

21-6780

^ No. _____

IN THE
Supreme Court of the United States

IN RE LORI SKLAR,

FILED
DEC 23 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS
TO THE SUPREME COURT OF THE STATE OF
CALIFORNIA

PETITION FOR A WRIT OF MANDAMUS

Lori Sklar
2234 Sherwood Court
Minnetonka, MN 55305
(952) 546-1051
lsklar@lorisklar.com

Petitioner Pro Se

December 2021

QUESTION PRESENTED

This case involves the first time this Court could enforce the due process right to impartial appellate review by retroactively disqualifying a judge that had been permanently removed from office based on previously concealed misconduct that directly infected two appellate cases.

California Appellate Justice Jeffrey W. Johnson ("Johnson") was removed from office and disqualified as a judge in 2021. (App. 2a-112a). His permanent disqualification stemmed from his misconduct that occurred inside and outside the courthouse from 2009 through 2018. (App. 7a, App. 109a, App. 112a). The previously concealed misconduct had polluted the three-member panel and a critical witness in two appellate cases. (App. 113a, App. 118a). Johnson's disqualification was imposed prospectively but the California Supreme Court denied discretionary review regarding his constitutional disqualification in two appellate cases seriously infected by his misconduct. (App. 1a). It would be a radical extension of judicial power to allow judicial misconduct to trample on constitutional guarantees by disqualifying a judge prospectively but not retroactively when the misconduct directly infected the removed judge's appellate decisions.

Due process compels a removed judge's retroactive constitutional disqualification with an appellate review do-over by mandamus relief. The petitioner was mistakenly and unjustifiably deprived of her life, liberty, and property interests and denied the right to an independent and impartial tribunal in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution based on Johnson's misconduct.

The question presented is:

Whether the California Supreme Court should be directed to order an appellate review do-over when due process compels a permanently removed judge's retroactive constitutional disqualification?

PARTIES TO THE PROCEEDINGS

Petitioner Lori Sklar was petitioner in the California Supreme Court, a real party in interest in the court of appeal case no. B257966 and a real party in interest/appellant in the court of appeal case nos. B220286/B227078.

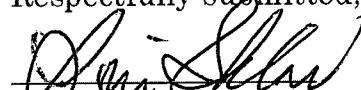
Respondent Court of Appeal, Second Appellate District, Division One was the respondent in the California Supreme Court. Respondent Toshiba America Information Systems, Inc. was the real party in interest in the California Supreme Court and the defendant in the court of appeal case nos. B220286/B227078 and B257966.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a publicly held corporation or other publicly held entity. Petitioner has no stock, so no publicly held corporation or entity owns any stock in the petitioner.

Dated: December 23, 2021

Respectfully submitted,


Lori Sklar

STATEMENT OF RELATED PROCEEDINGS

Sklar v. Court of Appeal, Second Appellate District, Division One, No. S269098, California Supreme Court (July 28, 2021) (denying mandate petition en banc) (App. 1a); and

Johnson v. Commission on Judicial Performance, No. S264179, California Supreme Court (January 27, 2021) (petition for review denied).

