No. 20-777

In the Supreme Court of the United States

IN RE DARREN HEYMAN, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

PETITION FOR WRIT OF MANDAMUS

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ORIGINAL

QUESTIONS PRESENTED

This case provides this Court with multiple instances for it to ground the criteria by which presiding judges, with different active relationships with a named-party university, may rule over a case involving that university, without violating 28 U.S.C. § 455 and/or the Due Process Clauses of the United States Constitution. It also allows the Court to determine whether interlocutory mandamus is appropriate when a presiding judge denies a motion to disqualify and the appellate court does not substantively address whether the judge erred in denying disqualification.

The presiding District Court Judge, despite stating he "ha[s] and will continue to ... serv[e], teach [for], and hir[e] students [from]" the named-Defendant university, denied the motion to recuse/disqualify himself from this case. His predecessor District Judge was a paid-employee teacher of the named-Defendant while presiding, never so disclosed, and recused himself after almost three and a half years of actively presiding, simply stating "[f]or good cause appearing," and ruling his university's teachers could not be held individually liable for defamation, as it is within their scope of employment. The current presiding District Court Judge, also a teacher at the same university, refused to reconsider any of the recused judge's orders or even hold a post-recusal status hearing to discuss the extraordinary recusal of his colleague.

In May 2015, *pro se* Plaintiff, a student at the University of Nevada, Las Vegas ("UNLV"), sued UNLV, through the State of Nevada, as well as certain UNLV teachers, presidents, and administrators, for defamation, negligence, and

other issues, in both their official and, where appropriate, individual capacities. At issue before the lower court is the university teachers' scope of employment and individual liability.

Two district court judges have presided over this case and both have multiple active extrajudicial relationships with the named-party university, which neither judge voluntarily disclosed. These undisclosed extrajudicial relationships include, but are not limited to, actively teaching for a named-party, and/ or actively being paid by the named-party while presiding.

After over three years of presiding over this case, the first presiding judge recused himself, in a *sua sponte* minute order, without forewarning, and for "good cause appearing." Even upon recusal the recused-judge never disclosed he was being paid by the named-party university while presiding over this case as a university teacher. This same recused teacher-judge ruled in this case that the named-party's university teachers cannot be held individually liable for defamation against their students.

The second, and currently presiding, district judge, also never disclosed he has several active extrajudicial relationships with the same named-party university. Only upon Plaintiff's disqualification motion did he admit he "ha[s] and will continue to ... serv[e], teach [for], and hir[e] students [from]" the named-party university's law school.

The district court denied Plaintiff's 28 U.S.C. § 455 motion for the second judge's disqualification under Plaintiff's motion for reconsideration, due to personal

interest in the case, of the recused-judge's orders. It also denied Plaintiff's motion to certify these denials for interlocutory appeal. The appellate court denied mandamus and a request for panel and/or *en banc* reconsideration. Trial is set to start in January 2021 on the surviving six claims against two defendants.

The questions presented are:

1. Whether a presiding judge must recuse/ disqualify themselves, under 28 U.S.C. § 455, and/or the Due Process Clauses of the US Constitution, when the judge has active teaching ties with a named-party university before him/her, and at issue are the university teacher's scope of employment and individual liability.
2. Whether interlocutory mandamus is appropriate when presiding judges do not voluntarily disclose their active relationship(s) with a named-party before them.

PARTIES TO THE PROCEEDING

Petitioner Darren Heyman was Plaintiff in the District Court and Appellant in the Ninth Circuit.

Respondent United Stated District Court, District of Nevada, was Appellee in the Ninth Circuit.

The State of Nevada ex rel. Board of Regents of the Nevada System of Higher Education on behalf of the University of Nevada, Las Vegas; Neal Smatresk; Donald Snyder; Stowe Shoemaker; Rhonda Montgomery; Curtis Love; Sarah Tanford; Phillip Burns; Kristin Malek; Lisa Moll-Cain; Debra Pieruschka; Elda Sidhu; and Does I – X inclusive were Defendants in the District Court, but did not participate in the Ninth Circuit appeal.

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No. _____

IN RE DARREN HEYMAN, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS

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FOR THE DISTRICT OF NEVADA

PETITION FOR WRIT OF MANDAMUS

Petitioner Darren Heyman, acting *pro* se, respectfully petitions for a writ of mandamus to the Unites States District Court for the District of Nevada. In the alternative, Petitioner respectfully requests the Court treat this petition as a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, or as a petition for a common law writ of certiorari to review the district court's decisions regarding disqualification, reconsideration, and change of venue.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's April 23, 2020 Order denying mandamus, (App., *infra*, 1a), and its July 31, 2020 Order denying rehearing, (App., *infra*, 2a), are unreported.

