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Docket: _____

21-6777

in forma pauperis

# IN THE SUPREME COURT OF THE UNITED STATES

Carol Garrard, Robert Richardson,
Petitioners,
vs.
Gavin Newsom, Governor of the State of California, Xavier Becerra, Attorney General of the State of California, sued in their official capacity;

Justices of the California Supreme Court: Hon. Tani Gorre Cantil-Sakauye, Hon. Ming W. Chin, Hon. Carol A. Corrigan, Hon. Goodwin H. Liu, Hon. Mariano-Florentino Cuéllar, Hon. Leondra R. Kruger, Hon. Joshua P. Groban, sued in their official capacity as rule makers and supervisory capacity over the California Commission on Judicial Performance;

Members of the California Commission on Judicial Performance: Hon. Michael B. Harper, Dr. Michael A. Moodian, Hon. William S. Dato, Hon. Eduardo "Eddie" De La Riva , Ms. Sarah Kruer Jager, Ms. Kay Cooperman Jue, Hon. Lisa B. Lench, Victor E. Salazar, Esq., Mr. Richard Simpson, sued in their supervisory capacity over the judiciary;

Doe-CSC Members 1-3; Doe-CJP Members 1-3; Doe Defendants 1-10,
Respondents.

# PETITION FOR A WRIT OF CERTIORARI

to the Ninth Circuit Court of Appeals
Case No. 20-16511
Date of Final Decision August 24, 2021

ORIGINAL

## QUESTIONS PRESENTED

1. Neither an allegation of infra-judicial acts of bias, nor proof of acts of bias, is an 'essential element' of the appearance of impropriety, and it was error to dismiss petitioners' complaint for lack of standing based on failure to allege acts of infra-judicial bias under 42 U.S.C. § 1983 in federal court.

2. Does the summary procedure under 28 U.S.C. §§ 1915 & 1917, as applicd to civil parties appearing in forma pauperis, create a "paupers' penalty" of lesser due process by denying citizens appearing in forma pauperis a timely opportunity to challenge or disqualify a judge for the appearance of impropriety under § 455, before a sua sponte disposition on the merits can occur?

3. Does a "religion exception" to the Judicial Canons, that originated in an American Bar Association Model Code in 1974 , and enacted by 35 states of the United States and District of Columbia since then, constitute an establishment of or entanglement in religion by creating an express or implied religion exception to disqualification of judges who are members of organizations that practice invidious religious discrimination?

4. Is the term 'religion' too vague and indeterminate as an exception to a judicial canon intended to police the appearance of impropriety, because the broad and inclusive definition of 'religion' under the First Amendment and subjective nature of belief systems renders attempts to adjudicate what is or is not religious discrimination conforming to religious tenets, beliefs, doctrine or commandments, an unlawful entanglement?

5. Can an individual who, as a religious tenet, believes in the overthrow of the United States as an entity constituting or controlled by the 'anti-christ,' and in overthrow of the United States by a theocratic autocracy by force, and therefore is disloyal to the Constitution, preside as a judge in a lawsuit over the objections of one or more l itigants?

## PARTIES TO THE PROCEEDINGS

Petitioners Carol Garrard and Robert Richardson are brother and sister individual parties aggrieved by the erroneous decisions of the district and court of appeals below.

Gavin Newsom and Xavier Becerra are the state executive officials charged with enforcement of the laws of the State of California, and with protecting and enforcing the civil rights of appellants.

Justices of the California Supreme Court: Hon. Tani Gorre Cantil-Sakauye, Hon. Ming W. Chin, Hon. Carol A. Corrigan, Hon. Goodwin H. Liu, Hon. Mariano-Florentino Cuéllar, Hon. Leondra R. Kruger, Hon. Joshua P. Groban, are sued in their official capacity as rule makers and in their supervisory capacity over the California Commission on Judicial Performance, and Members of the California Commission on Judicial Performance, that enact and enforces the California Judicial Canons, and supervise the California Commission on Judicial Performance.

Hon. Michael B. Harper, Dr. Michael A. Moodian, Hon. William S. Dato, Hon. Eduardo "Eddie" De La Riva, Ms. Sarah Kruer Jager, Ms. Kay Cooperman Jue, Hon. Lisa B. Lench, Victor E. Salazar, Esq., Mr. Richard Simpson, sued in their supervisory capacity over the judiciary, are the members of the California Commission on Judicial Performance responsible for the discipline of the judiciary in California and enforcement of the California judicial canons, including Canon 2C put in issue herein..

All defendants have a role under California law in enforcing the California Judicial Canons or in promulgating them. Because the case was dismissed before it was at issue, there were no appearances by any defendant below.

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## PETITION FOR CERTIORARI

Petitioners, Robert Richardson and Carol Garrard, hereby petition for certiorari and relief from the decision of the Ninth Circuit Court of Appeals, upholding a District Court dismissal of plaintiffs' complaint below.

## OPINIONS BELOW

This petition presents an issue of law of the sufficiency of a pleading. There were no appearances below. There are no reported opinions in this dispute.

## JURISDICTION

Jurisdiction is pursuant to statue under 28 U.S.C. 1254(1) from a final disposition by order in case 20-16511 before the Ninth Circuit Court of Appeals. This court also has federal question jurisdiction arising from an alleged error in pleading a case under 42 U.S.C. § 1983.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition presents issues of denial of due process and equal protection of the law under the Fifth Amendment, arising from unequal treatment of plaintiffs based on a wealth criterion in the federal court system; issues of denial of due process of law under the Fifth Amendment arising from legal error of the judges below in construing the allegations of the complaint in issue; and issues of denial of due process and equal protection of the law under the Fourteenth Amendment by creation of a religion exception to an otherwise general state law bar to judicial membership in organizations

that practice invidious discrimination. The complaint below was predicated under 18 U.S.C. § 1983. And relief was denied on the ground the complaint failed to allege standing and show a "case and controversy" under Article III was presented by the complaint. The state statute of principal concern is California Code of Judicial Conduct Canon 2C.

NATIONAL SCALE OF ISSUE OF RELIGION EXCEPTION TO JUDICIAL CANONS

Based on a Model Code of the American Bar Association, since 1974, 50 states and the District of Columbia have adopted a Code of Judicial Ethics which forbids membership in organizations that practice invidious discrimination, but approximately 36 contain an exception for religious memberships. The version adopted in the majority of states has ambiguity and internal contradiction of terms. Although the majority define 'invidious' in terms of discrimination against a list of suspect classes, none offers a definition of religion. The federal version of this code has no religion exception. See Appendix 1.