There are no other proceedings in state or federal courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
PARTIES TO THE PROCEEDINGS	4
CORPORATE DISCLOSURE STATEMENT	4
STATEMENT OF RELATED PROCEEDINGS	4
TABLE OF CONTENTS	5
TABLE OF AUTHORITIES.....	6
OPINIONS BELOW	8
JURISDICTION	9
CONSTITUTIONAL PROVISION.....	9
STATEMENT	9
A. PROCEEDINGS IN THIS CASE.....	12
1. California Supreme Court Proceedings Regarding The Misconduct That Infected Two Appeals.....	12
2. California Commission On Judicial Performance Proceedings Removing Johnson From Office.....	13
3. Appellate Court Proceedings Infected By Johnson's Misconduct.....	13
REASONS FOR GRANTING THE PETITION	13
A. THE RIGHT TO ISSUANCE OF A WRIT OF MANDAMUS IS CLEAR AND INDISPUTABLE.....	13
B. PETITIONER HAS NO OTHER ADEQUATE MEANS TO ATTAIN RELIEF.....	16
C. MANDAMUS RELIEF IS APPROPRIATE UNDER THE CIRCUMSTANCES.....	17
FACTUAL BASIS FOR PETITION.....	19
A. MANDAMUS RELIEF IS REQUIRED TO PROTECT THE FUNDAMENTAL RIGHT TO AN IMPARTIAL TRIBUNAL FROM GOVERNMENT ENCROACHMENT.....	19
1. The Probability Of Actual Bias On The Part Of Johnson Is Too High To Be Constitutionally Tolerable.....	19
B. THE CALIFORNIA SUPREME COURT SHOULD BE ORDERED TO VACATE TWO INFECTED APPELLATE DECISIONS AND REMAND THEM FOR RECONSIDERATION.	23
CONCLUSION	26
APPENDIX	
APPENDIX A California Supreme Court order denying a writ of mandamus (July 28, 2021)	1A
APPENDIX B Commission on Judicial Performance decision and order removing Justice Jeffrey W. Johnson (June 2, 2020)	2A
APPENDIX C Court of appeal opinion (May 6, 2016)	113A
APPENDIX D Court of appeal opinion (September 10, 2013).....	118A

TABLE OF AUTHORITIES

Cases

<i>Aetna Life Ins. Co. v. Lavoie</i> , (1986) 475 U.S. 813.....	26
<i>Caperton v. A. T. Massey Coal Co.</i> , (2009) 556 U.S. 868.....	17, 20, 22, 23
<i>Cheney v. United States Dist. Court</i> , (2004) 542 U.S. 367.....	14, 19
<i>Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission</i> , (1922) 260 U.S. 212.....	16
<i>Ellis, et. al. v. Toshiba America Information Systems, Inc.</i> , (2013) 218 Cal.App.4th 853.....	9
<i>Ex parte Metropolitan Water Co. of West Virginia</i> , (1911) 220 U.S. 539.....	16
<i>Hollingsworth v. Perry</i> , (2010) 558 U.S. 183.....	16
<i>In re Murchison</i> , (1955) 349 U.S. 133.....	14, 17
<i>Liljeberg v. Health Services Acquisition Corp.</i> , (1988) 486 U.S. 847.....	24, 25, 26
<i>Rippo v. Baker</i> , (2017) 137 S.Ct. 905.....	passim
<i>Will v. United States</i> , (1967) 389 U.S. 90.....	14
<i>Williams v. Pennsylvania</i> , (2016) 136 S.Ct. 1899	passim
<i>Withrow v. Larkin</i> , (1975) 421 U.S. 35	14, 17, 20, 23

Statutes

28 U.S.C. §1254(1)	9
28 U.S.C. §1651	9

Code Civ. Proc. 170.3(c)(1) 16

Constitutional Provisions

Cal. Const. art. 6 § 3 15

Cal. Const., art. 1 § 7(a) 15

U. S. Const. Amend. XIV, §1 *passim*

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PETITION FOR A WRIT OF MANDAMUS

The Petitioner, Lori Sklar, respectfully petitions for a writ of mandamus directing the California Supreme Court to order an appellate review do-over after the California Supreme Court permanently disqualified Johnson as a judge for nine (9) previous years of misconduct that remained hidden. The court of appeal had failed to conduct itself as an independent and impartial court as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Two appellate decisions authored by Johnson are the product of a constitutionally intolerable probability of bias. In the alternative, the petitioner respectfully requests that the Court treat this petition as a petition for a writ of certiorari.

OPINIONS BELOW

The judgment by the California Supreme Court denying the petition for writ of mandate, *Lori Sklar v. Court of Appeal, Second Appellate District, Division One*, No. S269098, July 28, 2021, is reprinted at App. 1a. The Court of Appeal, Second

Appellate District, Division One's opinions in *Ellis, et. al. v. Toshiba America Information Systems, Inc.*, B257966 is unpublished and reprinted at App. 113a and the consolidated matter is published at *Ellis, et. al. v. Toshiba America Information Systems, Inc.*, (2013) 218 Cal.App.4th 853, cert. denied, 134 S.Ct. 2692 (2014) and reprinted at App. 118a.