The July 11, 2019 Order of the United States District Court for the District of Nevada denying judicial recusal/ disqualification, change of venue, and reconsideration of the recused-judge's orders, (App., *infra*, 59a-63a), is unreported.

The August 6, 2019 Order of the United States District Court for the District of Nevada denying reconsideration of the recused-judge's orders, (App., *infra*, 64a-78a), is unreported.

The February 11, 2020 Order of the United States District Court for the District of Nevada denying certification of Orders for interlocutory review, (App., *infra*, 80a), is unreported.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a). In the alternative, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The Ninth Circuit issued its Order on April 23, 2020 and denied a timely filed rehearing petition on July 31, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution states in pertinent part:

"No person shall be ... deprived of life, liberty, or property, without due process of law."

28 U.S.C. § 144 states in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 455 states in pertinent part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> ...
> (b) He shall also disqualify himself in the following circumstances:
> ...
> (4) He knows that he, individually ..., has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> ...
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

28 U.S.C. § 1292 states in pertinent part:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the

entry of the order:

28 U.S.C. § 1404 states in pertinent part:

(a)...in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1651 states in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 2106 states in pertinent part:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

A. Factual Background

In September 2012, Darren Heyman, started his studies in the College of Hospitality, at the University of Nevada, Las Vegas, a public university. See D. Ct. Doc. 28 (April 13. 2016).

In May 2013, Heyman was informed university teachers accused him of planning to cheat on his upcoming. examinations. *Id.* The college dean and future UNLV president emailed Heyman stating the accusation was a student-based rumor and absolved Heyman of any wrongdoing. *Id.*

Heyman requested an investigation be done by UNLV into the UNLV-employed students and teachers involved in starting and spreading the accusation against Heyman, and those responsible to be held to account. There is no evidence anyone was held to account. *Id.*

Over the next year Heyman requested, and was granted, a leave of absence until Fall 2016. *Id.* Heyman sued UNLV and the individuals involved. *Id.*

After Heyman filed suit, UNLV counsel filed a complaint against Heyman with the State Bar of Nevada (the "Bar"), for practicing law without a license. *Id.*

After the Bar absolved Heyman, UNLV expelled Heyman for not having enrolled or a valid leave of absence, despite Heyman having a signed valid leave of absence. *Id.*

No district judge assigned to this case voluntarily disclosed any relationship with any named-party in this suit. Heyman would independently learn both district judges assigned to this case have active extrajudicial relationships with named-party UNLV.

Presiding District Judge Gordon "ha[s] and will continue to" teach at and "serv[e]" named-party UNLV. D. Ct. Doc. 465 (July 11, 2019); App., *infra*, 59a-63a.[1]

B. Procedural Background

On May 11, 2015, Heyman filed suit in Nevada state court against the

[1] While only tangentially relevant to this case before this Court, under Petitioner's 28 U.S.C. § 455(a) argument, *infra*, and seemingly only subject to final order appeal, Heyman would also independently learn after District Judge Boulware recused himself for "good cause appearing," D. Ct. Docs 406 (October 17, 2018), District Judge Boulware had been actively being paid by UNLV as an adjunct teacher while presiding over this case, and never so disclosed. See D. Ct. Docs 451 (April 16, 2019) & 466 (August 6, 2019); see also D. Ct. Docs 465 (July 11, 2019) & 474 (January 27, 2020).

University through the State of Nevada ("UNLV"), as well as the former and current university presidents, teachers, graduate assistant students, and administrators involved in the accusation and its "investigation," in their official and, where appropriate, individual capacities. App., *infra*, 4a-5a. Heyman made 12 claims, which included defamation and negligence, and sought compensatory and punitive damages.

A month later, Heyman filed an amended complaint adding two additional causes of action, including a Title IX claim. See D. Ct. Doc. 1 (June 29, 2015).

Based on the federal claim, Defendants' counsel moved the case to the United States District Court for the District of Nevada. App., *infra*, 5a. District Judge Richard F. Boulware II and Magistrate Judge George W. Foley were appointed to the case. D. Ct. Doc. 1 (June 29, 2015).

Heyman filed a motion for leave to amend the complaint. D. Ct. Doc. 19 (August 10, 2015). The district court granted Heyman's motion to amend his complaint. D. Ct. Doc. 27 (March 31, 2016).

