondent makes false representation to the Court that, under California law, a disqualified judge could order his own "re-assumption of jurisdiction." California law and judicial canons of ethics forbid disqualified judge "self-re-qualification." Indeed, no jurisprudence allows a disqualified judge to declare his or her own "self-re-qualification."

The Supervising Judge disqualified Judge Moss under Calif. Code of Civil Procedure §170.6. (App. F) A disqualified judge cannot hear the case. Calif. Code of Judicial Ethics, Canon 3B(1). The sole remedy to challenge the disqualification was a writ. (§170.3(d); *Hull v. Superior Court* (1991) 1 Cal. 4th 266, 276; *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) The Opinion, (App. A, at 19) incorrectly states the appellate court "denied Haugen's request for writ." There was no such writ in the related *Haugen* case. The court is confused with other writs filed in this case and in the case *Chodosh, et al. v. JAMS*. (App. H and M)

Besides, the Supervising Judge disqualified Judge Moss, then he "self-re-qualified". It was not for Petitioners to writ the disqualified judge's "self-re-qualification", but in the first place for Respondent to writ his disqualification by the Supervising Judge. (App. F) PBPA had to bring a writ, not Petitioners. There was no writ; instead there was PBPA's ineffective purported "objection" filed in the trial court before the newly assigned judge. (Opp. at 8; App. G, pg. 3, line 18)

California law specifically holds that a judge cannot pursue the sole remedy writ. A "Judge could not file a petition for a writ of mandate, the only remedy to challenge an order disqualifying him or her. Only the parties may seek to overturn the order disqualifying a trial judge for cause; the trial judge has no ability to do so"). *Curle v. Superior Court* supra, 24 Cal.4th at 1063 No law authorized Judge Moss to enter orders whereby he "reassumed jurisdiction". Law and ethics forbade it. In accordance with Rule 15, Petitioners address the Opposition misstatement of law that the disqualified judge could "reassume jurisdiction", i.e. "self-re-qualify."

The Opposition makes materially false legal argument in order to support the fiduciary fraud and self-dealing real estate sale which the offending trial judge enabled. Respondent misrepresents the law in a failed effort to rebut what is an obvious extreme fact – a disqualified judge "self-re-qualification."

The extreme fact of disqualified judge "self-re-qualification" was vital to the fiduciary fraud that the judge enabled, as it was done just in time, by call in from vacation, and right after the disqualified judge's order to block the TRO that would have halted the fraudulent real estate sale that cheated Petitioners and other seniors out of millions in real estate equity. The further unrebutted extreme fact is that the sale occurred just four (4) hours after the disqualified judge's "call in" from vacation; a call he made, he says, without any ex parte communication (App. G, pg. 8, lines 22-23) that would have prompted his strategic "call in" – another outrageously implausible and demonstrably false statement that is an extreme fact.

Respondent PBPA, by and through its same counsel that were present for the disqualified judge "call in", make false legal argument to this Court that in California a disqualified judge can "self-re-qualify". Their misstatement of law is intended to help preserve the fiduciary fraudulent taking of Petitioners' homes and their senior mobilehome park in a rigged sale at a price millions under market.

III. 14TH AMENDMENT DUE PROCESS RAISED; STATE COURTS CONSIDERED FEDERAL ISSUES

The Opposition inaccurately states that Petitioners "advance for the first time" a "constitutional objection" and that Petitioners "were not asserting any

federal or constitutional claim" (Opp. 10) Petitioners' appellate brief gave notice to the state court that a Section 1983 case (42 U.S.C. §1983) had been filed in District Court. (Opp. App. Q) Federal issues were not omitted. The opinion covered federal truth in lending 15 U.S.C. §1601 ("TILA"). (Opp. 56) Federal and constitutional law issues were considered. The federal case procedurally temporarily displaced the issues in state court. When it was dismissed, the issues returned to the state courts.