JURISDICTION

The judgment for which mandamus review is sought was entered by the California Supreme Court on July 28, 2021. (App. 1a). Were this Court to grant the petition as a Petition for a Writ of Certiorari, petitioner's petition must be filed on or before December 23, 2021, pursuant to Order of this Court dated October 18, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1651 or, in the alternative, 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

U. S. Const. Amend. XIV, §1

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This petition strikes at the heart of the constitutional guarantee of the fundamental right to an impartial tribunal. Johnson was appointed to the appellate court in 2009. On January 28, 2021, the California Supreme Court upheld the removal of Johnson from office and disqualification as a judge. (App. 2a-112a). His

disqualification stemmed from his misconduct that occurred inside and outside the courthouse from 2009 through 2018. (App. 7a, App. 109a, App. 112a). The disciplinary proceedings did not address the effect of the malfeasance on appellate cases that had involved Johnson's participation. (App. 7a). The disqualification was imposed prospectively without looking back at two appellate cases petitioner brought to their attention by a writ of mandate that were infected by Johnson's misconduct. The removal from office did not remedy the lack of neutrality and bias created by Johnson in the two appeals. The petitioner was not informed about the misconduct alleged against Johnson until his disciplinary proceedings where the petitioner learned the extent of how the concealed misconduct had infected the two appeals.

Johnson authored the two appellate decisions and the other two judges involved in the three-judge appellate panel were his victims along with a female attorney at a law firm that was a critical defense witness. Johnson's misconduct remained a secret because victims feared retaliation, destruction of their careers and/or serious disruption of their cases if they had reported his misconduct. (App. 22a, App. 31a, App. 55a, App. 61a, App. 67a, App. 98a). Concealment of Johnson's misconduct eliminated petitioner's statutory right to request recusal. Johnson's misconduct occurred throughout his participation in the two appeals. He repeatedly sought a sexual relationship with one panel member, verbally abused the other panel member, and sexually harassed a female attorney at a law firm that was a critical defense witness whose firm was also being paid by the same defendant in a

separate pending class action. The panel members and female attorney subject to Johnson's sexual advances and verbal abuse were under the influence of Johnson that directly infected the appeals. This extraordinary situation is a profound abuse of the judicial process.

The petitioner filed a writ of mandate to retroactively disqualify Johnson's participation in the two appeals in the California Supreme Court because she was mistakenly and unjustifiably deprived of her life, liberty and property interests and denied the right to an independent and impartial tribunal. The California Supreme Court's decision not to grant discretionary review of this important question encroached on petitioner's right to an independent and impartial tribunal in the two appeals infected by Johnson's misconduct. If the California Supreme Court can refuse to provide a forum to uphold the constitutional right to an impartial tribunal, then no constitutional right is protected from their nullification. "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, (2016) 136 S.Ct. 1899, 1909.

Due process compels Johnson's retroactive constitutional disqualification from the two appeals because he lacked impartiality. Johnson repeatedly sought multiple undisclosed nonconsensual sexual relationships with a panel member and an attorney directly connected to the appeals. These circumstances call into serious doubt the integrity of the judicial process regarding Johnson's participation in both appeals. No reasonable person would believe that Johnson was not actually biased

in his participation in the two appeals. The Constitution should guarantee new appellate reviews due to Johnson's partiality.

Based on nine (9) previous years of misconduct, the California Supreme Court permanently disqualified Johnson prospectively but have refused to address—and, as appropriate, to remedy- the two appeals directly infected by his misconduct. If a polluted three-member panel can be ignored, then no citizen can or should expect to receive impartial decision-making by a court.

