19-7424

No.

IN THE

# Supreme Court of the United States

CHRISTINE HAM,

*Petitioner,*

v.

THE SUPERIOR COURT SANTA CLARA COUNTY,

*Respondents.*

**On Petition For A Writ Of Certiorari**
**To The Superior Court For The State of California, County of Santa Clara**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does an intolerable conflict exist when the Supreme Court of California and the Ninth Circuit squarely address whether the appearance of partiality suffices to establish a ground for recusal and reach opposite conclusions?

2. Whether Judge McGowen's violation of judicial disclosure law followed by her failure to recuse herself from participation in her former client' s case after being the sole party that reviewed and determined her own disqualification for cause violated the Due Process Clause of the Fourteenth Amendment.

**LIST OF PARTIES**

[ ] All parties appear in the caption of the case on the cover page.

[X ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Leland Stanford Junior University, et al. Real Parties In Interest

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Christine Ham respectfully submits this petition for a writ of certiorari to review the judgment of the Superior Court of California, Santa Clara County.

## OPINIONS BELOW

Judge McGowen's order declining to recuse herself is not reported. (Pet. App. A)

## JURISDICTION

The Supreme Court of California denied review on July 17, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

## STATEMENT

Petitioner Christine Ham ("Ham") filed a complaint against Stanford University ("Stanford") in Santa Clara County, Superior Court of California whereby Judge Beth McGowen was assigned to hear the case. Judge McGowen failed to make any disclosures regarding her prior long-term professional and financial relationship with Stanford. The case was never heard on its merits. Judge McGowen dismissed the case with prejudice on procedural grounds. Ham later learned Judge McGowen represented Stanford for 19 years, the entirety of her career from law school graduation until she took the bench. Judge McGowen was counsel for Stanford when Ham's employment dispute commenced. Upon learning such information Ham immediately filed a motion to recuse Judge McGowen and vacate Judge McGowen's void dismissal order. Ham's recusal motion was based on the unavoidable appearance of partiality that Judge McGowen's failing to disclose her relationship with Stanford and the 19-year professional and financial relationship Judge McGowen had with Stanford created. Judge McGowen failed to respond within the statutory time, violated federal and state disqualification laws and denied Ham's motion to recuse. Judge McGowen was the only party to review Ham's disqualification for cause motion to recuse Judge McGowen. As a result, Ham's entire

case was disposed of without affording Ham her due process rights to a fair and impartial trial where her case would be heard on its merits.

This Court's review of Judge McGowen's insistence on participating in this case is warranted to provide authoritative guidance to the lower courts regarding the circumstances in which due process requires recusal of a judge who has benefited from a litigant's retainer, incentive and attorney's fees and to restore public confidence in the judicial system. Judge McGowen having a close, strong, long-standing relationship with defendants as one of her heavyweight clients and not disclosing such created a constitutionally unacceptable appearance of impropriety that required Judge McGowen to recuse herself from the case. Her failure to do so conflicts with the constitutional recusal standards articulated by this Court and other lower courts, denied petitioner her due process rights, and substantially undermined the integrity and reputation of the judicial system.

### A. **Statutory Background**

This Court has emphasized that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). This case affords

the Court the opportunity to clarify the circumstances in which a judge's former representation of a party to the case create an "appearance of bias" that is so significant that due process requires the recusal of the judge who benefited financially and otherwise from the expenditures on representation and attorney's fees—a question that is vitally important to preserving the "reputation for impartiality and non- partisanship"—and, ultimately, the "legitimacy"—"of the Judicial Branch." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

The focus of this Court has consistently been on the question whether the relationship between the judge and an interested party was such as to present a risk that the judge's impartiality in the case at bar might reasonably be questioned by the public. *Liljeberg v Health Services Acquisition Corp.* at 858-62, 108 S.Ct. at 2201-03.

California law expressly provides pursuant to Code Civ. Proc. § 170.3(c)(3):

> Within 10 days after the filing or service, whichever is later, the judge may file a consent to disqualification...or the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement.... The clerk shall forthwith transmit a copy of the judge's answer to each party or his or her attorney who has appeared in the action.

Pursuant to Code Civ. Proc. § 170.3(c)(4), "A judge who fails to file a consent or answer within the time allowed shall be deemed to

have consented to his or her disqualification..."

Code Civ. Proc. § 170.4(b) allows a trial judge against whom a statement of disqualification was filed to order it stricken for only two reasons, if such statement "is untimely filed or if on its face it discloses no legal grounds for disqualification."

Any striking of a disqualification statement must be made within the 10-day limit for responding set forth in Code Civ. Proc. § 170.3(c)(3). In *Lewis v. Superior Court*, Judge Major failed to take any action within 10 days of the filing and service of a statement of disqualification. After the 10-day period expired, Judge Major ordered the statement stricken on the ground it disclosed no legal grounds for disqualification. The petitioner contended that Judge Major was deemed to have consented to his disqualification by failing to file an answer within 10 days after the filing of the statement, and the court agreed that Code Civ. Proc. § 170.4(b) does not provide an exception to the automatic disqualification of a judge who fails to file an answer within 10 days as required by Code Civ. Proc. § 170.3(c) paragraphs (3) and (4). *Lewis v. Superior Court* (1987) 198 Cal. App. 3d 1101, 1103-1104.