## STATEMENT OF THE CASE

The complaint was filed July 14, 2020, below, with a request for waiver of fees. The waiver was granted but a Magistrate's Order issued July 24, 2020, granting the waiver and dismissing the complaint sua sponte, on the ground, p. 4, "they do not allege any facts to the effect that they have actually been discriminated against or that the proceeding has been biased in any way. " ( with leave to amend). Petitioners then served documents seeking disclosure of the magistrates memberships, but the papers were either stricken or denied without hearing. Petitioners filed an amended complaint July

28, 2020. That complaint was also dismissed and the order referred to the District Court. Petitioners filed a Rule 72 Motion August 3, 2020. The Rule 72 Motion was denied and the magistrate's Order upheld based on lack of standing, by rulin g of the District Court on August 6, 2020. A timely Notice of Appeal was filed. The District Court's Order was upheld by Memorandum decision of a panel of the Ninth Circuit Court of appeals entered May 27, 2021. Petitioners timely moved for panel rehearing and alternative en banc rehearing, and rehearing was denied by Order on August 24, 2021. The Court of Appeals rulings, District Court Order, and Amended Complaint are attached in Appendix 2.

## MEMORANDUM OF LAW

### I. THIS CASE PRESENTS THE ISSUE OF WHAT MUST BE PLEADED TO SHOW STANDING FOR RELIEF UNDER A CANON OF JUDICIAL CONDUCT THAT PROSCRIBES WHAT CONSTITUTES THE APPEARANCE OF IMPROPRIETY

In dealing with the issue of judicial disqualification, the California Supreme Court in a unanimous opinion in People v. Freeman, 47 Cal.4th 993 (2010), discussed and applied this court's opinion in Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009), and drew out the distinction found in that case between basic due process standards for judicial conduct– bias on the part of an adjudicator that rises to such an acute level as to compromise even the lowest threshold for a fair trial– that has a 'serious and willful' acts component (Id., at 101-102), and the higher standard created by codes of judicial conduct intended to eliminate even the appearance of impropriety. Id., at 105, citing Caperton v. A.T. Massey Coal Co., Inc., supra. See also Hayward v. Superior Court 2 Cal.App.5th 10, 19, 36 (2016) (applying Judicial Canons under state statute); Housing

Authority of Monterey County v. Jones 130 Cal.App.4th 1029, 1041-1042 (2005) (appearance of impropriety sufficient to disqualify).

Petitioners thus present the issue in this case of alleged lack of standing under Article III, the basis for dismissal of petitioners' complaint, as: An error below of failing to apply the lower burden to show misconduct arising from a higher standard of judicial conduct imposed by an American Bar Association (ABA) Model Code adopted nationwide, and instead applying a discredited standard requiring pleading and ad hoc proof of actual bias. That is, the trial court and court of appeal below held plaintiffs failed to allege standing because the complaint failed to allege specific biased orders, rulings or decisions of the challenged state judge and thus failed to allege a 'concrete' injury arising from an alleged breach of a California Canon of Judicial Conduct 2C [1] in the state case. Said Canon, in common with the ABA and federal version (see Part III infra), bars membership in organizations that practice invidious discrimination. and declares such memebership to be grounds for ("per se") disqualification. California version, Canon 2 ; ABA Canon 3; and see federal Canon 2C.

All disputes over judicial bias involve circumstantial evidence of mentation– bias being a type of emotion, an irrationality that short of a confession or possibly an 'excited utterance,' [2] is not susceptible of direct proof. No leading decision of this court has gone

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[1]California has a Code of Judicial Ethics containing Canons of Judicial Conduct.

[2]See Berger v. United States, 255 U.S. 22, 30 (1921) , Judge Kennesaw Mountain Landis, saying on the record, "One must have a very judicial mind indeed not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty. " But see Rebmann v. Rohde (2011) 196 Cal.App.4th 1283, 1291-1292.

further than reviewing circumstantial evidence of bias, and deciding whether the appearance of impropriety was shown, neither requiring nor making a finding of actual bias. Caperton v. AT Massey Coal Co., Inc., 556 US 868, Part B passim (2009) (state case); Liteky v. United States, 510 U.S. 540, 549, 551 (1994); Liljeberg v. Health Svcs. Acq. Corp., 486 U.S. 847, 859 (1988) (scienter not required) [3] ; Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (state case); In re Murchison, 349 U.S. 133, 136 (1955) (same). In all of these decisions the ground of relief was the appearance of impropriety arising from circumstantial evidence, not a finding the judge had the mental state of bias.

The District Judge below found a distinction between state and federal law, but petitioners are unable to find any authority to support a distinction based on the essential issue of whether specific acts of bias have to be pleaded or proven. That is, the Model Code has been adopted in all 50 states and the District of Columbia, besides the United States. See Appendix 1. Further, the original version of the Model Code was the basis for amending 28 U.S.C. § 455 (Liljeberg v. Health Svcs. Acq. Corp., 486 U.S. 847, 870 (1988), Rhenquist, J., dissenting), and therefore it is appropriate to apply the Canons in applying 28 U.S.C. § 455. See, e.g., Jones v. Governor et al., Case. 20-12003-U (11th Cir. 2020), Order Denying Motion to Disqualify, p. 9-11 (consulting Judicial Canons deciding § 455(a) motion).

By invoking the California Canons, this case is based on an appearance of

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[3]There is California authority that scienter is a statutory element for disqualification. Casden Park La Brea Retail LLC v. Ross Dress For Less, Inc. (2008) 162 Cal.App.4th 468, 477. But the state judge in issue knew of her disqualifying religious membership as alleged in the petitioners' complaint below.

impropriety arising from the 'higher than basic due process requires,' canonical standard of judicial conduct, here as proscribed by California Canon 2C, which prohibits judicial membership in organizations practicing invidious discrimination. A constitutional issue exists under the Fourteenth Amendment and § 1983, because the California version of this Canon contains an exception for membership in a religion, implicating the First Amendment. That is, in simple terms, the religion exception creates the appearance that judges are allowed to practice discrimination so long as their discrimination is based on religion. Not only is that a criterion that treats religious discrimination differently but it triggers First Amendment establishment and entanglement doctrines of this court in adjudicating 'What is religion?' whenever religion is invoked as the 'excuse' for discrimination, as adduced infra.