About a year after Petitioners notified the state court of appeal that federal questions were before the District Court, (Opp. App. Q, p. 57a) the Ninth Circuit upheld dismissal on *Rooker-Feldman*, but reversed to order dismissal without prejudice. The court took judicial notice of the federal action. Two (2) defendants in the dismissed federal action, the court of appeal presiding justice K. O'Leary and the opinion author associate justice W. Bedsworth, placed themselves, over Petitioners' objection, on the appeal. including its federal questions.

U.S. constitutional claims were repeatedly raised. Several motions to disqualify were made between 2014 and 2018. (App. D, F, G, H, I, J, L, M) Respondent does not address the Petition discussion and record citations to such issues being repeatedly raised by the motions. (Pet. at 18-19) Constitutional defenses to the ongoing failures and refusals to recuse culminated with the California Supreme Court, which the Opposition recognizes "could have entertained the recusal" that the sued justices should have recused themselves. (Opp. at 10) The Opposition passes over Petitioners' citations (Pet. 19) showing that federal due process was squarely before the California Supreme Court. (See, IV, infra)

Respondent recognizes that California appellate justice recusal law is borrowed from federal law, a system of self-recusal, with review on appeal to the California Supreme Court. (Op. at 17, "California has adopted the federal standard, where each appellate judge decides whether the facts required recusal. *Kaufman v. Court of Appeal*, 31 Cal. 3d 933, 939-940"). The multiple disqualification motions (App. D, F, G, H, I, J, L, M) included federal constitutional challenge as exists under both the federal and identical state standard for "intolerable appearance".

PBPA states the Court is "without the benefit of thorough lower court opinions to guide [its] analysis." *Zivotofsky v. Clinton*, 566 U.S. 189, 201-02 (2012) (Opp. at 11) The state courts did not opine or analyze at all Petitioners' numerous disqualification motions and protests of violation of United States constitutional due process. Instead, there were repeated stark denials of bias and refusals to recuse despite extreme facts. Federal questions were blatantly ignored.

IV. CONFLICT BETWEEN FEDERAL AND STATE LAW

The Opposition spends ample pages reviewing the California Code of Judicial Ethics and its Canons of Ethics, (Opp. 15-18, App. R) but concedes that, apart from the Code and ethics, California appellate justices' duties to recuse are the same as federal law. Petitioners argued to the California Supreme Court that "the extreme appearance of impropriety points to actual bias that need not be proven to find due process violation," referencing *People v. (Marilyn K) Freeman* (2010) 47 Cal. 4th 993, the California *Caperton* analogue, where the California Supreme Court, following *Caperton*, stated and held:

> While this matter was pending the United States Supreme Court filed its opinion in *Caperton v. A.T. Massey Coal Co., Inc.* (2009) __ U.S. __ [129 S.Ct. 2252]. The court's exhaustive review of its jurisprudence in this delicate realm of constitutional law compels the following conclusions: while a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist "the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable." (*Id.* at p.__ [129 S.Ct. at p. 2259].)

(Id. at 996) California has expressly adopted *Caperton*.

The non-recusing justices on the appeal had to consider *Caperton* in their recusal decisions. *Caperton* entered into their refusals to recuse, and in the California Supreme Court's review of their refusals. The state courts did not follow *Caperton* and related federal law of justice recusal which is specifically incorporated into the state law. As a result, there is a conflict between state and federal law.

V. EXTREME FACT OF TEMPTATION OF POST-BENCH LUCRATIVE JAMS JOB MADE FOR PECUNIARY MOTIVE

The Opposition ignored the financial JAMS – judicial officers interface and pecuniary motivation, glancing over the Court's opinions, starting with *Tumey v. Ohio*, 273 U.S. 510 (1927) where decision making that awards direct payment to the decision maker was unconstitutional, followed by cases in which "financial interests also may mandate recusal, even if less direct." (Opp. 14) JAMS –Justice monetary entanglements give rise to appearance of financial motive that impair impartiality. Objective inquiry on facts of past and present patterns and practices of Orange County justices and judges joining JAMS make for overall intolerable appearance of

bias. Petitioners sued JAMS and caused it to lose its court of appeal website advertising. Judicial officers with JAMS opportunity do not appear to impartially adjudge litigants that sued JAMS and shut down its court backed advertising.