The California Supreme Court has refused to ask the question required by precedent: whether, "considering all the circumstances alleged," *Rippo v. Baker*, (2017) 137 S.Ct. 905, 907 (*per curiam*), "the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams*, 136 S.Ct. at 1905 (internal quotation marks omitted). The California Supreme Court has deprived the petitioner of the fundamental right to an impartial three-judge appellate panel that should be appropriately protected by the Due Process Clause of the Fourteenth Amendment. Petitioner is entitled to the only avenue for relief- mandamus relief.

A. Proceedings In This Case.

1. California Supreme Court Proceedings Regarding The Misconduct That Infected Two Appeals.

This petition arises from an original proceeding in the California Supreme Court. Petitioner petitioned for a writ of mandate that requested the California Supreme Court enforce the due process right to impartial appellate review by

retroactively disqualifying Johnson's participation in two appeals based on Johnson's misconduct that directly infected the two appeals. The California Supreme Court denied petitioner's writ of mandate.

2. California Commission On Judicial Performance Proceedings

Removing Johnson From Office.

On January 28, 2021, the California Supreme Court denied Johnson's petition for review- upholding the California Commission on Judicial Performance June 2, 2020 Decision and Order removing Johnson from office. (App. 2a-App. 112a). Johnson was permanently disqualified as a judge for pervasive misconduct over nine (9) previous years. (App. 112a).

3. Appellate Court Proceedings Infected By Johnson's Misconduct.

The two appeals reviewed by Johnson concerned class counsel's clients' application for fees and costs for representing nearly one million consumers nationwide in a \$100 million settlement for design defects in 40 computer models and a separate discovery sanction for a computer inspection that did not occur. (App. 113a, App. 118a). The class action spanned twelve-years. After the lower court forgot to rule on costs, a second appeal regarding costs followed. (App. 113a).

REASONS FOR GRANTING THE PETITION

A. The right to issuance of a writ of mandamus is clear and indisputable.

Mandamus relief is warranted by the extraordinary nature of this case. First, it is brought directly as a due process claim under the Constitution because

the previous concealment of Johnson's misconduct eliminated any opportunity for a statutory recusal. If the petitioner had learned about Johnson's misconduct during the two appeals, Johnson's disqualification would have been sought.

This case involves the enforcement of the due process right to an impartial appellate review by retroactively disqualifying a judge that had been permanently removed from office based on previously concealed misconduct that directly infected two appellate cases. This case raises novel constitutional questions, for which there is no precedent regarding a judge who has already been removed from office. Not only is this case extraordinary, but it also has national significance. It is of special consequence when a disqualified judge's concealed misconduct directly infects cases.

The mandamus standard in *Cheney v. United States Dist. Court*, (2004) 542 U.S. 367 reaffirmed the long-standing precedent that mandamus is appropriate to correct either a "judicial usurpation of power" or a "clear abuse of discretion." *Cheney*, 542 U.S. at 380. Usurpation of judicial power occurs when courts act beyond their jurisdiction or fail to act when they have a duty to do so. *Will v. United States*, (1967) 389 U.S. 90, 95. This petition presents exactly the exceptional circumstances contemplated by this Court.

The California Supreme Court was required to "ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable". *Rippo*, 137 S.Ct. at 907. This principle flows from the case of *Withrow v. Larkin*, (1975) 421 U.S. 35, 47, which, quoting *In re Murchison*, (1955) 349 U.S. 133, 136, stated, "[n]ot only is a biased

decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'"

The California Supreme Court had a duty to review the constitutional disqualification of Johnson in the two appeals because the Commission on Judicial Performance has no authority to do so. The result of the California Supreme Court's order mistakenly and unjustifiably deprived life, liberty, and property of the petitioner as well as the constitutional right to an impartial tribunal. That result is patently erroneous and warrants mandamus relief. The Fourteenth Amendment of the United States Constitution provides that "No state shall...deprive any person of life, liberty, or property, without due process of law." (U. S. *Const. Amend.* XIV, §1).