"No man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

"Upon reviewing the cases of *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986), and *In re Murchison*, 349 U.S. 133, 136 (1955)," the dissenters in *Caperton v. AT Massey Coal Co. (Caperton II)*, 223 W.Va. 624, 679 SE2d 223, 229 n. 1 (2008) wrote, "it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts." It is clear, there are genuine due process implications arising under federal law, and therefore under California law, which have not been addressed.

Had Ham's case been in the federal circuit, the Ninth Circuit, instead of state court, 28 U.S.C. § 455 would have been the statutory grounds for recusal of Judge McGowen. This section contains no explicit requirement of timeliness and states, (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Judge McGowen's failure to disclose prevented petitioner from exercising her right to disqualify the judge without cause. By failing to disclose Judge McGowen denied Ham her due process rights to a fair and impartial trial.

B. **Facts and Procedural History**

1. Ham was a surgery resident and award-winning post-doctoral scholar and ARTS Fellow at Stanford University who was

discriminated and retaliated against and wrongfully terminated. Following a lengthy period of proceeding through internal grievance procedures with ultimately no response, she turned to the court.

2. Ham filed suit against real party in interest, Stanford University et al in the Superior Court of Santa Clara County, California, to recover damages attributable to wrongful termination, retaliation, discrimination, wrongful demotion, tortious interference with federal grants, contracts and prospective business relationships, breach of contracts, breach of the implied covenant of good faith and fair dealing, intentional interference with prospective economic advantage, unlawfully withholding of medical license, Title IX, intentional infliction of emotional distress, conversion, retaliation, misappropriation of federal funds, wrongful eviction, violation of Palo Alto Municipal Code and public policy, violation of California's Unruh Civil Rights Act, housing discrimination, unfair business practices act violations and other related claims. The parties entered into stipulations, requested and received an order from the court designating the case as exceptional, staying further proceedings and exempting the case from time standards for the purposes of allowing another case between the parties to proceed through the appellate procedure and then allow the parties to engage in private mediation. Ultimately, the parties never mediated after a failed session where

all Defendant parties failed to show. Subsequently, Stanford motioned for and was granted a dismissal with prejudice on procedural grounds.

Thereafter, during post-trial motions including reconsideration and motions to vacate the dismissal and for new trial, petitioner learned the judge who dismissed the case, Judge McGowen, had represented Stanford in employment matters for almost two decades prior to taking the bench. Within 4 days, Ham immediately prepared and simultaneously filed and served a disqualification statement pursuant to CCP 170.3(c)(1). The dismissal order by a judge with a potential or actual conflict of interest was dispositive of the case.

Petitioner's disqualification statement noted Judge McGowen's prior representation of the defendant in the case, her failure to disclose this information when Judge McGowen was initially assigned and appeared in the case as well as petitioners concern of the appearance of partiality.

Judge McGowen's former law firm has a close and long-standing relationship with the Defendants. Pet. App. D- Disqual. Mtn. p. 3

For the last 20 years, Bingham McCutchen (previously McCutchen, Doyle, Brown & Enerson) represented Stanford in various civil litigation matters while Judge McGowen was a member

of the law firm Bingham McCutchen. For years past, Stanford has been a valued and important client of Bingham McCutchen and McGowen. Your declarant is informed and believes and upon such information and belief, alleges that Stanford paid said Bingham McCutchen a sizable annual retainer as well as sizable attorney's fees and Judge McGowen, a partner at Bingham McCutchen was a participant in those retainers and fees, and may still be receiving a portion of those retainers and fees to this date. Pet. App. D. p. 3

In her Disqualification Motion, Ham provided evidence Judge McGowen served as a lawyer in employment issues and matters for Defendants Stanford University. Pet. App. D, Exh. 1, pointed out Judge McGowen was required to make disclosures and she had failed to do so. Ham argued she could not have a fair and impartial trial or hearing before Judge McGowen. Pet. App. D, p. 6- Declaration. Federal due process required Judge McGowen to recuse herself because Defendant Stanford was one of Judge McGowen's heavyweight clients over the two decades of her career prior to taking the bench and this created a constitutionally unacceptable appearance of impropriety, a violation of the Fourteenth Amendment of the United States Constitution.

In the issue presented in her petition for a writ of mandate to the California Court of Appeals 6th District (Pet. App. E), Ham again

raised the Constitutional implications violating her due process by Judge McGowen failing to recuse herself. "Unless this Court grants extraordinary relief, Respondent Court's untimely April 15, 2019 Order striking Petitioner's CCP 170.1 Disqualification Statement denies Petitioner her Constitutional right to a fair and impartial trial. These rules, laws and rights were established to protect the public from biased or self-interested parties determining the outcome of lawsuits. If judges are not required to follow the rules aimed at protecting claimants from biased outcomes, the judicial system will lose the public's confidence." Pet. App. E, p. 8

In accordance with the California Code of Civil Procedures, within 10 days of the simultaneous filing and service of the disqualification motion the challenged judge may file a consent to disqualification, a written verified answer or may order it stricken if untimely filed or on its face discloses no legal grounds for disqualification. A judge who fails to respond in one of the permitted three ways within the prescribed 10 days shall be deemed to have consented to his or her disqualification. CCP 170.3(c)(3-4), 170.4(b) Judge McGowen did not deny any of the allegations.