The contention is that a religion exception to a canon intended to police the appearance of impropriety creates the appearance invidious discrimination is tolerated so long as it is religious discrimination, and thereby makes the appearance of impropriety for a given litigant depend on the 'luck of the draw' whether the assigned judge self-identifies with an organization that practices discrimination as a religious practice (i.e., as 'divinely sanctioned unequal treatment'), or belongs to a political or other lay organization that practices the same invidious discrimination.

Despite the fact petitioners complaint below amply alleges the 'facts and circumstances' that a) in a pending state case where they were litigants, b) the state judge is a member of a religious organization practicing invidious discrimination, c) they attempted to disqualify the judge, and d) to date have had to endure the oppression of the

appearance of impropriety before that judge, petitioners' complaint was dismissed for failure to state Article III standing even though they alleged a canonical ("per se") due process violation of forbidden membership in an organizations practicing invidious discrimination.

Instead, in the words of the Magistrate below, petitioners "do not allege any facts to the effect that they have actually been discriminated against or that the proceeding has been biased in any way." This ignores the proscriptive effect of the Judicial Canons, and the injury posed by the appearance of impropriety and oppression by partiality arising from being forced to appear before a judge that, inter alia, has broadcast her practice of invidious discrimination in the media, as alleged in the Amended Complaint below. Frankly, the failure of the Magistrate, or District Judge or Ninth Circuit panel in their collective rulings to analyze the complaint, and resort to generalizations, [4] suggests petitioners' case was dismissed to avoid the basic issue raised, that the Judicial Canons 'raise the bar' for judicial conduct, and thus lower the burden of proof needed to disqualify a judge. The Model Code adopted in all 52 relevant jurisdictions, contains per se disqualification requirements, and it is no accident a majority felt 'forced' to add a religion exception to the proscription against participation in invidious discrimination.

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[4]The issue of lack of analysis explaining the alleged deficiency of the complaint was raised in the request for rehearing below, which included a request for clarification and opportunity to file an amended complaint. But the request for rehearing, like the appeal, was denied without analysis of the complaint. Petitioners contend that was error and the duty to decide includes a duty to articulate the reasons for a decision, especially where a defective complaint could plausibly be amended, albeit petitioners contend alleging infra-judicial 'bad acts' would be unnecessary, if not improper pleading. See infra.

Petitioners contend they do not have to allege Caperton- or Liljeberg- or Aetna Life -level judicial misconduct to plead and later prove the appearance of impropriety. Instead, they only have to plead and later prove the judge violated the proscriptions of an applicable judicial canon but refused to recuse herself. However because, as said, neither the trial nor appellate level decisions below contain any analysis of the actual fact allegations of the complaint, nor any analysis related to the Judicial Canon in issue, petitioners are unable to say more why the breach of a state Judicial Canon in a pending case was held insufficient to allow plaintiffs to raise the constitutional questions presented, below.

The closest any judge below came to articulating the reasons for dismissing the complaint was the District Judge. But his dicta distinguished Caperton by pointing to lack of an alleged adverse decision in state court. However the allegations of the complaint include allegations petitioners moved to disqualify in state court, and brought two state writ proceedings for relief that were summarily denied by the state court of appeal and supreme court. Exhaustion of state remedies may not be a pre-requisite for jurisdiction under § 1983, but adverse, prejudicial state outcomes were clearly alleged that preceded the federal complaint filed below.

In any case, the de facto standard the complaint lacked an express allegation of bias by not 'laundry-listing' bad 'things' the state judge did (presumably in the state courtroom) was, in effect, to create a false 'essential element' for pleading disqualification. This was a technical error since it obliged plaintiffs to plead infra-judicial evidence of bias (discussed infra), but also a conceptual error. It was a

conceptual error because only an alleged violation of one or more of the Judicial Canons per se violations of "objective standards [that] require recusal whether or not actual bias exists or can be proved." (Caperton, supra, 556 U.S. at 886) is required. In short, acts alleged to be motivated by actual ('malevolent') bias are not an essential element for disqualification; the pleader need only allege a judge presiding in his or her case violated a canon constituting the appearance of impropriety defined by the Canons and refused to recuse him or herself. No more is required for standing even if relief might pose different issues.

Therefor, petitioners contend the primary error below was basing the adverse Article III standing ruling on failure to identify a biased ruling by the state judge. The correct burden of proof, and therefore what plaintiffs were obliged to allege in their complaint, were facts, if assumed to be true, that plausibly show the appearance of impropriety by violating a proscriptive canon of judicial conduct, and not also the fact of subjective bias by inference from a disparaging remark, or adverse ruling showing bias, or some other ad hoc infra-judicial incident.

To restate the error alleged for clarity, by legal analogy to gross negligence and negligence per se: Gross negligence requires proof of willful conduct that creates great risk of harm to others under the circumstances, where negligence per se only requires proof of general intent to do an act that is deemed by law to be dangerous to others. Thus, if the court please, the legal error below was to hold plaintiffs to the stricter pleading standard for 'gross impropriety' rather than a standard of pleading for 'impropriety per se' based on a judicial canon, a lower standard of pleading.

Relevant here because of the inter-relationship of the Model Code of Judicial Canons, and 42 U.S.C. 455, is former Justice Scalia's discussion of the extrajudicial source 'rule' under §455 in the majority opinion in Liteky v. United States, 510 U.S. 540, 547-555 (1994) , and the several distinctions he draws between §455(a) and §455(b) and prior case law, and comment the source of an impropriety is a 'factor' not a 'doctrine' in the sense of a rule of decision. Petitioners summarize and simplify the points late Justice Scalia was making with this hypothetical:

Suppose Judge Daisy Foxglove and family host an exchange student from overseas who is a half-nephew of the judge's husband; an immigration issue arises and the case is 'automatically' assigned to Judge Foxglove by local rule. Under §455(b)(5)(i), this would be an express impropriety based on kinship. But even if the exchange student was a second cousin, outside the third degree of kinship (§ 455(b) (5)), disqualification under § 455(a) for appearance of impropriety would still be required since the student is a member of the judge's household. And that because the ordinary 'citizen in the street' would infer lack of objectivity and likely partiality by the judge, creating the appearance of impropriety, if the citizen was informed the judge was judging a member of her own household related by marriage.