The California Constitution is supposed to guarantee these same rights. *Cal. Const.*, art. 1 § 7(a). The serious risk of actual bias was too high to be constitutionally tolerable for the California Supreme Court to deny a forum to address the violation of such a fundamental constitutional right. The California Supreme Court's denial of petitioner's writ of mandate was a clear abuse of discretion to deny consideration of petitioner's federal due process claims which warrant mandamus relief.

Additionally, the California court of appeal is required to conduct itself as a three-judge court. *Cal. Const.* art. 6 § 3. The disqualification of Johnson for misconduct during the pendency of the two appeals would result in a two-judge panel, in conflict with the California constitution and without power to issue an appellate decision. Petitioner's appeals would therefore be void bolstering

petitioner's right to mandamus relief to obtain new appellate review. *See, Ex parte Metropolitan Water Co. of West Virginia*, (1911) 220 U.S. 539, 546; *See also, Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, (1922) 260 U.S. 212, 218-219. The right to mandamus relief is clear and indisputable.

B. Petitioner has no other adequate means to attain relief.

Petitioner was mistakenly and unjustifiably deprived of a fundamental liberty and property without due process of law. This is amplified by the California Supreme Court's refusal to consider the constitutional judicial disqualification of a judge removed from office retroactively in his cases directly infected by his misconduct. The California Supreme Court deprived petitioner of any adequate remedy at law regarding their denial of an appellate review before an independent and impartial tribunal. Johnson's impartiality would have been reasonably questioned upon assignment to petitioner's three-judge panels had his misconduct not remained concealed from the public. Instead, the misconduct was concealed eliminating any meaningful opportunity to exercise the right to allege a statutory recusal. *Code Civ. Proc.* 170.3(c)(1). This Court "has a significant interest in supervising the administration of the judicial system." *Hollingsworth v. Perry*, (2010) 558 U.S. 183, 196 (*per curiam*). This Court has recognized that "[c]ourts enforce the requirement of procedural regularity on others, and must follow those requirements themselves." *Hollingsworth*, 558 U.S. at 184. Unless this Court grants this petition for mandamus, the petitioner is without any redress.

Mandamus is the only remedy available. No other adequate means exist for petitioner to attain relief.

C. Mandamus Relief Is Appropriate Under The Circumstances.

To enforce the due process right to an independent and impartial tribunal for an appeal empowers the courts' legitimacy. The independence and integrity of the judiciary are paramount to public trust in the courts' ability to deliver impartial justice. Johnson's misconduct infected not only the impartiality of the panel (App. 14a, App. 21a- App. 23a, App. 25a) but also the appellate proceedings in the entirety. Retroactively disqualifying Johnson provides the impartial tribunal that every citizen is entitled. Otherwise, any judge could conceal a disqualifying circumstance which would undermine their duty to disclose.

If the California Supreme Court has discretion to deny petitioner an unbiased tribunal, the California Supreme Court will have turned a constitutional right into a limited privilege. This Court has explained that "[d]ue process guarantees 'an absence of actual bias' on the part of a judge." *Williams*, 136 S.Ct. 1899, 1905 (quoting *In re Murchison*, 349 U.S. at 136).

In *Rippo*, 137 S.Ct. 905, this Court clarified that the inquiry for judicial disqualification is whether, "objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable'" under the circumstances. *Rippo*, 137 S.Ct. at 907 (quoting *Withrow*, 421 U.S. at 47); *See Caperton v. A. T. Massey Coal Co.*, (2009) 556 U.S. 868, 889-890. In applying this standard, the court *must* determine "whether, as an objective matter, the

average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” *Rippo*, 137 S.Ct. at 907. Accordingly, the state supreme court’s decision in *Rippo*, which had affirmed the trial court’s rejection of the defendant’s recusal claim based on lack of proof of actual bias, was vacated, and the case was remanded to the state supreme court for further consideration of the federal due process claim under the clarified federal standard. *Rippo*, 137 S.Ct. at 907.