Ten days after the disqualification statement was simultaneously filed and served on Judge McGowen, with no response from the challenged judge, California Code of Civil Procedures state

the judge is deemed disqualified. Judge McGowen failed to respond in any way within the 10 days she was authorized to do so. Despite such, Judge McGowen continued to circumvent the law by post-dating service upon her by 7 days to reset the statutory 10 days in which she had to reply or strike the disqualification for cause. Nineteen days after service and filing, the judge filed an order striking petitioners disqualification statement. Judge McGowen's strike order was untimely. Not only was the strike order beyond the time permitted, it did not provide either of the two reasons for striking authorized by CCP 170.4(b).

Judge McGowen's failure to reply within the statutory 10 days constituted her consent to her recusal where she lost jurisdiction over all matters of the case and was no longer authorized to make or enter a strike order.

Judge McGowen's failure to disclose her close and long-standing relationship with a party to the case and refusal to follow federal due process requirements led to the case being improperly disposed of without Ham having her merits heard and without having procedural issues heard by an impartial tribunal.

As Ham argued in her Disqualification Statement, unless Judge McGowen feels it necessary to control the outcome of every motion left in this case, there is no reason why she would not simply

recuse herself. Pet. App. D, p.4 Any judges refusal to recuse themselves under the circumstances at the very least gives the appearance of partiality- there is no reason for the challenged judge not to recuse.

Judge McGowen's refusal to recuse herself endangers the public perception of the integrity of the court.

Judge McGowen's strike Orders were not on the basis of either reason provided for in Code Civ. Proc. § 170.4(b). Code Civ. Proc. § 170.4(b) allows a trial judge against whom a statement of disqualification was filed to order it stricken if such statement "is untimely filed or if on its face it discloses no legal grounds for disqualification." Code Civ. Proc. § 170.4(b) In this case, Judge McGowen's strike orders did not allege that petitioner's statements of disqualification either a) were untimely filed or b) disclosed no legal grounds for disqualification on the faces of the statements.

Rather, Judge McGowen's strike orders state petitioners statements of disqualification were "misdirected," and they provided the following reason for striking. "This Court is not currently assigned to preside over any pending or future proceeding in this case. The statement of disqualification is hereby stricken." Pet. App. A. The strike orders then referenced a case that discussed peremptory challenges pursuant to Code Civ. Proc. § 170.6, but the rules

regarding the timing of motions for peremptory challenges are different from those of Code Civ. Proc. § 170.3 in which a party files a statement of disqualification, so such reference was inapplicable to petitioners statement of disqualification.

Judge McGowen's dismissal order disposed of the case entirely prior to any hearing on the merits of the complaint. Ham has been denied her right to an impartial trial and to a trial at all as a result of Judge McGowen's actions/failing to comply with disclosure and recusal statutes and standards. This is compounded by the Superior Court condoning Judge McGowen's actions- allowing her to file an improper and untimely strike order and not having the disqualification motion heard by another judge.

Not only was the dismissal order unsupported by the facts, statutes and existing case law but also it was fundamentally unfair. Judge McGowen had not made any disclosures and Ham was unaware of the close and longstanding relationship between Judge McGowen and Stanford. Had Judge McGowen even properly disclosed the information and not recused herself, Ham could have exercised her option to disqualify Judge McGowen without cause. By failing to disclose and refusing to recuse, Judge McGowen denied Ham her right to a fair and impartial tribunal.

### C. Proceedings Below

Per CCP 170.3(d) petitioner filed a petition for a writ of mandate to the California Court of Appeals for the Sixth District on April 30, 2019. Although this is the only means of statutory appellate review the petition was summarily denied without opinion on May 16, 2019. Pet. App. B Pursuant to CRC 8.500 petitioner filed a petition for review to the California Supreme Court, which was denied July 17, 2019. Pet. App. C

## REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari to clarify the circumstances in which due process requires the recusal of a judge who has substantially benefited financially, professionally and socially from representing a litigant before taking the bench—an issue with profound ramifications for the Due Process Clause's guarantee of judicial neutrality and for the legitimacy of state judicial systems across the Nation.

Judge McGowen's conclusion that she could participate in this case consistent with the requirements of due process cannot be squared with this Court's repeated admonition that, in order to foreclose the possibility of *actual* judicial bias, a judge "must avoid even the *appearance* of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (emphasis added). A

constitutionally unacceptable appearance of bias exists, for example, where a judge criminally charges a defendant with contempt and then presides over the contempt proceedings (*In re Murchison*, 349 U.S. 133, 136 (1955)) and where a judge decides a legal issue that has a direct impact on the outcome of his own lawsuit. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). An equally unacceptable appearance of bias was created when Judge McGowen violated judicial disclosure law by failing to disclose her close long-term professional and financial relationship with Defendant Stanford, then presided over the case dismissing it with prejudice in favor of Stanford without the case ever being heard on its merits and her failure to recuse herself.