Heyman's newly amended complaint added an additional 17 causes of action based on UNLV's retaliatory bar complaint against Heyman, and his wrongful expulsion. D. Ct. Doc. 28 (April 13, 2016). Heyman also added as defendants the two UNLV in-house counsel involved in filing the bar complaint against Heyman. D. Ct. Doc. 28 (April 13, 2016).

District Judge Boulware dismissed Heyman's claims against former UNLV President Neal Smatresk, 10 claims against all other defendants.

District Judge Boulware also held, as a matter of law, punitive damages in all individual claims were prohibited as all defendants' actions, including defamation, were within the scope of defendants' employment. D. Ct. Doc. 225, at p.14 (October 20, 2017); App., *infra*, 3a-22a, at 21a-22a.

Parties filed motions for summary judgment. D. Ct. Doc. 371 (July 2, 2018).

On October 17, 2018, Judge Boulware recused himself *sua sponte* and without forewarning, stating simply "[w]ith good cause appearing." D. Ct. Doc. 406 (October 17, 2018); App., *infra*, 23a.

The next day District Judge Andrew P. Gordon was assigned to the case. D. Ct. Doc. 407 (October 18, 2018); App., *infra*, 24a.

When Judge Gordon failed to independently address District Judge Boulware's recusal, Heyman requested a status conference before Judge Gordon to discuss the recusal's effect on District Judge Boulware's three-plus years of orders. D. Ct. Doc. 419 (November 21, 2018). Judge Gordon denied Heyman's request. D. Ct. Doc. 424, at p.5 (February 28, 2019); App., *infra*, 25a-30a, at p.29a.

Judge Gordon then granted one defendant-teacher's motion for summary judgement, then granted, in part, all remaining defendants' motion for summary judgment, and *sua sponte* ordered a supplemental motion for summary judgment to give defendants an opportunity address claims it failed to address in their original motion for summary judgment. D. Ct. Doc. 427 (March 12, 2019); App., *infra*, 57a. The Court denied Heyman's motion for summary judgment. App., *infra*, 57a.

On April 16, 2019, Heyman motioned for Judge Gordon's disqualification/

recusal under 28 U.S.C. §455 because of Judge Gordon's active and undisclosed relationship with UNLV. D. Ct. Doc. 448 (April 16, 2019).

Heyman also filed a motion for the reconsideration of the recused-judge's orders based on the fact District Judge Boulware was an active employee and adjunct teacher of UNLV and never so disclosed. D. Ct. Doc. 451 (April 16, 2019). Heyman also moved for a change of venue under 28 U.S.C. §1404(a) on the basis both district judges have active relationships with the named-party university, and neither so disclosed, was evidence Heyman could not obtain a fair trial in the Nevada District's Las Vegas Court. D. Ct. Doc. 449 (April 16, 2019).

District Judge Gordon stated that while he "ha[s] and will continue to" teach at and "serv[e]" UNLV, 28 U.S.C. § 455 does not apply to him because he teaches at UNLV's Law School, and the case does not involve the Law School. D. Ct. Doc. 465 (July 11, 2019); App., *infra*, 59a-63a.

The same date the Judge Gordon denied as moot Heyman's motion for reconsideration of the recused-Judge Boulware's orders because he interpreted the motion for reconsideration to be contingent on his own recusal, which he had denied. D. Ct. Doc. 465 (July 11, 2019); App., *infra*, 59a-63a. The District court also denied Heyman's change of venue request, stating any suggestion of judicial bias or impropriety were "misguided," the case was over four years old, and the case had nearly 500 docket entries. D. Ct. Doc. 465 (July 11, 2019); App., *infra*, 59a-63a.

On August 6, 2019, Heyman filed a second motion for reconsideration of recused-Judge Boulware's decisions, making clear the motion was not contingent on

Judge Gordon recusing himself, and Heyman had just learned Judge Boulware had been receiving payment from UNLV while presiding over the case against UNLV. D. Ct. Doc. 466 (August 6, 2019).

Heyman also brough to the district court's attention District Judge Boulware also had a personal financial interest in the case by absolving UNLV teachers, including himself, of personal liability for defamation. D. Ct. Doc. 466 (August 6, 2019).

Magistrate Judge Foley then retired and Magistrate Judge Elayna Youchah was assigned to the case. D. Ct. Doc. 467 (August 9, 2019).[2]

Judge Gordon denied Heyman's second motion for reconsideration, stating that even if recused-Judge Boulware was an actively-paid adjunct professor Heyman had not identified why any of the recused-Judge's orders should be reconsidered or any orders which were wrongly decided or the product of bias. D. Ct. Doc. 474, at p.12 (January 27, 2020); App., *infra*, 64a-78a, at 75a-78a.