The California Supreme Court’s refusal to review whether Johnson should be disqualified retroactively from participating in the two appeals is a clear abuse of discretion that produced a patently erroneous result. It is a serious error to allow Johnson’s authored appellate opinions to stand when the basis for his removal from office and disqualification as a judge prospectively was based on nine (9) previous years of misconduct (App. 2a-App. 112a) which directly infected the two appeals. Mandamus is a necessary safety valve in this extraordinary situation.

Having a new appellate review by an impartial tribunal would not mean retrying complex and costly litigation or reopening a settlement agreement. In fact, the defendant would not have to pay more money as it had prepaid defense counsel. The appellate record already exists. A writ of mandamus has importance beyond this case due to the public importance of upholding the constitutional requirement that litigants be afforded an impartial tribunal. Further, courts would be held accountable to restoring public confidence in the integrity of the judicial system when action is delayed against a disqualified judge. Petitioner satisfies all three

mandamus prongs and should be granted mandamus relief. *See, Cheney*, 542 U.S. at 380-381. The importance of the issue at stake- a disqualified judge removed from office that infected two appellate decisions- is of such magnitude to the judicial system to justify mandamus relief.

FACTUAL BASIS FOR PETITION

A. Mandamus Relief Is Required To Protect The Fundamental Right To An Impartial Tribunal From Government Encroachment.

This case presents an excellent vehicle for this Court to provide mandamus relief when there is a clear abuse of judicial power in our court system that tramples upon constitutional guarantees. The right to an independent and impartial tribunal is fundamental to a successful democracy.

1. The Probability Of Actual Bias On The Part Of Johnson Is Too High To Be Constitutionally Tolerable.

Johnson's permanent disqualification stemmed from his misconduct that occurred inside and outside the courthouse from 2009 through 2018. (App. 7a, App. 109a, App. 112a). He did not meet the fundamental expectations of being a judge based upon misconduct that occurred while he participated in the 2013 and 2016 appeals. (App. 111a-App. 112a). If Johnson is unfit as an appellate judge today because of his misconduct during the pendency of the two appeals, Johnson was unfit as an appellate judge at the time he authored the two appellate decisions.

The decision and order removing Johnson from office overcomes the presumption of Johnson's honesty and integrity. *See, Withrow*, 421 U.S. at 47. The decision and order found that Johnson was patently dishonest, untruthful, and testified falsely (App. 3a, App. 5a, App. 13a, App. 43a, App. 91a- App. 92a, App. 112a). He was intentionally dishonest about relevant facts regarding his own behavior and the behavior of others. (App. 43a, App. 81a, App. 84a, App. 91a-App. 92a). His intentional fabrication and misrepresentation of the facts under oath in his own disciplinary proceeding demonstrated that he lacked the essential qualities of honesty and integrity required of a judge. (App. 92a). He failed to uphold high personal standards and failed to treat everyone with dignity and respect. He lacked the temperament and judgment required of a judge (App. 89a). He was hostile, demeaning, condescending and blamed others. (App. 92a). He accused nearly every witness of being a liar and blamed everyone else for his misconduct. (App. 10a, App. 23a, App. 48a, App. 52a, App. 94a- App. 95a). Yet, petitioner's past, present and future were placed in Johnson's hands when his misconduct revealed a clear objective probability of actual bias.

While "disqualifying criteria 'cannot be defined with precision. . . [c]ircumstances and relationships must be considered.'" *Caperton*, 556 U.S. at 880. Johnson used highly offensive language in referring to the other two panel members that were both victims of his misconduct. (App. 85a- App. 87a). The second panel member endured persistent sexual harassment. She was touched without her consent, solicited to have an extramarital affair, and publicly admonished not to

interrupt him. (App. 12a- App. 13a, App. 49a, App. 88a- App. 90a). He accused this panel member of lying for nine (9) years, during the 2013 and 2016 appeals. (App. 94a). He even warned this panel member not to report him (App. 8a). That panel member testified that reporting him would have seriously disrupted their cases. That panel member opted not to report him and chose an appeasement strategy. (App. 23a, App. 25a). She was afraid of challenging him and feared his retaliation (App. 31a, App. 36a, App. 54a, App. 61a, App. 67a, App. 98a-App. 99a). She was afraid to be around him (App. 14a, App. 21a, App. 25a, App. 100a). The third panel member testified against him at his disciplinary removal proceedings. (App. 104a).