Because of the substantial risk of actual bias created by Judge McGowen's failure to disclose followed by her failure to recuse when the information was learned by Ham compounded with Judge McGowen being the sole party who reviewed and determined her own disqualification for cause, the Constitution required Judge McGowen recuse herself from Ham's case.

Judge McGowen's insistence on participating in this case therefore conflicts with this Court's decisions specifying the circumstances in which due process requires recusal and with the Ninth Circuit holding that federal due process requires recusal when

as here the relationship between the judge and an interested party was such as to present a risk that the judge's impartiality in the case at bar might reasonably be questioned by the public. *Preston v. US*, 923 F. 2d 731 (1991). It also deepens a division among the lower courts regarding the due process standard governing recusal determinations and is squarely at odds with the Supreme Courts of Alabama, Hawaii, Utah, Idaho, Wisconsin, Mississippi and Nevada whose recusal statutes state recusal is mandatory if a judge was counsel at any point in time before taking the bench for a party in the lawsuit.

Although it is known that all judges began as practicing attorneys the relationship between attorneys and clients are bound by a superior level of trust and confidence that go beyond typical professional relationships This case affords this Court an ideal opportunity to clarify the circumstances where the appearance of partiality requires recusal to restore the public's diminishing confidence in our judiciary.

## I. There is a Split Between the Supreme Court of California and the Ninth Circuit on Whether the Appearance of Partiality Suffices to Establish a Ground for Recusal.

This case presents two important and recurring questions on which the Supreme Court of California and the Ninth Circuit are in conflict. After this Court's decision in *Caperton v. AT Massey Coal Co.*, 556 US 868, 129 S.Ct. 2252,173 L.Ed.2d 1208 (2009) these two courts remain divided over whether the appearance of partiality suffices to establish a ground for recusal. The Supreme Court of California and lower courts refuse to differentiate between the appearance of partiality and the ability to prove a judge's partiality. These courts overlook the fact that it is a simple question with a simple answer that does not require knowledge of the merits or crimes committed in a case.

In *People v. Carter*, 117 P. 3d 544 (2005) the Supreme Court of California determined the judge did not err by denying to recuse herself. Their decision directly contradicts with this Court's precedent and the Ninth Circuit. *People v. Carter* was a case about a man who murdered, raped and robbed numerous women in a period of two weeks. Setting aside the heinous crimes committed because they have no bearing in deciding whether due process required Judge Melinda J. Lasater to recuse herself based upon giving the appearance of partiality.

Several months prior to the commencement of trial Carter filed a motion to recuse Judge Lasater with the basis that Judge Lasater

had maintained a working relationship and a friendship with the prosecutor in the case, San Diego County Deputy District Attorney James Pippin, such that a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

As a result Judge Lasater conducted a hearing where she reviewed her contacts with Mr. Pippin that spanned a period of approximately 16 years where she noted the dates they had worked together and general information pertaining to their social contacts. During such Judge Lasater disclosed that she and Mr. Pippin had worked together in the San Diego District Attorney's Office until she left office in 1987. Judge Lasater further disclosed that her family and Mr. Pippin's family had gone camping together with some other families, that her husband had purchased Mr. Pippin's son's dirt bike 10 years prior to the hearing, that there had been sporadic social contacts at parties, that she had performed the wedding of Mr. Pippin's daughter at his daughter's request in August 1990, that Mr. Pippin's daughter had given Judge Lasater a necklace similar to necklaces given to the bridesmaids and that Mr. Pippin's daughter had "house sat" for her approximately one year earlier, for which his daughter had been paid a "minimal amount." From what Judge Lasater disclosed, Judge Lasater and Mr. Pippin could not have been closer unless they were dating or married. A dirt bike costs between

$300-$12,000. Normally people do not spend that much money on gifts- only people who are as close as family spend that kind of money on each other. For Judge Lasater's husband to purchase such a costly gift for Mr. Pippin's son, their two families must be as close as family. Judge Lasater never should have taken the bench. The relationship between Judge Lasater and Mr. Pippin annihilates the appearance of impartiality. Yet Judge Allen J. Preckle who was selected by agreement of the parties conducted a hearing on the motion to recuse Judge Lasater where Carter's motion to recuse Judge Lasater was denied. Judge Preckle held that "reviewing the nature of the professional and social contacts between Judge Lasater and Mr. Pippin, the court viewed "as weightless, particularly given the substantial passage of time, the assertion that a reasonable person would doubt Judge Lasater's impartiality because of her past association with Mr. Pippin. . . . [¶] . . . [¶] This court is further satisfied that any, albeit unreasonable doubt, concerning Judge Lasater's impartiality in this case would be erased by a reasonable person's being apprised of Judge Lasater's excellent reputation for integrity and fierce independence. [¶] This court, therefore, finds that a reasonable person, aware of all the facts, would not reasonably entertain a doubt that Judge Lasater will be able to be impartial in this case." The Supreme Court of California agreed with Judge