And further suppose in either instance, the student offers evidence on a motion to disqualify, that he and the judge aren't getting along at home, and frequently quarrel, to the point of discipline 'quite a few times,' and contends the judge's denial of a visa extension was biased. And last suppose, on the government's motion for rehearing, the government offers evidence Judge Foxglove dotes on the student, bought him a car to

drive "to school only" and provides him with her credit card, and contends the judge's grant of a visa extension was biased.

The essence of Justice Scalia's distinctions is, the latter two scenarios may be relevant on the issue of actual bias but are immaterial. The 'overstayed-welcome' quarrel or 'overly fond' favors may add a 'colorable' claim of actual bias, but even if that evidence was excluded, the outcome would be the same in either scenario because actual bias (pro or con) is not necessary for the appearance of impropriety under § 455. That's the sense in Justice Scalia's points that § 455 subsection (a) applies if (b) applies, but (a) can apply even if (b) doesn't apply, with or without proof of actual bias under (a) or (b).

For that reason, it is sufficient to show an extra-judicial ground or grounds for disqualification and there is no requirement for standing, to also allege nor prove any facts of infra-judicial 'bad acts.' This court has never held the appearance of impropriety requires 'hard' evidence of scienter (i.e., alleged comments, gestures, infra-judicial findings, ruling or decisions alleged to prove bias), nor even scienter at all. Liljeberg v. Health Svcs. Acq. Corp., 486 U.S. 847, 859 (1988).

Petitioners' therefore contend their complaint was sufficient to meet the pleading standard for alleging impropriety per se under California Canon 2C, by alleging membership in an organization that practices invidious discrimination. That in turn was a sufficient to put the Constitutional questions raised by the religion exception incorporated into Canon 2C in issue below– or in this forum.

## II. 42 U.S.C. §§ 1915 & 1917 CREATE DISPARATE PROCEDURAL TREATMENT BASED ON A WEALTH CLASSIFICATION AS APPLIED TO § 455.

Where a "filing fee scheme has a real and appreciable impact on the exercise of [a liberty interest]" (Bullock v. Carter, 405 U.S. 134 144 (1972)), it constitutes a de facto classification based on personal wealth that is subject to strict scrutiny. Although not every wealth criterion is suspect and subject to strict scrutiny (San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 120-121 (1973)), in this case the class is easy to define– any litigant who is so poor as to qualify for a filing fee waiver. See Boddie v. Connecticut, 401 U.S. 371, 373-374, 377 (1971) (filing fee barrier to welfare mothers seeking divorce violates due process).

Petitioners' 'paupers' penalty' arguments in the Court of Appeals were characterized as 'lacking merit.' Needless to say Petitioners disagree. But for purposes of this petition, they narrow the scope of their contentions to the issue that under the current manner of implementing 42 U.S.C. §§ 1915 & 1917 in the Northern District of California, where this matter was filed in forma pauperis, a judicial officer can issue an substantive ruling on the merits before any meaningful opportunity exists for a 'conflicts review' nor a 42 U.S.C. § 455 motion. Indeed, in this case there were no disclosures of any kind by any judge despite federal Canon 2C. An attempt was made under § 455 by motion to the magistrate (after her initial sua sponte dismissal order), who summarily denied it, but the District Court affirmed the dismissal, as did the Court of Appeals, and held that mooted any irregularity of the § 455 motion.

Petitioners contend this violates due process by denying paupers a meaningful opportunity to assess whether grounds for disqualification exist, before a sua sponte ruling can be issued under 42 U.S.C. §§ 1915 & 1917. That is, 'impropriety per se' can

exist in a pauper's case as much as in any other litigants' case.

III. THE INCLUSION OF A RELIGION EXCEPTION TO THE CALIFORNIA JUDICIAL CANON FORBIDDING MEMBERSHIP IN ORGANIZATIONS THAT PRACTICE INVIDIOUS DISCRIMINATION GUARANTEES UNEVEN ENFORCEMENT OF THE CANON

Reference to 'religion' implies or implicates First Amendments freedoms. But the Fifth Amendment is not yet left behind. The First is entwined with the Fifth in context of the underlying issues relating to California Canon 2C, because it contains an exception for religious memberships. That is, protection from the socio-political wrong that Canon 2C otherwise protects litigants from suffering, of being forced to endure the appearance of impropriety in their case, and oppression of uncertainty whether their judge will be improper or not, depends upon whether the impropriety is religious or not.

The latter point arises in part because 'invidious discrimination' was originally used in this court in context of economic litigation over alleged disparate treatment, and had the meaning of 'unequal treatment.' In Soon Hing v. Crowley, 113 U.S. 703, 708-709 (1885), a case about hours of operation of a business, former Justice Field appears to define it as what would today be called an 'equal protection' violation, viz.: "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws." Id., 708. This usage has been consistent: Nashville, Chattanooga & St. Louis Ry. Co. v. Browning, 310 U.S. 362, 366 (1940); Morey v. Doud, 354 U.S. 457, 463-464 (1957); Reynolds v. Sims,

377 U.S. 533, 561 (1964).

But the rise of this court's concerns with personal liberties expanded its use beyond economic cases. See Boddie v. Connecticut, supra, 401 U.S. at 385-386, Douglas, J., concurring and referring to "guidelines" [i.e., in same sense of modern usage of 'suspect classifications'], of race, alienage, religion, poverty, and "class and caste.' See also Frontiero v. Richardson, 411 U.S. 677 (1973) (sex [gender] suspect classification of invidious discrimination, requiring strict scrutiny).

The phrase has also been used in cases involving 'districting.' For example, voting rights cases. White v. Regester, 412 U.S. 755, 764, 767-768 (1973); Jenness v. Fortson, 403 U.S. 431, 385-386 (1971). The phrase 'invidious discrimination' is next used in a case broaching the phrase 'suspect classification' in Graham v. Department of Pub. Welfare, 403 U.S. 365, 370-372 (1971) (Blackmun, J.), marking its apparent current meaning.

And in economic litigation its modern usage is: "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973) (Douglas, J.) (emphasis added); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) ("invidious classification").

There is serious room for doubt about using the phrase 'invidious discrimination' in context of private organizations (Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166, 171-172 (1972)) or businesses (Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 257 (1974)). At least that was true in the era when the phrase gained its modern usage.