The district court further stated any potential risk to the public's confidence in the judicial process is insubstantial because Judge Boulware did not teach in the Hospitality College, Judge Gordon's pay of over $10,000 from the University while presiding the case against his employer was "modest," and federal judges should teach at law schools. D. Ct. Doc. 474, at p.12 (January 27, 2020); App., *infra*, 64a-

[2] Plaintiff had filed a 28 U.S.C. § 144 motion requesting Magistrate Foley's recusal for, amongst other issues, *ex parte* communication with opposing counsel. See D. Ct. D. Ct. Doc. 270 (December 29, 2017). It was denied. D. Ct. Doc. 305 (January 31, 2018). It is also of interest Magistrate Foley is an alum of named-party UNLV.

78a, at 75a-78a.

The same day Judge Gordon also granted, in part, defendants' supplemental motion for summary judgment. D. Ct. Doc. 474; at p.12 (January 27, 2020); App., *infra*, 64a-78a, at 75a-78a. Judge Gordon denied Heyman's supplemental motion for summary judgment. App., *infra*, 64a-78a, at 75a-78a.

Six causes of action remain against UNLV and an individual defendant. D. Ct. Doc. 474, at p.12 (January 27, 2020); App., *infra*, 64a-78a, at 75a-78a.

Heyman then filed motions requesting the district court certify its orders regarding Judge Gordon's recusal/ disqualification, change of venue, and the Court's refusal to reconsider the orders of a recused-Judge Boulware's decisions who had not disclosed he was an actively paid professor for the named-party University and who ruled on the individual liability of UNLV teachers. D. Ct. Doc. 475 (February 11, 2020).

A week later Magistrate Judge Youchah recused herself *sua sponte*, and without forewarning, for "good cause appearing." D. Ct. Doc. 483 (February 18, 2020); App., *infra*, 79a.

On February 20, 2020, Judge Gordon denied Heyman's motion for the district court to certify the orders denying Judge Gordon's recusal/ disqualification, change of venue, and reconsideration of recused-Judge Boulware's decisions for interlocutory appeal. D. Ct. Doc. 485 (February 20, 2020); App., *infra*, 80a. The Judge's entire argument was, "Heyman does not offer convincing arguments or facts to justify granting his requested relief." D. Ct. Doc. 485 (February 20, 2020); App.,

infra, 80a.

On March 27, 2020, Heyman filed a petition for a writ of mandamus with the Ninth Circuit Court of Appeals regarding District Judge Gordon's disqualification, reconsideration of the orders of recused-Judge Boulware, and change of venue. App. Ct. Doc. 1-2 (March 27, 2020). Therein Heyman spent 34 pages explaining how he satisfied all five "strict framework" criteria of the appellate court's *Bauman v. U.S. Dist. Ct.* decision. App. Ct. Doc. 1-2 (March 27, 2020).

On April 23, 2020, the Ninth Circuit denied mandamus, simply stating "Petitioner has not demonstrated that this case warrants the intervention of the court by means of the extraordinary remedy of mandamus. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977)." App. Ct. Doc. 4 (April 23, 2020); App., *infra*, 1a. The circuit court provided no evidence Heyman failed to satisfy any *Bauman* factor. *See id.*

On May 3, 2020, Heyman timely filed for panel and *en banc* rehearing of the appellate court's denial. App. Ct. Doc. 5 (May 3, 2020).

On June 4, 2020, the district court set trial for January 25, 2021, and mandated a pretrial settlement conference before the district court's magistrate judge. D. Ct. Doc. 516 (June 4, 2020); App., *infra*, 82a.

On July 24, 2020, the district court scheduled the pretrial settlement conference for September 22, 2020. D. Ct. Doc. 518 (July 24, 2020). Besides mandating attendance, the district court also mandated Heyman submit to the court a settlement conference statement seven days prior which abides by Local

Rule 16-6(f). D. Ct. Doc. 518 (July 24, 2020).

On July 31, 2020, the Ninth Circuit denied Heyman's motion for rehearing. App. Ct. Doc. 7 (July 31, 2020); App., *infra*, 2a.

On September 3, 2020, the district court changed the date of the settlement conference to October 29, 2020, with the settlement statements due by October 22, 2020. D. Ct. Doc. 521 (September 3, 2020); App., *infra*, 83a-87a.