Preckle's decision, "in our view, Judge Preckle correctly determined that on the facts presented in the pleadings below, a reasonable person would not entertain a doubt as to Judge Lasater's impartiality. (See *United Farm Workers of America v. Superior Court,* supra, 170 Cal.App.3d at pp. 105-106, 216 Cal.Rptr. 4; cf. *Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224, 230-231, 49 Cal.Rptr.2d 615 [disqualification proper where, 13 years earlier, judge had been a prosecutor representing the People in other proceedings against the defendant].) Accordingly, disqualification was not mandated in *People v. Carter.*

On the other side of the split is a Ninth Circuit case, a case very similar to the one at bar, *Preston v. US*, 923 F. 2d 731 (1991). This was a wrongful death action brought by the Preston heirs ("Preston") under the Federal Torts Claims Act where the sole contention on appeal was whether the district court erred in denying the recusal motion of Judge J. Spencer Letts. The recusal motion was based on the ground that prior to being appointed to the federal bench, Judge Letts was "of counsel" to the law firm of Latham & Watkins. The law firm represented Hughes Aircraft Company ("Hughes") who was Preston's employer at the time of his death. Although Hughes was never a party to the litigation before Judge Letts, had judgment been rendered against the government a

potential claim for indemnification against Hughes would have been triggered under a contract between Hughes and the government. The Preston heirs made no claim for actual bias but instead relied on the appearance of partiality. The Ninth Circuit determined that the relationship between Judge Letts and an interested party was such as to present a risk that the judge's impartiality in the case might reasonably be questioned by the public whereby there was no way "to purge the perception of partiality" in the case "other than to vacate the judgment and remand the case to the district court for retrial by a different judge." The Ninth Circuit recognized that Preston had been tried once to judgment and that retrial would involve considerable additional expense, perhaps with the same result as the first trial. However no price can be placed on due process. Despite it being unfortunate the Ninth Circuit felt the need to repeat the words of the Fifth Circuit to provide clarity to other courts faced with the same issue, "[t]he unfairness and expense which results from disqualification ... can be avoided in the future only if each judge fully accepts the obligation to disqualify himself in any case in which his impartiality might reasonably be questioned." *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1115 (5th Cir. 1980)

The California Supreme Court has flatly ignored this Court's precedents. Had petitioners case been heard in the Ninth Circuit, or

the precedent of the Ninth Circuit applied to petitioners case, Judge McGowen would have been recused, the dismissal order void and petitioner would have the opportunity to have her case heard on the merits by a fair and impartial tribunal. **In fact, had petitioner's proceedings taken place in one of eight other circuits, in one of forty-three other states, Judge McGowen would have been recused and her dismissal order void.** Even the United States Court of Federal Claims would have come to the correct conclusion and recused Judge McGowen. *Demodulation. v. US,* Court of Federal Claims 2014 (No. 11-236C) The decision is wrong, unfair and warrants this Court's review.

Like in *Preston,* there is no way to purge the perception of partiality in this case other than to order Judge McGowen recused and her orders void.

The "inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance * * * '" *Taylor v. Hayes,* 418 U.S. 488, 501 (1974) (quoting *Ungar v. Sarafite,* 376 U.S. 575, 588 (1964)).

Granted the appearance of bias may only exist in some cases and not bias itself but in order to protect the public's confidence in the judiciary due process requires judges who give the appearance of

partiality and in which impartiality might reasonably be questioned to recuse themselves. This "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Murchison,* 349 U.S. at 136

## II. Judge McGowen's Refusal to Recuse Herself Conflicts With This Court's Due Process Precedent.

This Court has emphasized that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). A "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). Indeed, "even if there is no showing of actual bias" on the part of a judge, "due process is denied by circumstances that create the likelihood or the appearance of bias" because such a *possibility* of judicial impropriety creates a constitutionally unacceptable risk of *actual* impropriety. *Peters v. Kiff*, 407 U.S. 493, 502 (1972).

Judge McGowen's failure to disclose her relationship with Stanford, followed by her unjustified bias toward Ham, her repetitive rulings in favor of Stanford despite those rulings being in contradiction with statutes and case law, her refusal to recuse herself when Ham learned about her relationship with Stanford, her failure

to follow both federal and state recusal laws, and her being the only judge who reviewed and determined her own disqualification for cause created the unavoidable and constitutionally intolerable and impermissible appearance that Judge McGowen was biased in favor of her former client Stanford. Judge McGowen's refusal to recuse herself from Ham's case directly contradicts this Court's decisions specifying what due process circumstances require recusal.

A. "[O]ur system of law has always endeavored to prevent even the probability of unfairness." *Murchison*, 349 U.S. at 136. This "stringent rule," the Court has explained, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted). Accordingly, in *Murchison*, the Court held that it violated due process for a judge who acted as a "one-man judge-grand jury" to charge a witness with contempt in grand jury proceedings and then convict the defendant of that charge because having been part of the accusatory process that culminated in the contempt charge, it was improbable that the judge could be "wholly disinterested" in the outcome of the contempt proceedings. *Id.* at 137.