Strictly speaking 'barriers to entry' of a private club are private not state action, and thus not 'invidious discrimination.' For example, the Millionaire Ms. Mavens, with a $50,000.00 initiation fee, hazing ritual involving a mile swim from shore to the island clubhouse, and a female only, no trans-genders allowed policy, may entrain discrimination on the basis of wealth, disability, gender, and sexual identity, but it is not 'invidious discrimination' because it is not state action. On the other hand, the only reported decision applying federal Canon 2C petitioners could find applies the rule to membership in a private golf club with a history of racial segregation, obliging the judge to resign his membership. In re Judicial Misconduct, 664 F.3d 332 (2011).

In this petition, the basic premise is within the 'traditional usage' by contending there is no rational basis for distinguishing between religious discrimination and secular or political discrimination, insofar as the appearance of impropriety arises from judicial associations in organizations with tenets (beliefs, principles, values, commandments, etc.) of invidious discrimination against one or more suspect classes listed in the Canon. For example, shorn of the penumbra of veracity supplied by cultural conditioning, there is no difference in the perniciousness of the tenet merely because one judge derives it from a political book (Mein Kampf) and the other from a religious book (Old Testament [Gen. 9:18-27]); belief in anti-semitism and belief in the Curse of Ham are not a rational basis for discrimination and thus invidious. The prohibition is to membership creating the appearance that government endorses discrimination. The oppression to a litigant is the fear bias will influence the actions of an official wielding great power over them, a threat that is not diminished by the source of the tenet.

Thus the religion exception in the state version of Canon 2C in issue, writes into an otherwise rational general proscription against harm an irrational sub-category of memberships constituting the basis for unequal treatment of litigants. That is, it is an irony the religion exception of Canon 2C engenders invidious discrimination between organizations by creating an irrational safe -harbor for one 'variety' or source of invidious discrimination but not another where the source is not religious. This 'two edged sword' creates an irrational and disparate outcome among judges as well as litigants: Judge XZ can associate with gender-phobics if the belief is at least colorably religious, but Judge WY cannot if the belief is sociological, and Litigant AC cannot disqualify Judge XZ but can disqualify Judge WY based on gender-phobia impropriety. Few would dispute gender bias that inheres in these hypotheticals is wrong, but the religion exception 'hijacks' even-handed application of the base Judicial Canon forbidding membership in organizations practicing invidious discrimination.

## IV. THE RELIGION EXCEPTION OF CANON 2C IS UNCONSTITUTIONAL AS AN ESTABLISHMENT OF RELIGION THAT ENTANGLES GOVERNMENT IN DECIDING WHAT IS OR IS NOT RELIGION-BASED DISCRIMINATION

The standard of judicial conduct in issue derives from an American Bar Association (ABA) model code which was adopted with minor variations by all 50 states and the District of Columbia. See Appendix 1. Thus it represents that category of rules discussed above which contain proscriptions that rise above the due process floor for misconduct and constitute 'impropriety per se.' These rules are made mandatory by the Model Code. In short, Judicial Canons are a priori standards of conduct no judge may violate without creating an appearance of impropriety, and in violating one or more

Canons a judge creates good cause for recusal. And because the issue is, like jurisdiction, preliminary 'appearances' matter because, if there are grounds for disqualification for the appearance of impropriety, then a judge is duty bound to step down before he or she has done anything improper, even if 'all ' the impropriety is, as in this case, is the appearance that bigotry is authorized in the court system so long as it is religious bigotry.

The federal version of the relevant rule is Code of Conduct for Federal Judges, Canon 2, which proscribes as follows:

"(C) Nondiscriminatory Membership. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin."

The federal version is not put in issue under the petitioners' complaint. But it became an issue because petitioners raised it under 42 U.S.C. § 455 at the district level and on appeal below. See Part II above.

The state canon is California Canon 2C, which proscribes, as follows:

"A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, or sexual orientation. [¶] This canon does not apply to membership in a religious organization. "

The more expansive list of 'suspect classifications' of the California version is a common variation between the state versions. See Appendiix 1, and compare 1(A), 1 (B), 1(C). [5]

The 'stand out' distinction between the foregoing versions of Canon 2C is the

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[5]And see, Javorsky v. Western Athletic Clubs, Inc. (2015) 242 Cal.App.4th 1386, 1404 ("Invidious discrimination is the treatment of individuals in a manner that is malicious, hostile, or damaging."). This is not federal 'invidious discrimination.'

'religion exception' appended to the California version derived from the comments to the ABA model version. Plaintiffs' chief contention under the First Amendment is that the 'religion exception' is patently a violation of separation of church and state, and constitutes both an entanglement in religion as well as an establishment of religion that, in substance, creates a 'safe-harbor' for judicial participation in the practice of invidious discrimination so long as the organization can be labeled 'religion,' and thus the 'safe harbor' is unconstitutional under the First, Fifth and Fourteenth Amendments.

Petitioners summarized this exception below as excusing religious bigotry but barring other forms of bigotry and therefore was an establishment by fostering religion over other beliefs, and entangling the courts in determining what was religious bigotry, and thus lawful, vs. other bigotry that is unlawful, on the part of a judge governed by the Judicial Canons and claiming the 'sanctuary' of the safe-harbor. [6]

As a general policy of constitutional law, this court 'abstains' from evaluations of the merit or demerits of any religious tenet, under the doctrine that government must

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[6]Petitioners were unable to find cases defining 'religion' under the Canons. Cf., United States v. Ballard, 322 U.S. 78, 86 (1944) (holding issue of good faith belief in religious tenet can't be submitted to jury in mail fraud case involving the writings of "Guy W. Ballard, now deceased, alias Saint Germain, Jesus, George Washington," citing Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." ); and see Torcaso v. Watkins, 367 U.S. 488, 495, fn. 11 (1988) (religion includes godless belief systems). Petitioners' points below included using religion as a pretext for discrimination; e.g., a flaming cross symbolizing anti-Catholic religious intolerance. And see Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707, 715-716 (1981) ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but . . . [c]ourts are not arbiters of scriptural interpretation."). Whatever the rationale, the safe-harbor exception for discrimination that is 'religion' is likely to inspire 'divine' casuistry to justify memberships.

adhere to neutrality toward religion (i.e., honoring the First Amendment but neither favoring or restricting associational belief systems). See Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 560 (1993), and authorities cited (Souter, J., concurring); Employment Div. v. Smith, 494 U.S. 872, 888-889 (1990), and authorities cited.

But also in the context of this case the rule applies that,

" To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' -- permitting him, by virtue of his beliefs, 'to become a law unto himself' contradicts both constitutional tradition and common sense."