The framework for this constitutionally mandated three-judge panel compromised the decisional independence of the panel members. Where the shared decision-making process is infected with bias, the entire adjudicatory framework is undermined. *See, Williams*, 136 S.Ct. at 1910. Due process cannot be satisfied by a rule that requires only some appellate panel members to be unbiased or that allows all but one member of an appellate panel to be free from bias. The petitioner was clearly deprived of an impartial appellate review by neutral decisionmakers.

Additionally, a female attorney that worked at a law firm that was a defense witness in the two appeals was also a victim. (App. 53a-App. 56a). Johnson had pursued a sexual relationship with her and offered to advance her career.¹ (App. 55a). Lending the prestige of the judicial office to advance his personal goals gave

¹ The attorney's law firm had received more than \$10 million in two small class actions involving a fraction of petitioner's class involving the identical defense counsel and defendant. That law firm testified as a defense witness to help minimize petitioner's fees and costs while negotiating a third pending class action.

him an actual stake in the outcome of the litigation, a constitutionally intolerable situation.

The instant facts are as extreme as *Caperton*, 556 U.S. 868, *Williams*, 136 S.Ct. 1899 and *Rippo*, 137 S.Ct. 905, where the risk of actual bias was held to be constitutionally intolerable. In *Caperton*, 556 U.S. 868, "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton*, 556 U.S. at 884. *Williams*, 136 S.Ct. 1899 concerned a judge who, as a district attorney, had personally authorized his subordinates to seek the death sentence the petitioner was challenging. *Rippo*, 137 S.Ct. 905 concerned where "a judge could not impartially adjudicate a case in which one of the parties was criminally investigating him." *Rippo*, 137 S.Ct. at 906.

Johnson was repeatedly sexually harassing one panel member, verbally harassing the other panel member, and attempting a sexual relationship with an attorney who worked for a defense witness. Johnson's participation undermined the tribunal's private, collective deliberative process and tainted the entire process in a manner due process should never tolerate. This case meets the *Rippo* standard by demonstrating that the probability of actual bias rises to a level "too high to be constitutionally tolerable" under the circumstances. See *Rippo*, 137 S.Ct. at 907. The average judge in Johnson's position was not likely to be neutral. These circumstances are precisely the sort of extreme circumstances that give rise to a

federal due process violation. At minimum, a serious risk of actual bias by Johnson is inherent under these circumstances.

A biased judge infects entire proceedings. "The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881. This constitutionally intolerable situation raises such a strong inference of actual bias that the presumption of judicial neutrality is conclusively rebutted. *See, Withrow*, 421 U.S. at 47. Johnson's authored appellate decisions are the product of a constitutionally intolerable probability of bias.

The California Supreme Court has refused to address the misconduct that infected Johnson's appellate cases. If even one case has been infected by Johnson's misconduct, the California Supreme Court has a duty to provide a new appellate review to uphold the constitution. Due process requires retroactive disqualification of Johnson to protect petitioner's due process right to an impartial adjudication and to protect the damage to the public's confidence in the judicial process.

**B. The California Supreme Court Should Be Ordered To Vacate
Two Infected Appellate Decisions And Remand Them For
Reconsideration.**

Johnson's permanent disqualification as a judge implicates the constitutional federal due process standard because the misconduct that seriously infected the two appeals had remained hidden. Johnson had failed to recuse himself and concealed his disqualifying circumstances. The unconstitutional failure to recuse presented a

structural error, and a showing of prejudice was not required. *Williams*, 136 S.Ct. at 1909. The victims, including a panel member, also concealed the misconduct. (App. 21a, App. 23a, App. 25a). The petitioner was prevented from raising a statutory recusal claim during the appeals by the clandestine nature of Johnson's misconduct. Concealment of the misconduct undermined the petitioners right to an impartial tribunal. Concealment of disqualifying circumstances aggravates the public's perception that the proceedings were tainted, results in injury to litigants, and seriously injures the judicial system. Judicial disclosure and disqualification are an important part of the integrity of and the public confidence in the judicial system.