Similarly, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the Court held that a judge who had been subjected to repeated verbal abuse by a criminal defendant could not preside over the defendant's criminal contempt proceedings. *Id.* at 466. Despite the absence of evidence of actual bias on the part of the judge, the Court concluded that recusal was required because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Id.* at 465; *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable" in cases in which the judge "has been the target of personal abuse or criticism from the party before him").

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court held that it violated due process for a state supreme court justice to participate in the court's review of a verdict for bad-faith refusal to pay an insurance claim because the justice was at that time pursuing his own bad-faith suit against an insurance company and the legal principles established by the supreme court's decision had a direct impact on the outcome of the justice's own case. *Id.* at 825. The Court explained that it was "not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama would offer a possible

temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Id.* (alterations in original; internal quotation marks omitted). Justice Embry's ongoing pursuit of monetary damages through a cause of action identical to the one pending before the state supreme court offered just such a "temptation."

B. The appearance of impropriety created by Judge McGowen's former representation of Stanford on similar employment issues for 19 years prior to her taking the bench compounded with Judge McGowen's failure to disclose her relationship with Stanford followed by her failure to recuse herself is at least as strong as the appearance of impropriety in *Murchison*, *Mayberry*, and *Lavoie*. **Given the timeline of petitioners dispute with Stanford and McGowen's simultaneous representation of Stanford, McGowen likely advised Stanford on petitioners dispute.** Indeed, just as it is human nature for a judge to be biased *against* a criminal defendant whom he has charged with committing contempt or by whom he has been verbally abused, it is equally a part of human nature for a judge to be biased *in favor* of a party who provided her with the lifestyle she lives. Judge McGowen was a Partner at Bingham McCutchen where she shared in the profits of the firm in addition to receiving a salary. Judge McGowen

represented Stanford for her entire legal career, directly out of law school until she took the bench. Stanford retained Judge McGowen and her law firm for 19 years to handle similar employment issues. Everything Judge McGowen has in life including her position as a judge, the car she drives, the house or houses she owns, the neighborhood she lives in, and the schools her sons attended all trace back to money Judge McGowen was paid by Stanford. Defending Stanford became subconscious to Judge McGowen after doing such for 19 years.

Similarly, just as a judge operates under a constitutionally unacceptable "temptation" to decide a case in a manner that furthers his own interests where he is pursuing a lawsuit raising identical issues to the case pending before him, such a "temptation" is equally acute where the judge is beholden to her former long-term client, the defendant Stanford for giving her a financially secure lifestyle where casting an outcome- determinative vote against Stanford in a multimillion-dollar case may foreclose the possibility of financial support when she seeks re-election.[1] Judge McGowen is just as aware as the public that Stanford receives a $27 billion-dollar tax-free endowment each year to spend on whatever they please where Judge McGowen cannot afford to be on Stanford's bad side.

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[1] This Court has held that it "violates the Fourteenth Amendment . . . to subject [a

The circumstances of Judge McGowen formally representing Stanford for 19 years in employment matters which she failed to disclose and then has refused to recuse herself "create[d]" a constitutionally intolerable "appearance of bias" (*Peters*, 407 U.S. at 502) that required Judge McGowen to recuse herself from Ham's case.

Certiorari is warranted to reconcile Judge McGowen's insistence on participating in this case with the requirements established by this Court's due process jurisprudence.

## III. Judge McGowen's Refusal to Recuse Herself Deepens an Existing Conflict Among the Lower Courts Regarding the Circumstances in Which Recusal is Constitutionally Required.

Although this Court has repeatedly recognized that "[t]rial before 'an unbiased judge' is essential to due process" (*Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam)), lower courts have reached conflicting conclusions regarding the federal constitutional standard governing recusal determinations—a conflict that extends to litigants past attorneys and includes the appearance of impartiality as in the instant case.

To be sure, numerous lower courts have faithfully applied this Court's decisions holding that due process prohibits both actual bias

and the appearance of bias on the part of a judge. *See, e.g., Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 678 (4th Cir. 1989) ("The due process clause protects not only against express judicial improprieties but also against conduct that threatens the 'appearance of justice.'"); *Archer v. State*, 859 A.2d 210, 227 (Md. 2004) ("Not only does a defendant have the right to a fair and disinterested judge but he is also entitled to a judge who has 'the appearance of being impartial and disinterested.'").[2]

There are seven states in the Nation whose recusal statutes state if a judge was "of counsel" for a litigant at any point in time when he or she was a practicing attorney it is mandatory for the judge to recuse himself/herself from the case. Of these seven states, three fall within the Ninth Circuit and the remaining four states are distributed among the other circuits, no two falling within the same circuit. This is statistically important because if the judicial jurisdiction of Ham's case had fallen within one of these three states

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[2] See also *Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) ("Due process requires not only that a judge be fair, but that he also appear to be fair.") (citation omitted); *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) ("there need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns"); *State v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989) (due process requires that justice "'satisfy the appearance of justice'").

within the Ninth Circuit Judge McGowen would have been required to recuse herself regardless of any other circumstances.