Id., 494 U.S. at 885 (citation omitted). That is, petitioners contend the religion exception to California Canon 2C makes the appearance of impropriety depend on whether invidious beliefs are religious and permits every religious judge to self-define propriety. This is unlawful because it favors religion above other belief systems. To adapt a quote that states the principle concisely:

"A [] law may exempt conscientious objectors, but it may not exempt [persons] whose objections are based on theistic belief [] as opposed to nontheistic belief [] or atheistic belief."

Board of Ed. v. Grumet, 512 U.S. 687, 716 (1994) (O'Conner, J., concurring).

Thus the inclusion of a religion exception in the California (and 35 or more other versions of) Canon 2C, encroaches on that neutrality by creating a sub-category of memberships that are rendered 'not-discriminatory' by fiat of exclusion from a common definition of general application because the membership can be labeled 'religion.' [7] But

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[7]'Whether membership in an organization that is merely 'religious' such as a study group, or charitable corporation, or must be a 'religion' is left for briefing; ABA Comment 4 suggests 'religious' is enough. See Appendix 1, 1(A) Comment.

there is a distinction in the law between restraint of, or favors to, religious practice and restraint or favor based on belief. Whatever the perceived rationale for creating a religion exceptions to Canon 2C was, a bar to membership in organizations that practice religious discrimination is a bar to religious practice, not belief.

To draw another hypothetical, to emphasize the latter: The religion exception to Canon 2C is no more sensible or lawful than an exemption from earthquake safety standards would be based on whether a building housed the meeting hall of a religion that believes earthquakes are 'god's retribution' (thus allowing practice of a belief "if god wills it, sheer walls won't help"). The difficulty in the latter belief is that its effects can impact visitors, children and elderly put at risk at services, as well as others in adjacent buildings or passing by, if the building collapses. If the building code's earthquake reinforcement standard is enforced against the building, the restraint is on religious practice not the belief 'god's will' is behind earthquakes.

The latter distinction permits common sense to prevail over dogma, and inheres in the famous formulation:

"[T]the [First] Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940).

Viewed in light of the latter principle, the language of the Canons is clear enough to, should the court chose, make the decision easy. That is, the federal Canon proscribes against "any membership in an organization that practices invidious discrimination." The California State Canon 2C proscribes against membership in "any organization that

practices invidious discrimination." Both are consistent with the ABA model, which proscribes membership in "any organization that practices invidious discrimination." The key being the verb 'practices' a form of discrimination against a protected class of citizens. That permits this court to overturn the safe-harbor for religious discrimination based on regulation of an activity that discriminates rather than a belief discrimination is righteous. If there is any restraint, eliminating the religion exception to Canon 2C will only 'chill' religious activity that is directly harmful to protected classes.

Even assuming arguendo Canon 2C could pass as an accommodation of religious practice, the issue of 'What is religion?' has to be answered, since the same membership is barred if secular but not if religious. And that entrains at a minimum entanglement in adjudication of what is a religion and what is not, what is 'genuine' doctrine, practice and belief, and what is not, in that one area of life and law where the courts 'dare not tred.' Or, at least dare tred only lightly because of the inherent lack of justiciable standards for sincerity of beliefs rooted in mysticism, miraculous events, ancient texts of divine provenance, a priori truths, and holy commandments that dogma insists must be enforced against unwilling other-believers or non-believers as well as believers.

Add to that the competitive nature of many religious sects aggressively trying to recruit others, many in well organized, well financed and well planned information campaigns. The term 'propaganda' originated in a religious context. A judicial determination that the beliefs of one organization are 'bad' and another's 'good' is bound to be controversial and denounced by the one and lauded and publicized by the other for competitive advantage. Especially so if the ruling is by this court.

Or not. The lead case on entanglement is controversial Lemon v. Kurtzman, 403 U.S. 602 (1971). At issue in that case was not dogma or religious practice per se, but money, a teacher's salary supplement that was paid to parochial school teachers. It wasn't paid for religious instruction, but the majority held– even if the subsidy wasn't intended to pay for religious instruction– it entrained entanglement by government 'monitors' in deciding what was or was not religious in the lessons. Id., 615-616. But key was former Chief Justice Berger's observation that, unlike subsidies for "Bus transportation, school lunches, public health services, and secular textbooks" paying for teachers made a qualitative difference in the degree of state entanglement in religious education, saying: "teachers have a substantially different ideological character from books. In terms of potential for interjecting some aspect of faith or morals in secular subjects, a textbook's content is ascertainable [ahead of time]; but a teacher's handling of a subject is not." Id., at 403 U.S. 617.

In more contemporary terms, the deciding factor was the decision the chances a devout teacher would give subtle religious 'spin' to lessons otherwise secular, was too great to avoid the appearance, if not actual fact, the state salary bonus was subsidizing religious instruction. If the hypothetical subtle effects of how a geography lesson is taught by a religious teacher is an entanglement despite a secularized textbook, then the impact of how litigation is conducted by a religious judge applying 'spin' to secular law codes is an entanglement of several magnitudes greater. There is no right to a parochial education by a subsidized teacher; but there is very definitely a constitutional right to due process of law , to a fair trial, to equal treatment, and to be free from government-

forced religious dominion in the courtroom.

Thus, to apply one formulation of the Lemon Test:

"Against this background [this court] consider[s] four questions: first, does the[Canon] reflect a secular legislative purpose? Second, is the primary effect of the [Canon] to advance or inhibit religion? Third, does the administration of the [Canon] foster an excessive government entanglement with religion? Fourth, does the implementation of the [Canon] inhibit the free exercise of religion?"

Tilton v. Richardson, 403 U.S. 672, 678 (1971). Petitioners contend: 1) Does the religion exception reflect a secular purpose? No; the exception is based on religious membership. 2) Is the primary effect of the exception to advance or inhibit religion? Yes; prima facie it favors religion over secular membership. 3) Does administration of the religion exception foster an excessive government entanglement with religion? Yes; it entangles the judiciary in deciding when discrimination is religion-based or not. 4) Does implementation of the religion exception inhibit free exercise? No; it only applies to unlawful practice of discrimination not belief. Therefore, the religion exception to California Canon 2C (and all similar exceptions) meets all four of former Chief Justice Burger's criteria for entanglement where a perfect score means unconstitutional.