In *Liljeberg v. Health Services Acquisition Corp.*, (1988) 486 U.S. 847, this Court found that the judge's failure to disclose a potential basis for disqualification "compels the conclusion that vacatur was an appropriate remedy" because it prevented the parties from timely raising the issue and deprived the parties of an appellate issue. *Liljeberg*, 486 U.S. at 867. In *Liljeberg*, the trial judge was a member of the board of trustees of a university that had a financial interest in the litigation, but he was unaware of the financial interest when he conducted a bench trial and ruled in the case. This Court identified three factors relevant to the question whether vacatur is appropriate: [i] the risk of injustice to the parties in the particular case, [ii] the risk that the denial of relief will produce injustice in other cases, and [iii] the risk of undermining the public's confidence in the judicial process. *Liljeberg*, 486 U.S. at 864. The test propounded applies to the instant case

because the petitioner was unaware of Johnson's disqualifying circumstances that had been concealed until Johnson's formal disciplinary proceedings.

The petitioner is entitled to a factfinder who both appears and is in fact impartial. *See Liljeberg*, 486 U.S. 865, n. 12 ("this concern has constitutional dimensions"). Second, the failure to vacate Johnson's findings of fact "will produce injustice in other cases." *Liljeberg*, 486 U.S. at 864. Johnson's appellate decisions should not be permitted to stand or be given preclusive effect. Johnson should not be allowed to trample on due process rights by his decisions infected by his misconduct. The failure to vacate these appellate decisions will result in the manifest injustice to unwary litigants. Vacating Johnson's appellate decisions will have a deterrent effect in other cases where judicial misconduct could remain hidden without consequence to the cases infected by misconduct. Mandamus relief will prevent injustice in future cases by encouraging judges to have transparency and to examine possible grounds of disqualification more carefully. The risk to future litigants will be lessened by vacatur. Third, allowing Johnson's decisions to stand will erode "the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864. As this Court observed "there is a greater risk of unfairness in upholding the judgment . . . than there is in allowing a new judge to take a fresh look at the issues." *Liljeberg*, 486 U.S. at 868. All three factors favor the vacatur of the two appellate decisions. Johnson should have been constitutionally disqualified and the appellate decisions should be vacated and remanded for reconsideration.

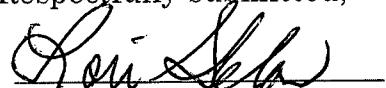
In *Liljeberg*, this Court specifically rejected holding that disqualification may have prospective effect only. *Liljeberg*, 486 U.S. at 861. The petitioner therefore urges retroactive disqualification antedated to Johnson's participation in the two appeals. Retroactive disqualification is necessary to protect petitioner's right to an impartial adjudication and the public confidence in the judicial process. The only reliable way to remove Johnson's influence in the two appeals is by vacating and remanding the appellate decisions for reconsideration. Under the *Liljeberg* test, vacatur is the appropriate remedy. Additionally, Johnson's participation as the leading role in the two appellate decisions requires the decisions be vacated and remanded for further proceedings. *See, Aetna Life Ins. Co. v. Lavoie*, (1986) 475 U.S. 813, 827-28.

CONCLUSION

The petition for writ of mandamus should be granted and the two appellate decisions vacated and remanded for reconsideration.

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Respectfully submitted,



Lori Sklar
2234 Sherwood Court
Minnetonka, MN 55305
Telephone: 952-546-1051
Facsimile: 508-546-1056
E-mail: lsklar@lorisklar.com

Petitioner Pro Se