But at least five state supreme courts, agreeing with Judge McGowen, have held that the Due Process Clause requires only the absence of actual bias and does not require recusal based on an appearance of impropriety. *See State v. Canales*, 916 A.2d 767, 781 (Conn. 2007) ("a judge's failure to disqualify himself or herself will implicate the due process clause only when the right to disqualification arises from *actual bias* on the part of that judge") (emphasis in original); *Cowan v. Bd. of Comm'rs*, 148 P.3d 1247, 1260 (Idaho 2006) ("we require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has deprived the proceedings of the appearance of fairness").[3]

Moreover, while stopping short of reading the Due Process Clause to forbid only actual bias, several circuits have held that due

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[3] See also *State v. Reed*, 144 P.3d 677, 682 (Kan. 2006) ("in order to establish a violation of due process, [one] must demonstrate actual bias or prejudice by the judge"); *Hirning v. Dooley*, 679 N.W.2d 771, 780-81 (S.D. 2004) (party's "constitutional right to due process is not implicated" where he failed to "assert actual bias or prejudice"); *Kizer v. Dorchester County Vocational Educ. Bd. of Trs.*, 340 S.E.2d 144, 148 (S.C. 1986) ("actual bias rather than a mere potential for bias must be shown").

process does not invariably require the disqualification of a judge who merely appears to be partial. *See, e.g.*, *Davis v. Jones*, 506 F.3d 1325, 1333 (11th Cir. 2007) (this Court's precedent does not clearly establish "that an appearance problem violates the Due Process Clause"); *Welch v. Sirmons*, 451 F.3d 675, 700 (10th Cir. 2006) (this Court's precedent does not hold "that the mere appearance of bias on the part of a state trial judge, without more, violates the Due Process Clause"); *Johnson v. Carroll*, 369 F.3d 253, 262 (3d Cir. 2004) (same); *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1371-72 (7th Cir. 1994) (en banc) ("The Supreme Court has never rested the vaunted principle of due process on something as subjective and transitory as appearance."). These circuits generally acknowledge that even in the absence of actual bias, there may be circumstances that "give rise to a presumption or reasonable probability of bias" sufficient to establish a due process violation. *Welch*, 451 F.3d at 700; *see also Del Vecchio*, 31 F.3d at 1371 ("the due process clause sometimes requires a judge to recuse himself without a showing of actual bias, where a sufficient motive to be biased exists").

Judge McGowen's decision not to recuse herself as she saw no objective evidence that she was actually biased in favor of Stanford deepens this tripartite disagreement among the lower courts. It also directly conflicts with a decision in the Ninth Circuit —siding with

those courts that have deemed an appearance of impropriety sufficient to require recusal—held that federal due process requires recusal whenever the relationship between the judge and an interested party was such as to present a risk that the judge's impartiality in the case at bar might reasonably be questioned by the public. *Preston v. US*, 923 F. 2d 731 (1991).

In *Preston,* the Ninth Circuit held that it violated federal recusal statutes and thereby federal due process for a judge to preside over proceedings when the judges former firm represented an interested party in the case. Applying the due process principles articulated by this Court in *Murchison*, *Potashnick, Liljeberg*, and other cases, the Ninth Circuit court conclude[d] that due process must include the right to a trial without the *appearance* of judge partiality. As in *Murchison,* the reach of due process jurisprudence requires not only a fair tribunal, but also the *appearance* of a fair tribunal. *Murchison*, 349 U.S. at 136) (emphasis in original).

Judge McGowen's failure to recuse herself also conflicts with recent decisions of the Supreme Court of Minnesota.

Because "the appearance of justice is often as important as the proper administration of justice," the Supreme Court of Minnesota strictly adheres to the due process precedent of this Court as

described in *The Minnesota Daily: The University of Minnesota and the Supreme Court/ too close for comfort?*

Identical to Stanford, the University of Minnesota has a presence in courthouses throughout the state- judges at all levels have attended, taught at or sat on committees for the school. The four justices who.have recused themselves from the two University cases have strong connections to the school. Like Judge McGowen, Chief Justice Lorie Gildea was a lawyer for the University. The other three justices include a former member on the Board of Regents for four years; a seven-year faculty member of the University's Law School and a faculty member at the University's law school who donates to the University. All four justices have ties to the University that could make them biased when hearing University cases.

All four justices acknowledge their ties to the University and recuse themselves whenever a University case comes before them. These justices maintain not just the impartiality but also the appearance of impartiality of the judiciary.

If a former judge or justice comes out of retirement to replace a recused justice there is a cost to the state but this extra cost cannot and was not a factor taken into consideration by the four Supreme Court of Minnesota justices when they decided to recuse themselves

from the two University cases. No dollar amount is equivalent to the value of a litigant's due process rights to a fair and impartial trial.

If Judge McGowen had previously represented a party in a case before the Ninth Circuit, Judge McGowen would have been required to recuse herself from any case involving the party she previously represented under the court's interpretation of federal due process in *Preston.*

In light of these divergent understandings of federal due process, this Court should grant review to provide the lower courts with authoritative guidance regarding the recusal standard mandated by the Due Process Clause and the circumstances that undermine the appearance of impartiality requiring the recusal of a judge.