Petitioners' suing JAMS and its co-founder, causing loss of its state sponsored court of appeal website advertising, and exposing the JAMS admitted "classic" mediation technique of "pressuring" litigants with harmful and prejudicial ex parte communication with the litigants' trial judge, are facts which would tempt judicial officers that have opportunity for lucrative post-bench position at JAMS to rule contrary to law and against Petitioners. Indeed, justices could perceive that denying rights and misapplying law to harm litigants that sued JAMS would enhance the justices' prospects for a lucrative post-bench JAMS sinecure.

VI. EXTREME FACT - SUED JUSTICES NO RECUSAL; TAKE APPEAL

Respondent describes that Petitioners in a federal action sued "Court of Appeal Presiding Justice O'Leary, [and] Court of Appeal Associate Justice Bedsworth", but then misleadingly refers to the "unpublished opinion" of "Division 3", omitting that the opinion author was Justice Bedsworth. (Opp. 4-5) Petitioners did not move to disqualify justices already assigned to their appeal. Rather, the justices they had sued many months before, Justices O'Leary and Bedsworth, did not recuse. They took the appeal after the federal case had been dismissed without prejudice, meaning they still faced Petitioners' viable claims.

Petitioners had moved to disqualify all nine (9) of the Orange County (4th Dist. Div. 3) justices in the prior case *Chodosh v. JAMS*. Presiding Justice O'Leary

denied the motion, stating that, in accordance with California law, (which tracks federal law), individual justices would decide whether to recuse. (App. J) The California Supreme Court ordered the JAMS case transferred (App. K) Later, in this case, Petitioners moved again to disqualify all Orange County justices. (App. I)

Months later, after the federal case had been dismissed, and after disqualification motions, out of the nine (9) Orange County justices that could have heard the appeal, Presiding Justice O'Leary and Associate Justice Bedsworth, acted and ruled in Petitioners' appeal. (App. I, App. A) Other justices, not sued, were available for the appeal, but of the nine (9) justices on the Orange County appellate panel, the two (2) that had been sued took the appeal.

It is an extreme fact that a justice, sued by appellants, took their appeal. Regardless of legal issues or rulings, it is gross appearance of bias and due process denial that sued justices would take the case of appellants that had sued them.

VII. EXTREME FACT – COUNSEL DECLARATION OF JUDGE "FIX" – NO CONTEMPT FOUND

Respondent states that the justices "addressed the accusations made by Petitioners' counsel", quoting the opinion (Opp. at 6; App. A 20):

> 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.
>
> [The justices 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."

The Opposition leaves out the justices' Order denying rehearing (Pet. App. C):

> This court most assuredly did not agree with attorney Patrick Evans' allegation that Judge Moss "fixed" a related case against appellants. The fact an appellate panel exercises its discretion not to give an attorney the spotlight of a contempt hearing based on a statement the attorney made in open court does not establish the truth of his statement.

If Petitioners' counsel "fix" accusations were not true, and there were no basis to hurl "calumnies" against the judge, the court would have to find counsel in contempt. *In re Koven* (2005) 134 Cal.App. 4th 262, 272. By not finding contempt, the court determined there was a "fix" as counsel declared. However, the court rejected that clear law and logic, breaching *Koven* to state that where an attorney declares there is a "fix", the court has "discretion" to not find contempt, in order "not to give an attorney the spotlight of a contempt hearing," i.e., to not inquire and ascertain if there was or was not a "fix" as counsel proclaims.

It is an extreme fact for counsel to accuse the judge or justices of a "fix", hurl "calumnies" against them, and "invite" the appellate court to hold counsel in contempt, and then for the court to not hold counsel in contempt, on the rationale that the court does not want to give counsel the "spotlight". If there were no fix, and if the calumnies were not true, the court had to hold counsel in contempt, as there is "no accusation more serious or injurious to a court's reputation than that it 'conspired' with a party to 'fix' the case." *Koven*, supra, 134 Cal. App. 4th at 274. But because the spotlight would prove Judge Moss' fix, the light was blocked.