On October 29, 2020, parties conducted a settlement conference, to no avail. D. Ct. Doc. 524 (October 29, 2020).

Parties have since filed their motions *in limine*, and responses. D. Ct. Doc.s 525-531 (November 6, 2020) through D. Ct. Doc.s 532-538 (November 6, 2020)

As of today, November 25, 2020, almost five and a half years after filing suit, with a docket number of over 500, with 3 motions to dismiss and four motions for summary judgement filed and ruled upon, Heyman has never once been before any district court judge in this case.

REASONS FOR GRANTING THE WRIT

Mandamus is warranted when a party establishes: (1) the "right to issuance of the writ is 'clear and indisputable,'" (2) the party has "no other adequate means to attain the relief " sought, and (3) "the writ is appropriate under the circumstances." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-381 (2004) (citation omitted). Mandamus is reserved for "exceptional circumstances amounting to a judicial 'usurpation of power.'" *Id.* at 380 (citation omitted). Those are the circumstances of this case. The Respondent Court's position there is no actual bias, and no reasonable person could even suspect the district court's impartiality, when its judges failed to disclose their paid and/or active extrajudicial teaching relationships with a named-party university before them, and where the judge must rule on the scope of employment and individual liability of university teachers, a class to which the presiding judges could belong, is astonishing. 28 U.S.C. § 455(a); *Liteky v. U.S.*, 510 U.S. 540, 567 (1994) citing *Liljeberg v. Health Serv. Acquisition Corp.,* 486 U.S. 847, 860 (1988) (emphasis added).

In this case the factors for mandamus are readily satisfied.

A "clear and indisputable" right to relief, *Cheney,* 542 U.S. at 381 (citations omitted), is established by the Respondent Court's continuous refusal to abide by 28 U.S.C. § 455 and recuse/ disqualify a judge who: (i) refused to voluntarily disclose; (ii) he "ha[s] and will continue to serv[e]" and teach for a named-party before him; (iii) as a teacher has a personal interest in the case before him; and (iv) a reasonable person could question his impartiality.

Petitioner has "no other adequate means" to "attain the relief" as there is no final order, the disqualifiable judge refused to certify his decisions for interlocutory appeal, and now Petitioner has to conduct unnecessary and expensive further pre-trial litigation and an expensive trial before a biased court which, by all measures herein, will be overturned on appeal, only to engage in further financially-crushing litigation.

Issuance of "the writ is appropriate under the circumstances."; indeed "the traditional use of the writ *** has to confine" a court "to a lawful exercise of its prescribed jurisdiction." *Id.* at 380 (citation omitted). Mandamus is not only appropriate here, but required.

There are "few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself." *In re International Business Machines Corp.*, 618 F.2d 923, 926 (2nd Cir. 1980).

> A judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. The shadow should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge. In recognition of this point we have been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify.

Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710, 712 (7th Cir.1986)

In the alternative, the Court can grant further review of this case in either of two other ways. First, the Court could construe this petition as a petition for a writ certiorari under 28 U.S.C. § 1254 (1) seeking review of the Ninth Circuit's April 23,

2020, denial of Petitioner's mandamus petition. App., *infra*, 1a. The Court could then grant certiorari on any or all of the questions presented and review the court of appeals' decision not to issue a writ of mandamus to disqualify the district judge, reconsider the recused-judge's orders, and/or change venue. Cf. *Cheney*, 542 U.S. at 391 (granting petition for writ of certiorari and reversing court of appeals' decision not to grant mandamus).[3] Second, the Court could construe this petition as a petition for a common-law writ of certiorari under 28 U.S.C. § 1651 seeking review of the district court decisions denying Petitioner's motions. App., *infra*, 59a-63a, 64a-77a. The Court could then grant certiorari on any or all of the questions presented and review the district court's decisions directly.

Whatever the Court chooses, this case should not be permitted to proceed to trial before a court which has repeatedly demonstrated its inability to be forthright about its judges' disqualifying paid and/or active relationships with a named-party.