Petitioners are aware of the criticism of the so-called 'Lemon Test' but regard it as resulting from a de facto policy of not restricting religious membership or worship by too 'fancy' distinctions over what subsidizes or restrains religious activity. But this case does not present anything so subtle as whether an old war memorial can retain its Roman Cross, hoary with lichens, pigeon what, weed growth, and all. Such memorials are, after all, necessary because the actual memory of the war dead– of the faces of 18 and 19 year olds– dies with their parents and buddies. After the last tears of the last old

veteran who knew the sacrifices of long ago, far away, beyond the ken of new generations, the dead can only be honored by symbols. That's why the worth in war memorials is what they honor, not what they're made of.

But in this case, petitioners submit there is no subtlety. The issue is stark. The religion exception to California Canon 2C enables religious practice of discrimination that is condemned by many statutes and unlawful-- outside a courtroom. A judicial officer sworn to protect the public from discrimination, who presides in a public building with the authority of the state, cannot avoid the appearance of impropriety merely because it can be labeled religion. Public trust in the judiciary is a cornerstone of liberty and the religion exception erodes that trust by creating the appearance that the practice of invidious discrimination is allowed to some judges 'just so long as' it is religious.

V. THE RELIGIOUS TENETS OF THE SECT IN ISSUE INCLUDE A BELIEF THE UNITED STATES IS THE ANTI-CHRIST TO BE OVERTHROWN BY FORCE.

As alleged in the complaint below in detail, petitioners objected to having to appear before a judge who is committed to the overthrow of the United States and its Constitution, thereby creating the appearance the judge is not committed to upholding the constitution, its principles, or their civil rights. The 'religion' in issue is a Christian sect known as the Seventh Day Adventists (SDA). As alleged in the complaint one of the Fundamental Beliefs all Adventists must accept and commit to 'uphold' is a tenet, based on the writings of a 19th Century church founder, that the United States is a part of the 'anti-christ,' an idea derived from re-interpretation of the King James Version (KJV) of an ancient Greek-language text known as the Book of Revelation, included in the Vulgate

Bible compiled by St. Jerome (c. 390 C.E.), and included in the bible translation into English commissioned by King James I, completed in 1611. Adventists are obliged to accept only the 'KJV as truth. This Part can only hint at that vast world of discourse relating to bibles, bible translation and bible interpretation– there are more than ample scholarly and ecclesiastical resources for corrected and modern re-translations.

But the belief the United States is part of the 'anti-christ' is unique to the SDA, and includes commitment to the overthrow of the United States and Constitution by force, as a "Fundamental Belief" that the United States is an evil tool of the anti-christ whose 'rise,' catastrophic end, and replacement with a theocratic 'world order' is foretold in Revelation. That necessarily entrains disloyalty to the United States and equivocation over upholding the Constitution.

Petitioners contend that if the allegations of their Amended Complaint relating to these beliefs are accepted as true, as they must, they rise above the speculative level, and membership in the SDA represents a present belief in the destruction of the United States, is an extrajudicial sourced impropriety that creates the appearance of disloyalty to the democratic ideals of the United States as well as the personal liberties guaranteed by the Constitution. Petitioners' 5th and 14th Amendment guarantee of a judge truthfully sworn to uphold the Constitution, is violated thereby.

This Part V is only intended to highlight the issue of entanglement that ensues from the ABA and California Canon that creates a safe harbor for discrimination in

religious memberships. [8] Petitioners submit that but for the religion exception to

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[8] To expand the'hint' but not expand this petition too far onto that vast and complex world of Bible interpretation entrained by the 'tanglefoot' religion exception: The Adventist 'US is anti-christ' tenet is derived from 19th Century writings among founders of the sect, a mid-West off-shoot of the Methodist 'tent-revival' movement– an off-shoot soon disavowed by mainstream Methodism; the latter sect publicly supports the United States and the Constitution. A more detailed but not overlong exposition of the bible interpretation behind this belief is found in the Adventist publication Spectrum at: https://spectrummagazine.org/article/2018/06/08/america-and-two-horned-beast-revelation-13. But modern scholarly views of the Book of Revelation reject lurid equating of 'Apocalypse' with what properly is 'Armageddon,' referring in biblical context to an Egyptian vs. Hittite battle near Mount Megiddo (c. 1500 B.C.E.) that decided hegemony over the Hebrews. Revelation has no correlation with modern catastrophic events. The learned view is Revelation is a warning written by a prelate on Patmos, intended for congregations on the mainland (now SW Turkey), of coming 'trials and tribulations' of faith by coerced demands for faith-testing sacrifices to a new Emperor, portended by construction of a temple for the purpose near the then-extant harbor of Ephesus, c. 91 C.E.. The palace court scenes in the visions related in Revelation depict government rituals of the Roman era, not Jesus's heavenly throne room, and the many allusions to Jewish history in the text (including Armageddon) were allusions meant to obscure the meaning of a subversive message from Roman 'eyes,' it being treasonous to refuse emperor worship in the Roman Empire, c. 91 C.E. That is, the allusions were meant for an audience of ethnic jews 20 years after a holocaust, c. 74 C.E., who fled the brutal Roman re-conquest of Judea by Titus, in the first wave of the Diaspora. The converso congregations Revelation was actually meant to reach, preach and teach would have understood the symbolism. If it is prophetic beyond the immediate warning, Revelation presaged no further than the persecutions in Diocletian's reign, c. 308 C.E., where a refusal to burn a sprig of incense to the emperor was punishable by public execution by the penalties of the day, including sometimes even the lions of Quo Vadis. Horrific but persecutions over emperor worship died out after Diocletian's era (to be replaced by death-struggles over Arianism; the Aryan Heresy had nothing to do with Nazi race theory; it was a rival faction, bishops' dispute over the Holy Trinity). But nothing in Revelation has any bearing on modern political or other events. Finding references to the rise of the United States in the KJV version of Revelation, without access to the Latin or Greek texts, by 'seers' based in Battle Creek, MI, c. 1856, is a feat of religious imagination. The Greek terms for anti-Christ are not even in the original scroll. Thus Revelation is no excuse for disloyalty. A judge, if he or she is 'in,' has to be in 100% when taking the oath to uphold the Constitution, just as much as any lawyer, nurse, pilot, peace officer, sailor, court clerk, ranger, driver, diver, welder, cook, gardener, or custodian in government employ. It is a grievous wrong to be forced to appear before a disloyal judge with a secret, anti-United States 'agenda.'