VIII. RESPONDENT'S FALSE REAL PROPERTY ANALYSIS

Respondent PBPA labels the Petition "[A] last ditch effort to resurrect [Petitioners'] moribund property claims." (Opp. 11) Denying that Petitioners owned

real property was essential to the state courts' intentional disregard of the law in order to punish Petitioners for having attacked JAMS. A "resident owned park" ("ROP") member holds an interest in the HOA non-profit corporation and a lease for specific space. (Calif. Civil Code §799(c)) It is a form of ownership utilized in similar format for a stock cooperative or a condominium. (See, e.g., California Civil Code §4125(b), condominium; §4100(d) "stock cooperative"). The California Supreme Court held an ROP is a "unit" of real property. *Holland v. Assessment Appeals Bd. No. 1* (2014) 54 Cal.4th 481, 488–9. The trial and appellate courts held that the HOA loans violated federal Truth in Lending ("TILA") 15 U.S.C. 1601 et seq. (App. A, at 18, 22) TILA applies to loans secured by real property, not personal property.

The Opposition states the "trial court correctly ordered Petitioners' ejectment from the Park for nonpayment of rent, not an illegal foreclosure." (Opp. 9, App. B, 5) The Opinion holds that "The judgment against appellants for unpaid rent must therefore be reversed" (App. A, at 17) When the judgment for rent was reversed, so too must the ejectment have been reversed. Petitioners must get their homes back.

The court trampled such law and logic by holding that Petitioners were mere tenants. (App. B) But TILA does not apply to tenant loans. By applying TILA, the courts conceded Petitioners' owned real property. The self-re-qualifying judge, and the sued justices, intentionally disregarded the law to falsely rule that Petitioners leases were personal property. (App. A at 7) Wrong rulings that Petitioners owned no real estate were not mere legal error, but intentional disregard of the applicable real property law that, applied to the facts, demonstrated the rulings were wrong.

IX. PETITIONERS ARE HARMED REGARDLESS OF REMAND

The Opposition wrongly states that Petitioners have "sustained no harm" because "remanded proceedings court result in Petitioners' receiving a favorable ruling that they owe no rent". The Opposition glowingly concludes that "Petitioners were relieved of a judgment in excess of $1 million, and may potentially prevail on remand in their favor." (Opp. 23) The Opinion found Petitioners owed neither rent nor loans, but would not get their homes back, thereby inflicting a basic harm – the taking of Petitioners' homes. Remand will not undo that harm.

X. CASE FACTS BASE FOR CRITICALLY NEEDED LAW ON INTERSTICE REQUIRED BETWEEN COURTS AND ADR VENDORS

Caperton dealt with intolerable facts in the election of a judicial officer. Petitioners raise the specter of due process denigration on grotesque appearance of bias against litigants that challenged and criticized the ADR vendor that has provided post-bench employment to the judicial officers hearing their cases and appeal. ADR has been and is here to stay. Law is needed to establish the limits and parameters of ADR influence on the courts. In this case, the appearance of ADR vendor influence on the courts is extreme and intolerable.

The Opposition cautions: "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." *Great W. Mining & Mineral Co., v. Fox Rothschild LLP*, 615 F. 3d 159, 178-9 (3d Cir. 2010), (Opp. 20.)

Petitioners' facts go way beyond those of *Great W. Mining*. There the ADR company had not threatened the plaintiffs and the plaintiffs had not already sued the ADR company, caused cessation of its appellate court website advertising, or uncovered its "classic" tactic of "pressuring" settlement by threatening to malign mediating litigants to their trial judge.

Petitioners' case facts amount to an intolerable display of a pattern of deliberate failure and refusal to recuse and a corrupt use of judicial process to protect the wrongdoing of the judge that "self-re-qualified." The overall facts of due process denial design appear as a scheme to punish the Petitioners for having challenged the ADR vendor that, in accordance with usual and historic practice, will most probably provide future employment for the judges and justices that decided Petitioners' case and appeal. The Opposition utterly fails to refute that this is a "rare case" arising from "extreme facts" that "create "an unconstitutional probability of bias." (Opp. at 1, quoting *Caperton*, supra, 556 U.S. at 887, 890)

XI. CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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