A. Petitioner has a clear and indisputable right to relief from the district court's refusal to abide by 28 U.S.C § 455 and provide petitioner due process of law under the U.S. Constitution

Petitioner's right to have his case heard by judges whose impartiality cannot even be suspected is "clear and indisputable." *Cheney*, 542 U.S. at 381 (citation omitted); 28 U.S.C. § 455. When such judges choose to withhold the facts they: (i) have a personal interest in the case before them, and (ii) have undisclosed active

[3] In *Cheney*, this Court declined to issue a writ of mandamus directly to the district court because the "Court wa[s] not presented with an original writ of mandamus." 542 U.S. at 391. Here, by contrast, Petitioner has sought a writ of mandamus from this Court.

extrajudicial relationships with a named-party, and/or (iii) are actively being paid by a named-party, their impartiality can be questioned and they must proceed no further. 28 U.S.C. § 455.

To this end, to avoid the exact situation before this Court, the Guide to Judiciary Policy, Compendium of Selected Ethics Advisory Opinions, § 3.4-3(a), advised:

> a) A judge who teaches at a law school **should recuse from all cases involving that educational institution as party**. The judge should recuse (or remit) from cases involving the university, as well as those involving the law school, where the judge's impartiality might reasonably be questioned in view of the size and cohesiveness of the university, the degree of independence of the law school, the nature of the case, and related factors... Teaching at a state law school does not necessitate recusal from all cases involving the state or its agencies. (emphasis added).

Furthermore, to put an even more fine point on the subject the same Guide states, "[i]t is permissible for judges to teach in law schools. However, ... **the judge should not participate in any case in which the school or its employees are parties**." The Guide to Judiciary Policy, Compendium of Selected Ethics Advisory Opinions, § 4.1(b) (emphasis added).

Note these opinions do not state only when the law school is a party should the law school teaching judge recuse him/herself. *Id.* This advice is especially relevant here, as the presiding judge in question teaches for the named-party university, and at issue before the judge is the individual liability of that university's teachers.

1. **The district court clearly and indisputably erred by not recusing/ disqualifying a presiding judge under 28 U.S.C. § 455 as that judge: (a) has a personal bias or prejudice; (b) has a financial interest in the case before him; (c) has an interest in the outcome of the hearing; and/ or (d) a single reasonable person could suspect the judge's impartiality**

a) Respondent violated 28 U.S.C. § 455(b)(1) – personal bias or prejudice.

A presiding judge "shall" disqualify himself if "he has a personal bias or prejudice concerning a party." *Id.* This test is the same for 28 U.S.C. § 455(b)(1) as 28 U.S.C. § 144. *U.S. v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980); *Gerald v. Duckworth*, 46 F.3d 1133, n. 1 (7th Cir. 1994). When the presiding judge stated he "ha[s] and will continue" to "serv[e]" and teach for a named-party before him, he unequivocally demonstrates his bias and prejudice for that named-party before him.

While disqualification under 28 U.S.C. § 144 simply requires a party provide an affidavit which states the basis for the party's belief the judge in question has bias or prejudice "such judge shall proceed no further." 28 U.S.C. § 144. The simple accusation of personal bias "upon information and belief" as to a presiding judge's bias is enough to disqualify a presiding judge, even to the extreme where the accusation is false. *Berger v. United States*, 255 U.S. 22, 35 (1921). While the basis of the perceived bias or prejudice need not be extrajudicial, *Liteky v. U.S.*, 510, U.S. 540, 548-550, here they are. *Supra* ("I [the presiding District Judge] have and will continue to engage with [named-party's] Law School through service, teaching, and hiring students." D. Ct. Doc. 465 at p.3. App., *infra*, 62a.

Unlike § 144, § 455(b)(1) does not require an affidavit. *See* 28 U.S.C. § 455(b)(1). While Plaintiff was not able to file a § 144 motion regarding the district judge,[4] Plaintiff accused the district judge of actual bias and prejudice, which the judge labeled "misguided." D. Ct. Doc. 465 at p.5; App., *infra*, 62a.

Not only does the judge admit to his active relationships with a named-party, he has also expressed his desire to continue those relationships in the future, while the case is ongoing, and after the case has been decided. App., *infra*, 62a.

Even using the heightened extrajudicial source bias requirement, the judge has admitted to his active teaching relationships with a named-party in a case involving the individual liability of his colleague teachers, making him disqualifiable under 28 U.S.C. § 144 with an affidavit. App., *infra*, 62a. As 28 U.S.C. § 455(b)(i) is repetitious of section 144, without the affidavit requirement, then the presiding judge must recuse himself here. *Sibla*, 624 F.2d at 868; *Berger*, 255 U.S. at 35 (1921). Respondent clearly and indisputably erred in not disqualifying such a judge. *Cheney*, 542 U.S. at 381.

b) Respondent violated 28 U.S.C. § 455(b)(4) – financial interest in outcome.