## IV. The Questions Presented Are Exceptionally Important to the Preservation of Public Confidence in State Court Systems Across the Nation.

Indeed, this Court has repeatedly emphasized the importance of maintaining the courts' "reputation for impartiality and nonpartisanship." *Mistretta*, 488 U.S. at 407; *see also White*, 536 U.S. at 802 (Stevens, J., dissenting) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and

nonpartisanship."); *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring) ("The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges."). These issues are not only of general importance to the public, but of fundamental legal significance and national in scope.

This is such an exceptional case because of the extraordinary amount of time that Judge McGowen represented Stanford compounded with the fact that she felt so indebted to Stanford that Judge McGowen was willing to deny Ham her due process rights to a fair trial, violate federal and state laws all the while refusing to recuse herself from this case. It seems unconscionable that Judge McGowen's actions are acceptable actions of an impartial tribune. In fact her actions appear to be an egregious abuse of power. This case therefore represents the ideal opportunity for this Court to provide the lower courts with guidance regarding the factors that courts should weigh when determining whether due process requires recusal.

## V. The Decision Below is Incorrect.

The decision below cannot be reconciled with this Court's statutory recusal precedents.

Within 4 days of learning of the judge's former representation of defendants, petitioner filed and served a disqualification statement for cause. Petitioner's statement was timely as pursuant to CCP 170.3(c)(1) it was filed and served "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification". Petitioners Disqualification Statement was timely served and disclosed several legal grounds for disqualification including, a) the ground that a significant part of the Judge McGowen's approximately 19-year legal career before becoming a judge involved representing Stanford in proceedings involving the same issues as Plaintiff's cases and b) the ground that Judge McGowen's extensive representation of Stanford, especially in employment matters, might make a person aware of those facts reasonably entertain doubt that Judge McGowen would be able to be impartial. Those are legal grounds set forth in Code Civ. Proc. §§170.1(a)(2)(A) and 170.1(a)(6)(A)(iii).

Judge McGowen not disclosing and recusing herself from a case where one of her former clients was a party gave rise to the very

definition of "appearance of impropriety". Hardly a soul would believe that a judge who benefited to the extent that Judge McGowen did from a litigant could rule fairly on cases involving that litigant. If judges are not required to follow the rules aimed at protecting claimants from biased outcomes, the judicial system will lose the public's confidence. Pet. App. E - Pet for Writ p.8

Allowing judges to get away without disclosing relationships (professional, former or otherwise) encourages such information to be hidden from an unknowing litigant until the case is disposed of.

The California court's recusal procedures violate federal due process because they do not provide a means for an unbiased judge to review a challenged judges decision not to recuse himself and particularly so when the challenged judge strikes the disqualification motion.

The decision below should be reversed.

## VI. This Case is an Ideal Vehicle to Resolve this Recurring Issue of National Importance.

This is an inherently national issue that arises with great frequency. And because Petitioner is an especially strong candidate for discretionary relief, this is the ideal case to resolve these

questions.

This case matters not only to petitioner, but also to litigants throughout the Nation who repeatedly face the issue. The issue has frequently arisen and will recur.

Not all litigants across the nation receive impartial tribunals, a right guaranteed by the Constitution particularly with respect to failure to recuse in cases with former clients of the judge. As a result, litigants are not receiving due process and in the instant case never having the merits of the case heard.

Logically, if a judge previously represented a litigant there is a conflict of interest. It is no different than the first question attorneys ask before hearing about a case, "who is the opposing party so I can do a conflict check." The purpose of this conflict check is to make sure the attorney is or has not represented the opposing party. If the attorney has represented the opposing party, the conversation abruptly ends with the attorney stating he/she has a conflict of interest. Likewise, a judge who previously represented a litigant in a case the judge presides over has a conflict of interest because it gives the appearance of partiality, which violates our due process clause.

This Court has been clear that justice must also give the appearance of justice. Thus, just as it would be uniquely

inappropriate for the various states to adopt different policies regarding whether the appearance of partiality suffices as a ground for recusal, it is inappropriate for different rules to persist in the Supreme Court of California and the Ninth Circuit.

The questions presented have frequently arisen and will recur. The lower courts have been grappling with these questions for over a decade, and there has been no shortage of decisions on these matters in the past five years.

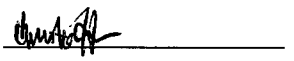
This case is an especially good vehicle for resolving these issues. The decision below squarely addressed the questions presented. And it did so with the benefit of this Court's guidance in *Caperton*. Thus, it not only re-entrenched the long-standing split on the question; it flatly contradicted this Court's most recent precedent on judicial recusal. Error alone would be sufficient to warrant this Court's review. Moreover, this Court's decision will have a meaningful effect for Petitioner because she is an especially strong candidate for discretionary relief as this erroneous decision disposed of Ham's entire case, prior to being heard on the merits.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

In the alternative, summary reversal or vacating the decision and remanding for further proceedings will best serve "the appearance of justice".

Respectfully submitted.



CHRISTINE HAM

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