California Canon 2C, the state judge would be disqualified also for disloyalty to the constitution and belief destruction of the United States and Constitution is a 'good' or 'righteous' outcome she has a religious duty to engender.

VI. PUBLIC PERCEPTION OF IMPROPRIETY IS NOT A LEGAL FICTION THAT ONLY JUDGES CAN APPLY TO JUDICIAL CONDUCT

Historical analysis shows the concept that "justice should appear to be done" was a part of the first ABA Code of Judicial Conduct in 1924, and gained status as a due process requirement by decisions such as In re Murchison, 349 U.S. 133, 136 (1954) and Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971). The "appearance of impropriety" standard was added to the 1974 revision of the Judicial Canons by the ABA, and § 455(a) was added to the Code, in the wake of the Abe Fortas and Clement Heynsworth corruption scandals c. 1969-1970, and popular 'uproar' in the media, in a direct attempt to reinforce public perception of the integrity of the courts. McKoskie, R.J., The Overarching Legal Fiction: "Justice Must Satisfy the Appearance of Justice", pp. 59-60 (Savanna LR V4:1 2017); Gyeh, C.G, Why Judicial Disqualification Matters: Again, pp. 688-689 (Mauerer Archives #826 2011). Thus the standard whether "reasonable minds, with knowledge of the relevant circumstances" (Federal Canon 2A) would perceive the appearance of impropriety, was based on how the 'man and woman in the street' would view judicial conduct and whether it appears 'honest justice is being done' or not. See Jolie v. Superior Court (William Bradley Pitt), 66 Cal.App.5th 614, 619 (2021) (referring to "the average person on the street" and "reasonable member of the public" as phrased in state precedents).

Over the years the courts have abstracted what 'reasonable minds with knowledge' would think into a legal fiction– a negation of the democratic element in the original purposes of the Canons and § 455(a). Plaintiffs contend the Canons are more than a façade intended to fool a gullible public, and were meant to have substance as reform of judicial conduct. Because of the limited scope of a petition for certiorari, petitioners only 'touch and go' on this issue, by reference to two California cases that haply serve to illustrate the point. The first is a criminal case, People v. Cowan, 50 Cal.4th 401 (2010). The second is a civil case, Haworth v. Superior Court (Ossakow) 50 Cal.4th 372 (2010).

People v. Cowan, was a multi-murder prosecution in which material fact witnesses were social friends of the judge. The judge did not self-recuse on assignment, and the case reached the guilt phase of trial, before the impropriety was disclosed. The judge did not immediately recuse himself; although a new judge was eventually assigned, the case went to verdict of guilty. Id., 50 Cal.4th at 452-454. It seems clear enough that 'John Q. and Júlia Public' hearing of these facts, would "instinctively" reason it was 'not right' because that judge would be partial to the testimony of friends. But that is not how the issue was treated. The court first engaged in a technical construction of Cal.Code Civ. Proc. § 170.1 et seq., wherein disclosure is supposed to be self-initiated by a judge upon assignment. Defendant objected under the statute when the judge was 'outed' and moved for mistrial. However, the conviction was upheld despite the statute because, " the statute requires a judge to cease participating in the proceeding only after the judge 'determines himself or herself to be disqualified.' Here, Judge [] did not 'determine[]'

himself to be disqualified until after" critical testimony was taken. 50 Cal.4th at 454-455. The court then denied a mistrial finding there was no prejudice. Id., at 455. This in effect permitted a partial judge to time his own disqualification.

The court then considered the defendant's right to an impartial judge under the due process clause citing both state and federal case law. The court distinguished its prior ruling in People v. Freeman (2010) 47 Cal.4th 993 (cited above Part I), which held that under Cal.Code Civ. Proc. § 170.1, the appearance of impropriety is based on "a public perception of partiality, that is, the appearance of bias," and based its decision (it said) on Caperton, supra. It held in substantial effect "the probability of actual bias on the part of the judge or decisionmaker [was not] too high to be constitutionally tolerable." People v. Cowan, supra, 50 Cal.4th at 456-457.

It is hard to reconcile the ruling defendant had to make a 'heightened showing of a probability, rather than the mere appearance, of actual bias to prevail' with facts of a judge personally acquainted with witnesses in a murder case. Obviously "under a realistic appraisal of psychological tendencies and human weakness" neither John Q. nor Júlia Public would ever believe a judge would hear his friends' testimony impartially. People v. Cowan thus demonstrates the appearance of impropriety is being treated as a legal fiction, not a 'real world' issue of public perception. This completely 'de-democratizes' the issue of the appearance of impropriety and reduces it to a legal fiction.

The second case, Haworth v. Superior Court (Ossakow) (2010) 50 Cal.4th 372, illustrates that even among judges there can be strong differences of opinion on what is or is not impropriety. The issue in Haworth was impropriety of an arbitrator (by rule the

Judicial Canons applied), who was alleged to have gender bias. The challenged impropriety arose from a prior public censure of the judge for misconduct in the workplace. The judge did not disclose the censure and it was discovered after a ruling in a cosmetic surgery dispute.

A majority of the court held the prior censure was not sufficient to create an appearance of impropriety despite evidence of at least one disparaging remark about the female plaintiff during the arbitration. That prompted a strongly worded dissent by two justices; the dissenters saying (Id., 50 Cal.4th at 396):

"The standard, it bears emphasizing, is not whether Judge [] in fact would be biased, but whether his past conduct could cause a person aware of the facts to reasonably entertain a doubt that he could be impartial." (Emphasis added.)

The dissent then analyzes the judge's past conduct and contended a reasonable inference of bias arose from disparaging women's bodies and sexuality in a dispute over cosmetic surgery. Id., at 398-399. The point in context of this petition is not the dissent's 'how gross does it have to get' (there were 'graphic' postcards) disagreement with the majority but the majority figuratively taking the issue away from John Q. and Júlia Public and treating 'reasonably entertain doubt' as legal fiction for judges to decide.

## CONCLUSION

For each of the foregoing reasons petitioners submit that their complaint below had merit, plausibly alleged all necessary facts to show that, but for the religion exception to California Judicial Canon 2C, their state trial judge is disqualified to preside, they had no relief by the courts below, and as a result they have been denied a liberty interest and oppressed by having to appear before a judge who believes religiously

'religiously' in discrimination and is disloyal to the United States and its Constitution.

Dated: November 11, 2021

Robert Richardson

Carol Garrard