A presiding judge "shall" disqualify himself if "[h]e know that he [has]... any financial interest that could be substantially affected by the outcome of the proceeding." *Id.* (emphasis added).

It is undisputed even the slightest financial interest in the outcome of

[4] Petitioner is unable to file a motion under 28 U.S.C. § 144 against presiding District Judge Gordon as, "[a] party may file only one such [bias/ prejudice] affidavit in any case." Petitioner had already filed such an affidavit against Magistrate Judge Foley earlier in the case. D. Ct. Doc. 270.

litigation requires disqualification. "455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety." *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, n.7 (1987) (citations omitted) (emphasis added).

The presiding district judge admits he actively teaches for named-party university's law school and hopes to continue to do so. *Supra.* At issue in this case is whether that university's teachers, accused of defaming a student, are acting within their scope of employment and therefore not subject to individual liability. *Supra.* As a named-party university teacher, the presiding judge is a member of the exact class before him. As such, the individual liability of the judge as a university teacher is affected, meaning he has a potential financial interest in the outcome of this case.

A judge who can be personally affected by the case's ruling cannot preside over that decision. 28 U.S.C. § 455(b)(4). Respondent clearly and indisputably erred in not disqualifying such a judge. *Cheney*, 542 U.S. at 381.

c) Respondent violated 28 U.S.C. § 455(b)(5)(iii) – any interest in outcome.

A judge "shall" disqualify himself if "[h]e is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." *Id.*

The presiding judge knew he is, recently was, and/or intends to be a teacher at the named-party university when he was assigned the case. *Supra.* He should have known from the beginning, but has since certainly been made aware since, at issue is the scope of employment and individual liability of that university's

teachers. *Supra.* As such he knows this precedential case will affect his personal liability, as a teacher for named-party university, a role he hopes to continue into the future, he must be disqualified from hearing such an issue. 28 U.S.C. § 455(b)(5)(iii). Respondent clearly and indisputably erred in not disqualifying such a judge. *Cheney*, 542 U.S. at 381.

d) Respondent violated 28 U.S.C. § 455(a) – reasonable person suspicion of bias.

A presiding judge "shall" disqualify himself if "his impartiality might reasonably be questioned." *Id.*

This Court found if any reasonable person who had all the information about the judge and the case, could even suspect the judge's impartiality, §455(a) guarantees that judge will not sit on that case. *Liteky v. U.S.*, 510 U.S. 540, 567 (1994) ("Section 455(a)), in contrast, addresses the appearance of partiality, guaranteeing not only that a partisan judge will not sit, but also that no reasonable person will have that suspicion.") (emphasis added).

The reasonable person is not only a judge who has had at least 6 years of higher education and who has a self-interest in preserving the perceived integrity of the courts. The reasonable person also includes the healthy skeptic of the judicial system, who acknowledges the court's authority but is wary of its judges' potential self-interest. It is the latter group for whom the very low bar of 455(a) appears to be intended.

Here, are the considerations the reasonable person must weigh the following

facts about the case and the presiding judge:

(i) the presiding judge actively teaches for the named-party university's law school; and:

(ii) he failed to voluntarily so disclose;

(iii) the case involves scope of employment and individual liability of other teachers at the same university, albeit a different college therein, thereby potentially giving the presiding judge a personal and/or financial interest in the case before him;

(iv) other named-parties to the case include the named-university's presidents, in-house counsel, and administrators, all of whom work with and/or have purview over the university's law school and the presiding judge;

(v) he refused to grant a status hearing after his predecessor recused after actively presiding for over three years, stating it was at his discretion and unnecessary;

(vi) he refused to reconsider the orders of the recused-judge who, was shown to be an actively paid employee of a named-party while presiding, never so disclosed, and ruled university teachers could not be held individually liable; and

(vii) he denied a request for interlocutory appeal of his decisions not to recuse or reconsider the decisions of a recused-judge who appears to have been self-interested in the case before him.

If one single reasonable person, even the reasonable and healthy judicial skeptic, could suspect this judge's impartiality, the presiding judge must recuse

himself or else be disqualified. *Liteky*, 510 U.S. at 567. Congress gave the district court no choice. *Id.*; 28 U.S.C. § 455(a). Respondent clearly and indisputably erred by abusing its discretion in finding not a single reasonable person can question the impartiality of this presiding judge. *Liteky*, at 567 (1994); *Cheney*, 542 U.S. at 381.

2. The district court clearly and indisputably erred by not recusing/ disqualifying a presiding judge under the Fifth Amendment's Due Process Clause as even the appearance of potential unfairness so requires.

This Court has made it abundantly clear, Due Process, under the U.S. Constitution, guarantees "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

> A fair trial in a fair tribunal is a basic requirement of due process. 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. ... *Tumey v. Ohio,* 273 U. S. 510, 273 U. S. 532 [1927]. Such a stringent rule may sometimes bar trial by judges who have no actual bias .... But, to perform its high function in the best way, "justice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14 (1954).

When the presiding judge is an active teacher for a named-party university, and the case involves the scope of employment and individual liability of that university's teachers, the judge unquestionably has an interest in the outcome of the case before him, as his own potential individual liability as a university teacher is at issue. *Id.*

By refusing to reconsider the recused-predecessor's finding that university

teachers in this case could not be held individually liable for any alleged tort, including defamation, the presiding judge affirms the recused-judge's order which absolved both judges of such liability. *Supra.* This type of self-interest is the exact interest in outcome and bias which this Court has already ruled is unacceptable. *In re Murchison*, 349 U.S. at 136. As such, Due Process requires such a judge to recuse himself, or else be disqualified. *Id.*

B. Petitioner Has No Other Adequate Means to Attain Relief From A Biased And Partial Court

Mandamus is warranted to correct the district court's egregious errors because Petitioner has "no other adequate means" to obtain relief from the district court's refusal to disqualify and reconsider the decisions of judges actively being paid by a named-party and/or with a personal interest in the case before them. *Cheney*, 542 U.S. at 380 (citation omitted).

The denial of a motion to disqualify is not among the "final decisions of the district courts" reviewable by a court of appeals under 28 U.S.C. § 1291. And the district court has repeatedly rejected the Petitioner's requests for reconsideration and to certify its decisions for interlocutory appeal. *See* D. Ct. Doc.s 465, 474, & 485; App., *infra*, 63a, 78a, 80a.

Petitioner will have a trial before a district judge who has a personal interest in the case before him, who has voluntarily undisclosed active relationships with a named-party, and whose rulings Petitioner will be continually questioning on extrajudicial grounds. *Supra.*

Even if the case goes to an appealable final order, an appellate reversal at a later point would hardly provide an "*adequate* means" of obtaining relief from the usurpation of power by the district court and from the resulting proceedings which themselves violate Petitioner's due process rights. *Cheney*, 542 U.S. at 380 (emphasis added; citation omitted); see, *e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) (granting mandamus where appeal after final judgment would not provide an "adequate" means of obtaining relief), cert. denied, 135 S. Ct. 1163 (2015); *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 20-25 (1st Cir. 1982) (Breyer, J.) (same); 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3932 (3d ed. 2005 & Supp. 2018) (citing similar cases). A *pro se* student Plaintiff will have not only been forced to spend tens of thousands of dollars on an unnecessary trial, but will have revealed his entire case strategy at trial, a critical bell for Plaintiff which can never be "unrung."

The appellate court did not address the issue of judicial disqualification in its blanket finding these circumstances are not extraordinary enough to warrant mandamus. App., *infra*, 2a.

C. Mandamus Relief Is Appropriate Under the Circumstances

Finally, and for the reasons discussed above, mandamus relief is "appropriate under the circumstances." *Cheney*, 542 U.S. at 381.

There are "few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself." *In re International Business Machines Corp.*, 618 F.2d 923, 926 (2nd Cir. 1980), citing *Rosen v. Sugarman*, 357

F.2d 794, 797 (2nd Cir. 1966); see also *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 712 (7th Cir.1986) ("[a] judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. The shadow should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge. In recognition of this point we have been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify.").

Without mandamus, potentially self-interested district judges who refuse to recuse or self-disqualify have an arsenal of weapons to help ensure their disqualification denial does not reach appeal, including: (a) purposefully delaying rulings to avoid a final judgment; (b) refusing to certify their disqualification denial for interlocutory appeal; (c) mandating potentially bankrupting litigation and trial costs; (d) offensively using immediately unappealable contempt charges and fines against the movant during litigation and trial; (e) creating so many appealable errors during litigation and trial the movant cannot raise them all at appeal; and, probably most importantly, (f) instilling such a fear in the disadvantaged party that he is chilled from asking the courts for legitimate assistance in the future.

CONCLUSION

The petition for a writ of mandamus should be granted. In the alternative, certiorari should be granted review the lower appellate court's decisions, or common law certiorari should be granted to review the district court's decisions.

Respectfully submitted.

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